ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 29 June 2022

Written Observations by the Kingdom of Norway

represented by Kristin Hallsjø Aarvik, advocate at the Office of the Attorney General for Civil Affairs, and Tone Hostvedt Aarthun, senior advisor at the Ministry of Foreign Affairs, acting as agents, in

Case E-4/22 Stendi AS & Norlandia Care Norge AS

in which Oslo tingrett (Oslo District Court) has requested an advisory opinion from the EFTA Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA) on the interpretation of Articles 31, 32 and 36 of the Agreement on the European Economic Area (EEA Agreement), and Articles 2(1)(9) and 74-77 of Directive 2014/24/EU on public procurement (the Procurement Directive).

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1 INTRODUCTION

(1) The referring court's questions have arisen in proceedings between the companies Stendi AS and Norlandia Care Norge AS (the Claimants), and Oslo kommune (Oslo municipality). The proceedings concern the procurement by Oslo municipality of long-term places in nursing homes, in which the right to participate in the procurement procedure was reserved for non-profit organisations. The Claimants have challenged the reservation of the contract for non-profit organisations, alleging that it is not compatible with EEA law.

(2) On this basis, the national court has referred the following questions to the EFTA Court:

> *"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 affected under the*

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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 nonprofit) 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?"*

2 QUESTION 1 AND THE CONCEPT OF SERVICES

(3) By its first question, the referring court asks, in essence, whether the contract for the provision of long-term places in nursing homes as described in the request, constitutes a public service contract within the meaning of point (9) of Article 2(1) of the Procurement Directive.

(4) As set out in point (5) of Article 2(1) of the Procurement Directive, a "public contract" means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities, and having as its object the execution of works, the supply of products or the provision of services. A "public service contract" is defined in point (9) of Article 2(1) of the Procurement Directive as a public contract having as its object the provision of services other than those referred to in point (6) of Article 2 (1). It is, therefore, appropriate to examine, first, whether the contract at issue may be regarded as having as its *object* the provision of services within the meaning of the Procurement Directive.

(5) As regards the notion of services in the Procurement Directive, the Procurement Directive does not establish a *lex specialis* definition of that notion. To that end, it must be borne in mind that the Procurement Directive is designed to implement the provisions relating to the freedom of establishment and the freedom to provide services in the Treaty on the Functioning of the European Union (TFEU) and the EEA Agreement. The notion of services, therefore, cannot have a different meaning or a wider scope than under the provisions on services in the TFEU or EEA Agreement.[1]

(6) According to the first paragraph of TFEU Article 57 and Article 37 (1) of the EEA Agreement, only services normally provided for remuneration shall be considered to be "services" within the meaning of those provisions. For the purposes of those provisions, the essential characteristic of remuneration lies in the fact that it "*constitutes consideration for the service rendered*".[2] Thus, in order to constitute a service under those Articles (and the Procurement Directive), the relevant activity must have an economic dimension primarily manifested by the existence of remuneration.

(7) Conversely, activities or services of a non-economic character, without the element of remuneration, do not qualify as services under the free movement rules or the Procurement Directive. In the context of the Procurement Directive, the EU legislator has explicitly clarified in recital 6 of the preamble that:

> *"[…] non-economic services of general interest should not fall within the scope of this Directive."*

(8) Neither the Procurement Directive nor the provisions on services in the TFEU or the EEA Agreement set out any definition of what constitutes such a non-economic service (of general interest) falling outside their scope. However, the case-law of the CJEU and the EFTA Court indicates that in order to make this distinction, it is essential to assess the system of organisation and financing of those services within the State.

(9) In a string of cases, the CJEU and the EFTA Court have held that the element of remuneration is absent where, first, the State, in establishing and maintaining a national 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,[3] and second, this system is mainly financed by the public purse (and the payment by the end users of the services only constitutes a fraction of the true cost of the services[4]). Under such circumstances, the state financing of the activities or services in question is aimed at achieving broader policy objectives in that particular field, rather than the provision of any particular service in return for the remuneration.

(10) In the recent case E-13/19 *Hradbraut*, the EFTA Court confirmed that this line of reasoning, as regards the assessment of the economic or non-economic character of a service, applies in

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[1] Case E-13/19 *Hradbraut,* para. 90.
[2] Case C-263/86 *Humbel*, para. 17; case C-76/05 Schwarz, para. 38; and case E-5/07 *Private Barnehagers Landsforbund*, para. 81
[3] *Humbel*, para. 17-18; *Schwarz*, para. 39; and case C-74/16 *Congregacion*, para. 50.
[4] *Private Barnehagers Landsforbund*, para. 83.

the context of the Procurement Directive. The EFTA Court held at para. 92 that the essential characteristic of a service is absent in the case of education provided under a national education system in situations where the following two conditions are satisfied. First, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural, and educational fields. Second, the system in question is, as a general rule, funded by the public purse and not by pupils or their parents. Further, the EFTA Court held at para. 93 that the nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the national educational system. The EFTA Court, therefore, held that contracts with the characteristics such as those described in the request for an advisory opinion, fell outside the scope of both the provisions in the EEA Agreement on services and the Procurement Directive.

(11) Though much of the case-law by the CJEU and the EFTA Court referred to above concerns educational activities, the legal principles relied upon in that case-law must logically also apply in other fields, provided that the conditions are fulfilled. Indeed, there is nothing in the case-law to suggest that this line of reasoning is relevant only for educational services. On the contrary, the case-law refers in broad terms to national systems in the "***social**, cultural and educational fields*" (emphasis added). As such, it its equally valid for other services that the State is responsible for providing to its citizens in these areas, such as the activity of kindergartens.[5]

(12) In the view of the Norwegian Government, the line of reasoning applied in the case-law referred to above should, therefore, apply equally to health and social services which, but for such characteristics, would prima facie otherwise be covered by the Procurement Directive, cf. the types of activities which are listed in Annex XIV to the Procurement Directive. Indeed, recital 6 of the Procurement Directive emphasises that:

> "*States are free to organise the provision of compulsory social services [...] either as services of general economic interest or as non-economic services of general interest or as mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive*."

(13) Moreover, the preamble of the Procurement Directive states in recital 114 that "*given the importance of the cultural context and sensitivity of [services to the person, such as certain social, health and educational services], Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate*". The analysis of the financial arrangements in the area of social services to the person must, therefore, be undertaken with particular caution, bearing in mind that other forms of financing may often exist here, and that the policy area itself is of a highly sensitive nature.

(14) The fact that a State has decided to make use of private operators to provide the relevant service within a system with the characteristic described in para. 9 above, does not render an

[5] *Private Barnehagers Landsforbud*

otherwise non-economic service to be of an economic character.[6] Indeed, in the context of the Procurement Directive, the EFTA Court confirmed this in *Hradbraut*, as it did not place any emphasis on the fact that the Icelandic State made use of private operators to provide educational services within the national system of education when assessing whether those services were of an economic or non-economic character.[7] Last, the Norwegian Government recalls that the presence of competitive elements in a social welfare system which is predominantly financed by the public purse, does not change the nature of the scheme where competitive elements are secondary to the social, solidarity and regulatory aspects of the scheme.[8] The Norwegian Government, therefore, cannot see that it is material for the assessment of whether a service is of economic or non-economic character, that the provision of services is made subject to a tender procedure, to ensure the general principle of transparency. When financing a service within a national system in the social, cultural, and educational field, the state is fulfilling its duties to its population; such financing is not consideration for the service rendered.

(15) In the Norwegian Government's view, the assessment of whether the provision of long-term places in nursing homes falls within the scope of the EEA Agreement and the Procurement Directive, or rather, whether they are to be considered as activities or services of a non-economic character of general interest that fall outside of their scope, should accordingly be based on an overall assessment of the specific circumstances under which that activity is organised, performed and financed.

(16) As to the first condition set out in para. 92 of *Hradbraut*, the provision of long-term places in nursing homes takes place as an integral part of a national social and health care system where Oslo municipality is not seeking to engage in gainful activity but is fulfilling its legal duties towards its population in the social field. Under the Norwegian Health and Care Services Act, the municipalities are responsible for providing necessary health and care services to persons resident in Norway, except for services assigned to the State or regional health authorities. Pursuant to point (6)(c) of the Health and Care Services Act, the responsibility of the municipalities in this respect includes, inter alia, the provision of places in institutions, including places in nursing homes. Section 3-2a of the Act sets out more detailed rules on the responsibility of municipalities to offer places in nursing homes or equivalent housing specifically designed for day and night services. Oslo municipality, therefore, has a legal obligation to provide places in nursing homes to its residents in need of such care. Further, both nursing homes run by the municipality and private operators are subject to the same legislation, quality standards and supervision by the municipality.

(17) As to the second condition set out in para. 92 of *Hradbraut*, the system of long-term places in nursing homes are, in large, funded by the public purse and not by the recipient of such health care in nursing homes. Although residents may contribute to the funding of the service by a

[6] Case C-74/16 *Congregación*, para. 2. Cf. also the approach in the Services Directive, where Article 2 (j) makes no distinction as for the application of the derogation in the case where the services are provided in-house or by providers mandated by the State.

[7] Eqally, it was of no relevance in *Private Barnehagers Landsforbund* that kindergardens were also operated by private entities, cf. para. 80.

[8] Case C-262/18 P *Dovera*, paras. 34, 41-50 and 61.

co-payment, which may differ depending on the resident's income, the services are financed mainly by public funds. As set out in the request for an advisory opinion, on average 80 per cent of the actual costs of residents' stay in nursing homes is funded by the public, whereas 20 per cent is funded by residents through co-payments. When the overall co-payment only constitutes a fragment of the true cost of the service, it cannot be qualified as a *quid pro quo* vis-à-vis the health and social service concerned, but only as a contribution to a national health and care system which is predominantly funded by the public purse.[9]

(18) As the provision of long-term places in nursing homes is organised within a public national health and care system, funded, and supervised by the municipality, the Norwegian Government respectfully proposes that question 1 should be answered as follows:

> "*The contract for the provision of long-term places in nursing homes should not be regarded as having as its object the provision of "services" within the meaning of Directive 2014/24/EU, since the provision of such services takes place as an integral part of a national health and care system where the municipality is not seeking to engage in gainful activity, but is fulfilling its obligation towards its own population based on the principle of solidarity, and where that system is primarily financed by the public purse. As such, the contract does not constitute a public service contract within the meaning of point (9) of Article 2(1) of that directive*."

3 QUESTION 2 AND THE EXCEPTION FOR EXERCISE OF OFFICIAL AUTHORITY

3.1 Preliminary remarks and part 2) of the question

(19) Question 2 concerns the interpretation of Article 32 of the EEA Agreement, which states that:

> "*The provisions of Chapter 2 shall not apply, so far as any given Contracting Party is concerned, to activities which in that Contracting Party are connected, even occasionally, with the exercise of official authority*".

(20) Pursuant to Article 39 EEA, Article 32 EEA also applies to Chapter 3 on services. Accordingly, the provisions relating to the freedom of establishment and the freedom to provide services do not extend to activities which in a State are connected, even occasionally, with the exercise of official authority. Such activities are also excluded from directives which, like the Procurement Directive, are designed to implement the Treaty provision relating to such freedoms.[10] Article 32 and 39 EEA are the equivalent to the exceptions in Article 51 and 62 TFEU, and their wording is identical. The principle of homogeneity enshrined in the EEA Agreement leads to a presumption that provisions framed identically in the EEA Agreement and the TFEU are to be construed in the same way.[11]

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[9] *Private Barnehagers Landsforbund*, para. 83, and *Hradbraut*, para. 95. In the former, 80 per cent of the costs were borne by the public purse, and in the latter, 78-95 per cent of the costs were born by the public purse.
[10] Case C-160/08 *Commission v Germany (II)*, para. 74.
[11] Case E-2/20 *EFTA Surveillance Authority v Norway*, para. 59

(21) The CJEU has held that as a derogation from the fundamental rule of freedom of establishment, the exception in Article 51 must be interpreted in a manner which limits its scope to what is strictly necessary in order to safeguard the interests which it allows the States to protect.[12] In addition, the CJEU has repeatedly held that the exception must be restricted to activities which, in themselves, are directly and specifically connected with the exercise of official authority.[13] Such a connection requires a sufficiently qualified exercise of prerogatives outside the general law, privileges of official powers or powers of coercion. In this respect, the CJEU held that the exception does not extend to activities merely auxiliary and preparatory to the exercise of official authority,[14] or to certain activities whose exercise, although involving contacts, even regular and organic, with the administrative or judicial authorities, or indeed cooperation, even compulsory, in their functioning, leaves their discretionary and decision-making powers intact,[15] or to certain activities which do not involve the exercise of decision-making powers,[16] powers of constraint[17] or powers of coercion.[18]

(22) It is, therefore, clear from the CJEU's case-law that the application of the exception depends on the nature and purpose of the activity in question. If the relevant activity involves a direct and specific connection with the exercise of official authority, the derogation may be invoked.

(23) In respect of the applicability of Article 32 EEA in this case, the Norwegian Government notes that pursuant to chapter 4A of the Norwegian Patient and User Rights Act, health care may be provided to persons who are opposed to health care, if that person lacks capacity to consent to such care. The objective is to ensure that the person is provided with necessary health care to avoid serious harm.

(24) As set out in the Norwegian Health Personnel Act, the term "*health care*" means "*any act that has a preventive, diagnostic, therapeutic, health-preserving, rehabilitating or nursing and care objectives and that is performed by health personnel*". The health personnel's power in this respect, therefore, encompasses a wide range of measures, which go far beyond the contribution to the protection of public health which any individual may be called upon to make, by assisting a person whose life or health is in danger.[19] Health personnel's powers of coercive health care include detaining a patient in an institution, such as a nursing home, and treating patients with medication without consent. In the Norwegian Government's view, such extensive powers of constraint and coercion under national legislation is at the core of the derogation in Article 32. Further, to be subjected to coercive health care is clearly invasive and would entail restrictions on fundamental rights, such as the right to liberty and the right to respect for private life.

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[12] Case C-404/05 *Commission v Germany*, para. 37 and 46; case C-438/08 *Commission v. Portugal*, para. 34
[13] Case C-47/08 *Commission v UK*, para. 85; Case 2/74 Reyners, para. 45; *Commission v Germany*, para. 38; *Commission v Portugal*, para. 36
[14] Case C-114/97 *Commission v Spain*, para. 38; *Commission v Germany*, para. 38; *Commission v Portugal*, para. 36
[15] *Reyners*, para. 51 and 53
[16] *Commission v Germany*, para. 38 and 44; *Commission v Portugal*, para. 36 and 41
[17] *Commission v Spain*, para. 37
[18] *Commission v Portugal*, para. 44
[19] *Commission v. Germany (II)*, para. 80.

(25) Furthermore, health personnel in nursing homes are authorised to adopt a decision on coercive health care without any further involvement or authorisation by state or municipal bodies, and as such, are conferred autonomous powers as how to deal with residents who need health care but are opposed to such care, and do not have the legal capacity to consent.

(26) In part 2) of the question, the referring court asks how the wording "*even occasionally*" in Article 32, read in conjunction with Article 39, is to be construed. In this respect the Norwegian Government firstly notes that the ordinary meaning of "*occasionally*" is at infrequent or irregular intervals: in other words, now and then, or from time to time. Secondly, the wording "*even*" in the various language versions of the Treaty provision places a particular emphasis on the fact that the exception shall apply regardless of how infrequent or irregular the exercise of official authority is in connection with the relevant activity.[20] In the Norwegian Government's view, the exception, therefore, applies to activities which, even if only now and then, involves the exercise of official authority. This is, thirdly, supported by the fact that exempt activities are those "*connected*" with the exercise of official authority. Further, the objective of the exception is to limit the free movement rules to specific activities that are connected with the exercise of official authority. It is the nature of the activity and its connection with the exercise of official authority that is decisive, not the frequency of the exercise of official authority in connection with that activity.

(27) The Norwegian Government notes that the Claimants seem to rely on case-law from the CJEU in respect of Article 45 (4) TFEU (Article 28 (4) of the EEA Agreement). Under Article 28 (4) EEA, the provisions in that article on free movement for workers and non-discrimination based on nationality as regards employment, remuneration and other conditions of work and employment "*shall not apply* to *employment in the public service*". The wording, therefore, differs from the wording in Article 32, in that it does not include the wording "*even occasionally*".

(28) The concept of "public service" in Article 45 (4) TFEU covers posts which involve direct and indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State and thus presume on the part of those occupying them the existence of a special relationship of allegiance to the State.[21] The interests which States are allowed to protect under Article 45 (4), is, therefore, the restriction of admission of foreign nationals to certain activities in the public sector.[22] It is on this basis that the CJEU has held that recourse to that derogation cannot be justified solely on the ground that rights under powers conferred by public law are granted by national law to the holders of the post in question. It is also necessary that such rights are in fact exercised on a regular basis by those holders and do not represent a very minor part of their activities. The scope of that derogation must be limited to what is strictly necessary for safeguarding the general interests of the Member State concerned, which would not be imperilled if rights of powers conferred by

[20] The wording in French is e.g., "*même à titre occasionnel*".
[21] Case C-47/02 *Anker*, para. 10.
[22] Case 152/73, Sotgiu, para. 4

public law were exercised only sporadically, indeed exceptionally, by nationals of other Member States.[23]

(29) In the Norwegian Government's view, the application of the derogation in Article 32 is not, however, precluded where official authority is exercised only sporadically in connection with the relevant activities. To limit its application in this way is clearly contrary to the wording "*even occasionally*". As the wording, context, and objective of Article 28 (4) are different from that of Article 32, the Norwegian Government cannot see that case-law in respect of the former is relevant for the interpretation of the latter.

(30) As set out in the request for an advisory opinion, health personnel in municipal nursing homes in Oslo adopted approximately 200 formal decisions on coercive health care per year pursuant to Chapter 4A of the Patient and User Rights Act in 2018-2021. The Norwegian Government would emphasise, as set out in the request for an advisory opinion, that a decision on coercive health care may be adopted in respect of one patient for a period of up to one year. The number of formal decisions does, therefore, not reflect that such patients are subjected to measures of coercive health care on a regular, or even daily basis. The exercise of official authority in connection with the provision of long-term places in nursing homes, does not, in any event, seem sporadically.

(31) In the Norwegian Government's view, the provision of long-term places in nursing homes is directly and specifically connected with the exercise of official authority within the meaning of Article 32 EEA. In such nursing homes, decisions on coercive health care are adopted in respect of its residents by health personnel at such nursing homes. Only health personnel are expressly authorised to exercise coercive health care pursuant to a specific legal basis in national law and the exercise of this power does not require any further involvement or authorisation by State or municipal bodies.

3.2 Part a) and b) of question 2

(32) In part a) and b) of question 2, which in the Norwegian Government's view should be examined together as they concern, in essence, the same issue, the referring court asks whether the following affects Oslo municipality's ability to rely on the exception in Article 32:

> *a) that 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; and*
>
> *b) that 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.*

(33) The Norwegian Government's understanding is that the argument put forward by the Claimants is that even where the provision of long-term places in nursing homes is specifically and directly connected with the exercise of official authority, Oslo municipality is nevertheless

[23] Case C-47/02 *Anker*, para. 63.

unable to rely on the exception in Article 32 EEA due to a) or b) above. In the Norwegian Government's view, such an argument cannot succeed. Oslo municipality's ability to rely on the exception in Article 32 is not affected by a) nor b).

(34) In this respect, the Norwegian Government submits that for the exception in Article 32 EEA, it is not appropriate to verify whether it is consistently invoked by the State for a service to which it applies. The legal nature of the exception in Articles 32 and 39 EEA is that those are rules on their own right, which has the effect of delimiting the scope of the respective fundamental freedoms. Articles 31(1) and 36(1) EEA negatively defines the scope of those freedoms in that activities connected with the exercise of official authority are immediately excluded from them ("shall not apply"). In other words, Articles 32 and 39 EEA are not exceptions to the application of a rule, but exceptions constituting the rule which determines the scope of the freedoms in the EEA Agreement.[24] As such, Articles 32 and 39 EEA authorises EEA States to remove from the scope of Chapter 2 and 3 of the EEA Agreement certain activities that are specifically and directly connected with the exercise of official authority. Whilst the exercise of "official authority" remains an autonomous concept of EU/EEA law subject to the interpretation of the European Courts, activities qualifying as such may not be subject to a control of compliance in light of the freedom of establishment and freedom to provide services as a result of their non-applicability. The Norwegian Government notes that the EFTA Surveillance Authority is of the same view in its Decision No. 154/17 of 17 September 2017 in case no. 77606, see section 4.2.4.

(35) Further, the case-law of the CJEU shows that whether the national measure is, first, a restriction on the right of establishment, and second, which may be justified, is examined only after it is concluded that the exception for the exercise of official authority does not apply.[25] If the exception in Article 32 EEA applies to an activity, it is, therefore, not appropriate to verify its application is consistently invoked by the State in light of the right of establishment and the freedom to provide services. Nor can a practice by the State (or in each local municipality of that state) define or alter which activities that qualifies as the exercise of "official authority" or preclude a State from relying on the exception in respect of activities that would otherwise fall within its scope.

(36) According to the request for an advisory opinion, the Claimants rely on cases 157/73 *Sotgiu* and 225/86 *Commision v Italy*. These cases concerned employment in the public sector subject to national regulation which allowed for less favourable treatment of employees who were foreign nationals. As this constituted discrimination on the basis of nationality, the CJEU held that the exception in Article 45 (4) TFEU for employment in the public service cannot apply against workers once they have been admitted to such public service.[26] The Norwegian Government cannot see that this case-law is relevant for the interpretation of Article 32 EEA in the case at hand. The application of Article 32 in the case at hand does not discriminate

[24] Legal Opinion of Advocate General Cruz Villalón in cases C-47/08, *Commission v Belgium*, C-50/08, *Commission v France*, C-51/08, *Commission v Luxembourg*, C-53/08, and C-54/08, *Commission v Austria*, C-54/08, *Commission v Germany*, and C-61/08, *Commission v Greece*, para. 78, in which the exception related to the "exercise of official authority" is defined as the "negative scope of the freedom of establishment".
[25] *Commission v Germany*, para. 86-87, *Commission v Portugal*, para. 45
[26] *Sotgui*, para. 4; *Commission v Italy*, para. 11.

against service providers from other EEA states, as long as they qualify as non-profit providers. The criterion for establishing a distinction in treatment is not nationality, but rather a business model.

(37) In the Norwegian Government's view, *Sotgiu* and *Commision v Italy* are not relevant for the interpretation of Article 32 in the present case as they concern an instance of discrimination based on nationality, which is not the issue in the circumstances giving rise to the national proceedings. As the wording and objective of Article 28 (4) are different from that of Article 32 EEA, the Norwegian Government cannot see that case-law in respect of the former is relevant for the interpretation of the latter.

3.3 Part c) of question 2

(38) In part c) of question 2, the referring court asks whether Oslo municipality's ability to rely on Article 32 EEA is affected by the fact that the power to take decisions on coercive health care in respect of residents in nursing homes is not placed directly with the municipality's contractor, but rather with the health personnel working for the contractor.

(39) In the Norwegian Government's view, it is of no relevance for the application of Article 32 that it is health personnel employed by the contractor (or indeed by the municipalities) that under national law are authorised to adopt decisions on coercive health care. As set out above, Article 32 applies where the relevant activity involves a direct and specific connection with the exercise of official authority. When the power to adopt decisions on coercive health care in respect of residents in nursing homes lies with the health personnel employed by the provider of long-term places in nursing homes, this connection is clearly established. Further, a decision on coercive health care must necessarily be adopted by health personnel, who are the persons with the medical qualifications to make such a decision. A company or organisation does not have the requisite medical qualifications, it only has employees with such qualifications. Without its health personnel with the powers to adopt decision on coercive health care in respect of residents, a company or organisation could not provide long-term places in nursing homes, as the activities are intrinsically linked.

3.4 Proposed answers to question 2

(40) In light of the above, the Norwegian Government respectfully proposes that the answers to question 2 should include the following:

> "*The exception in Article 32 EEA applies to activities which, in themselves, are directly and specifically connected with the exercise of official authority. If so, States may rely on it in respect of such activities without any verification of whether it is consistently invoked. Further, the application of the exception is not limited to activities where official authority is exercised on a frequent or regular basis, as this would run counter to the wording "even occasionally".*
>
> *The provision of long-term places in nursing homes is directly and specifically connected with the exercise of coercive health care in respect of residents in such homes. That the*

power to adopt a decision on coercive health care under national legislation lies with the health personnel employed by the provider of places in nursing homes, rather than the provider itself, does not affect the applicability of Article 32 EEA."

4 QUESTION 3

4.1 Preliminary remarks

(41) The last question is whether Articles 31 and 36 of the EEA Agreement and Articles 74–77 of the Procurement Directive preclude national legislation which allows contracting authorities to reserve the right to participate in a tender process for health and social services contract to non-profit organisations on the terms laid down in the national legislation in question.

(42) At the outset, the Norwegian Government notes that the question from the referring court is not limited to the reservation of the contract in the case at hand, which is for the provision of long-term places in nursing homes. Instead, it refers to the reservation of contracts for "*health and social services*" in general to non-profit organisations. In this respect, the Norwegian Government notes that Article 34 of the SCA establishes a special means of judicial cooperation between the EFTA Court, on the one hand, and national courts on the other. The aim is to provide national courts with the necessary interpretation of elements of EEA law to decide the cases before them.[27] Conversely, where it is obvious that the interpretation of EEA law that is sought is unrelated to the facts of the main proceedings or its purpose, and where the problem is hypothetical, the EFTA Court is not obliged to give a an advisory opinion.[28] As the nature of the service may be relevant for the right to reserve a contract to non-profit organisations, the Norwegian Government will, where appropriate, focus its submissions on a contract for the provision of long-term places in nursing home. It is the compatibility with EEA law of the reservation of this contract to non-profit organisations which is the issue before the national court. The compatibility of a reservation for other health and social services is a question of general and hypothetical nature.

(43) Further, in submitting its observations on this question, the Norwegian Government will, without prejudice to its submissions on question 1, assume that the contract for the provision of long-term places in nursing homes is deemed to be a public service contract of an economic character within the meaning of point (9) of Article 2(1) and thus fall within the scope of the Procurement Directive. In this respect, the Norwegian Government refers to its submissions on question 1.

(44) Pursuant to Article 74, public contracts for social and other specific services listed in Annex XIV shall be awarded in accordance with the provisions of Title III Chapter I of the Procurement Directive, where they exceed the threshold in Article 4(1)(d). In short, such contracts must fulfil the criteria of the simplified regime set out in Articles 75 and 76 (hereafter referred to as the Light Regime). Further, Article 77 expressly allows States to determine the type of

[27] Case E-4/19 *Campbell*, para. 43, case E/16-20 *Q & others*, para. 33.
[28] Case E-11/12 *Koch*, paras. 50-51

organisations that may participate in the procedures for award of the contracts in respect of certain services set out therein.

(45) Before addressing Articles 74-77, the Norwegian Government will in section 4.2.1 below set out a brief outline of case-law concerning the award of contracts for the provision of health and social services before the entry into force of the Procurement Directive. This outline will show that EU/EEA law did not preclude national legislation under which contracting authorities could reserve such contracts to non-profit organisations. Then, in section 4.2.2, the Norwegian Government will turn to the wording, context, and the preparatory works of the Procurement Directive. This will show that the entry into force of that directive, has not overturned the CJEU's previous case-law. As such, Articles 74-77 of the Procurement Directive do not preclude national legislation under which contracting authorities may reserve contracts for the provision of health and social services to non-profit organisations.

4.2 Reservation of contracts for the provision of health and social services for non-profit organisations

4.2.1 The legal starting point: The regime of Directive 2004/18/EU

(46) Under EU/EEA law, any derogation from the free movement rules and the fundamental principles of transparency and equal treatment requires an objective justification, such as the need to protect human health and life. In cases where the CJEU has assessed the legality of derogations from those principles in respect of health and social services, it has repeatedly emphasised that EU law "*does not detract from the power of the Member States to organise their public health and social security systems*".[29] Moreover, the CJEU has stated that health and life of humans rank foremost among the interests protected by the Treaty, and that it is for the States to decide on the degree of protection they wish to afford to public health and for the way that degree of protection is to be achieved in national law.[30]

(47) In Case 70/95 *Sodemare*, the question was whether Italian national legislation, in which the possibility to enter into contracts concerning health and social services was reserved solely for non-profit organisations, was compatible with the Treaty right of establishment. In its assessment, the CJEU emphasised that the Italian social welfare system was based on the principle of solidarity, which sought to promote and protect the health of the population. According to the Italian Government, the national legislation precluding profit-making entities from entering into contracts furthered social aims of the national health system, in that non-profit entities were not influenced by the need to deprive profit from the provision of services so as to enable them to pursue social aims as a matter of priority.[31] The CJEU concluded that:

> *"(…) as Community law stands at present, a Member State may, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system of the kind at issue in this case necessarily implies, with a view to attaining its*

[29] Case C-70/95 *Sodemare* para. 27
[30] Case C-113/13 *Spezzino*, para. 56; case C-50/14 *CASTA*, para. 60.
[31] Sodemare, para. 31

> *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"***.[32] (Emphasis added)

(48) Moreover, the CJEU emphasised that the national legislation was not liable to place profit-making entities from other Member States in a less favourable factual or legal situation than profit-making companies from Member States in which they are established.[33] The CJEU has equally accepted that a difference in treatment of entities under national legislation, such as tax law, depending on their status and objective, such as non-profit or charitable status, is compatible with the free movement rules. The decisive test is whether the national legislation is to the detriment of entities established in another Member State compared to those established in the relevant state, having the same status or objective.[34]

(49) The legal principle in *Sodemare* was reiterated by the CJEU in a procurement context in cases C-113/13 *Spezzino* and C-50/14 *CASTA*. The question in these cases was whether national legislation that permitted contracts for health and social services to be awarded directly, and on a preferential basis, to voluntary associations, was compatible with EU law.

(50) Assuming that the services in question concerned health and social services under Annex B of Directive 2004/18/EU, to which only a limited number of the provisions in that directive applied,[35] the CJEU held that the relevant legal benchmark was Articles 49 and 56 TFEU and the principles of transparency and equal treatment. Although *Spezzino* and *CASTA* concerned voluntary associations, the CJEU applied the same reasoning as in *Sodemare*, thus placing non-profit organisations and voluntary associations on an equal footing:[36]

> "*58. In the second place, it must be recalled that, in paragraph 32 of the judgment in Sodemare and Others, EU:C:1997:301, the Court held that a Member State may, in the exercise of the powers it retains to organise its social security system, consider that a social welfare system for elderly people 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***.
>
> *59. Therefore, a Member State, in the context of its discretion to decide the level of protection of public health and to organise its social security system, may take the view that recourse to voluntary associations is consistent with the social purpose of the emergency ambulance services and may help to control costs relating to those services*." (Emphasis added)

[32] Sodemare, para. 32
[33] Sodemare, para. 33
[34] Case C-153/08 *Commission v Spain*, paras. 29-35
[35] Spezzino, para. 41-45, and CASTA, para. 36-38 and para. 53 ff.
[36] Spezzino, paras. 58-59.

(51) Although *Spezzino* and *CASTA* concerned voluntary associations, the decisive element was the absence of profit-making by the organisations concerned, cf. CASTA, para 65:[37]

> *"(…) it must be ensured that profit making, even indirect, cannot be pursued under the cover of a voluntary activity and that volunteers may be reimbursed only for expenditure actually incurred for the activity performed (…)"*

(52) In a procurement context, it is, therefore, established that the reservation of contracts for health and social services to non-profit organisations are not contrary to the principle of equal treatment, provided than non-profit organisations in other States are not treated differently than non-profit organisations established in the relevant state. In a procurement context, this entails the possibility to participate in the procedure through the publication of a tender notice and, as such, the observance of the principle of transparency.

(53) In *Spezzino* and *CASTA* the contracts were, however, awarded directly. The CJEU, therefore, found that such a direct award in a procurement context, in the absence of transparency, amounted to a difference in treatment to the detriment of undertakings which might be interested in the contract but were established in another Member State, unlike the situation in *Sodemare*. The CJEU nevertheless held that the derogation from the free movement rules and the principles of equal treatment and transparency could be justified on the basis of public health and social welfare considerations, provided that the direct award of the contracts at issue contributed to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency.[38] The national legislation was, therefore, compatible with EU law.

(54) To summarise: Under the regime of Directive 2004/18/EU, in cases concerning contracts for health and social services belonging to Annex B of that directive, the right to award contracts directly and on a preferential basis to non-profit organisations was compatible with EU law. Though the awards in *Spezzino* and *CASTA*, in the absence of transparency, were contrary to the principle of equal treatment, such a derogation was nevertheless justified.

(55) Since a reservation would amount to a less restrictive interference than a direct award, one may infer from that case-law, by reason of logic, that EU/EEA law did not preclude the reservation of the right to participate in a tender procedure for health and social services contracts to non-profit organisations, provided that such reservation complies with the principles of transparency and equal treatment. Compliance with those principles, will in a procurement context require a publication of a tender notice. In the absence of such compliance, such a reservation would be a legitimate and proportionate interference with the principles of equal treatment and transparency where it is necessary and proportionate in view

[37] In the EFTA pillar, this was confirmed by the EFTA Surveillance Authority in Decision No. 154/177COL of 20 September 2017 in case no. 77606.
[38] Spezzino, para. 55-60, and CASTA, para. 61-62.

of the attainment of certain social objectives pursued by the national social welfare system.[39] Whether that is the case, must necessarily be assessed on a *case-by-case basis*.

(56) Against that background, it is necessary to assess whether the adoption and entry into force of the Procurement Directive and its Light Regime, including Article 77, precludes national legislation which permits contracting authorities to reserve the right to participate in a tender procedure for health and social services contracts to non-profit organisations.

(57) In short, the Norwegian Government's view is that the reservation of competition for contracts (within the field of health and social services) and for these organisations (non-profit organisations) remains within the discretion of the States, provided that the conditions outlined by the CJEU in the case-law referred to above are fulfilled. That settled case-law has not been overturned by the entry into force of the Procurement Directive. Articles 74-77 does not preclude the right to reserve contracts for health and social services to non-profit organisations. Thus, the legal benchmark for the assessment of a reservation of contracts falling within the Light Regime to non-profit organisations remains the general principles of transparency and equal treatment, and the conditions for legitimate derogations from these principles, as outlined in the CJEU's case-law referred to in para. 53 above. This interpretation is confirmed by recital 114 of the preamble to the Procurement Directive, which explicitly states that for contracts falling under the scope of the Light Regime, the directive impose only the observance of basic principles of transparency and equal treatment.[40]

4.2.2 The Procurement Directive and Articles 74-77 do not preclude the reservation of contracts for health and social services to non-profit organisations

(58) At the outset, the Norwegian Government recalls that it is settled case-law that in interpreting provisions of EU/EEA law, it is necessary to consider not only their wording but also the context in which they occur and the objectives of the rules of which they are part.[41] It is, therefore, clear that the meaning of a provision may follow explicitly from its wording, or it could – as often is the case – follow from a more detailed interpretation and analysis. Moreover, though the level of harmonisation of a directive must be determined individually for each provision, it is relevant to stress that the Procurement Directive does not include any clauses or statements in the preamble to the effect that it provides total harmonisation,[42] excluding national regulation on a case-by-case basis.[43] On the contrary, recital 4 of the preamble to the Procurement Directive states that though the increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification

[39] See point 209 in the Commissions «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 interest» (2013).
[40] See recital 114, further described in section 4.2.2 below.
[41] See e.g., case C-1/96 para. 49. For example, in Directive 76/768 Article 7(1), Directive 2011/83 Article 4, Directive 2007/46 Preamble, recital (2).
[42] Joined cases C-285/99 & C-286/99, para. 33
[43] Compare for instance Directive 76/768 Article 7(1), Directive 2011/83 Article 4, Directive 2007/46 Preamble, recital (2).

should not, however, broaden the scope of the Procurement Directive compared to that of Directive 2004/18/EU.

(59) Recital 41 of the preamble stresses that "*nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect (…) public health (…), provided that those measures are in conformity with the TFEU*". This indicates that the overall objective of the Procurement Directive is not a total harmonisation, but rather a partial harmonisation, where national regulation still has a role to play (at least in areas where the directive does not provide an explicit and detailed regulation of the matter concerned). This view, that States can introduce further regulation, provided that they are compatible with primary EU (and EEA) law, is also supported by legal literature.[44]

(60) As far as the specific provisions of the Procurement Directive are concerned, there are no provisions that expressly states whether public contracts on health and social services falling within the scope of the Light Regime, cf. Annex XIV, may be reserved for non-profit making organisations. Thus, the Procurement Directive does not expressly preclude reservation of such contracts to non-profit organisations.

(61) Turning to the specific provisions of the Light Regime, Article 75 concerns the publication of notices. For contracts falling within the scope of the Light Regime, public authorities have to comply with the rules on publication of tender notices in respect of those contracts. In doing so, the contracting authorities observes the principle of transparency.

(62) Article 76(1) states that Member States shall put in place national rules for the award of contracts subject to that regime in order for contracting authorities to comply with the principles of transparency and equal treatment of economic operators. Further, the same provision states that 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. Whereas this does not mean that the States have free rein, it does imply that the limitations that apply under Article 76 are the observance of the fundamental principles of transparency and equal treatment. Indeed, the EU legislator has confirmed this in respect of services falling within the scope of the Light Regime in recital 114 of the preamble:

> *"(…) Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive take account of that imperative,* ***imposing only the observance of basic principles of transparency and equal treatment*** *(…)*" (Emphasis added)

(63) In other words, the same basic principles of EU/EEA law that applied under Directive 2004/18/EU for health and social services (Annex B services) are still applicable for the services falling within the scope of the Light Regime. These services are only subject to a limited part of the Procurement Directive, and also subject to less strict regulations within this limited application of the Procurement Directive. Thus, services falling within the scope of the Light

[44] S. Arrowsmith, "Law of Public and Utilities Procurement" (2014), page 478.

Regime should be assessed in the same way as services for which Directive 2004/18/EU was not fully applicable (Annex B services) and where the legal benchmark for the assessment of the lawfulness of a reservation for non-profit organisations was the principles of transparency and equal treatment.

(64) That interpretation cannot be called into question by the introduction of Article 77.

(65) Pursuant to Article 77(1), 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 the CPV codes set out therein. Such organisations must fulfil the criteria in Article 77(2). Recital 118 of the Procurement Directive states that, in order to ensure the continuity of public services, that directive should allow that participation in procurement procedures for certain services in the field of health, social and educational services could be reserved for organisations which are based on employee ownership or active employee participation in their governance, and for existing organisations such as cooperatives to participate in delivering these services to end users. Article 77, accordingly, concerns the possibility of reserving contracts to certain newly established companies by persons previously employed in the public sector. It is not restricted to non-profit organisations but extends to commercial companies as well. Indeed, Article 77 was introduced at a late stage of the legislative procedure to address a particular situation in the UK.[45]

(66) The circumstances leading up to the inclusion of Article 77 indicate that this provision does not limit the right to reserve contracts only for the specific services set out in Article 77 (1) to only organisations fulfilling the conditions set out in Article 77 (2). Indeed, the wording, purpose and context of the adoption of Article 77 show that it was borne out of very specific circumstances. There is no sound basis for an antithetical interpretation, in that Article 77 is an exhaustive regulation of the conditions under which public authorities may reserve contracts for health and social services. As such, the inclusion of Article 77 cannot preclude the reservation of health and social services to non-profit organisations, as envisaged under the previous case-law of the CJEU. This is further indicated by the fact that Article 77 has a broader scope than health and social services. It also includes contracts for services which it would be more difficult to envisage reserving to non-profit organisations.

(67) In that regard, it should be emphasised that the Procurement Directive cannot be viewed as a total harmonisation directive on this point. On the contrary, and as set out above, recital 114 of the preamble of the Procurement Directive underlines that States may determine the relevant procedural rules applicable and that they have *"(…) a wide discretion to organise the choice of the service providers in the way they consider most appropriate (…)*". On the same note, recital 41 of the preamble of the Procurement Directive underlines that *"(…) nothing in*

[45] S. Smith (2014) Article 74 to 77 of the 2014 Public Procurement Directive. The New «Light Regime» for Social, Health and Other Services and a New Category of Reserved Contracts for Certain Social, Health and Cultural Services Contracts, Public Procurement law Review (2014) 4 p. 159-168.

this Directive should prevent the imposition or enforcement of measures necessary to protect (…) public health (…)".

(68) Moreover, one of the assessments during the legislative process appears to have been whether, for legal certainty, the recital of the draft directive should include an express reminder of the possibility granted by primary EU law to reserve contracts for health and social services to non-profit organisations. In this respect, the Norwegian Government refers to the proposal of the Committee on Employment and Social Affairs of the European Parliament to include the following reminder of the continuing importance of the case-law from the CJEU in the recital of the Procurement Directive:[46]

> "*According to case law of the Court, in particular the judgement in case C-70/95 (Sodemare), contracting authorities may be allowed to reserve contracts to non-profit organisation, if such a restriction is provided for by national law and compatible with European law, if it is necessary and proportionate to attain certain societal goals of the national welfare system*".

(69) The justification for this proposed amendment by the European Parliament was that *Sodemare* is "*essential for the reservation of contracts to non-profit organisations*". Though the proposal was not included in the final text, the Norwegian Government is not aware of any formal statements in the preparatory documents to suggest that the Council or the Commission were of a different opinion as to the state of law under the (new) Procurement Directive. Nor are there any statements to suggest that the intention of the legislator was to constrain the existing possibility in the CJEU's case-law for States to reserve contracts for health and social services to non-profit organisations. Hence, the travaux preparatoires clearly indicates that the intention of the EU legislator was not to preclude the reservation of contracts to non-profit organisations under the Procurement Directive. Indeed, recital 2 of the preamble clarifies that well-established case-law is incorporated into the Procurement Directive, which Articles 75 and 76 are examples of.

(70) To summarise: For contracts for the provision of health and social services falling within the scope of the Light Regime, the essential limitations on the discretionary freedom of the States are the observance of the basic principles of transparency, cf. Article 75, and equal treatment, cf. Article 76 and recital 114 of the preamble of the Procurement Directive. Those are the same principles that applied under Directive 2004/18/EU for health and social services were the procedural rules of that directive was not fully applicable (Annex B services). Under those principles, the CJEU accepted, first, that the reservation of contracts for health and social services to non-profit organisations was not contrary to primary EU law.[47] Second, the CJEU accepted derogations from the principles of equal treatment and transparency through the direct award of contracts to voluntary, non-profit organisations, provided that this contributed to the attainment of the social objectives pursued by the national social welfare system in question.[48] By reason of logic, one may infer from the same case-law that the Procurement

[46] https://www.europarl.europa.eu/doceo/document/A-7-2013-0007_EN.html?redirect
[47] *Sodemare,* para. 32.
[48] Spezzino and CASTA, as described in paras. 50-53 above.

Directive or EU/EEA law does not preclude the reservation of the right to participate in a tender procedure for such contracts to non-profit organisations, provided that this complies with the principles of transparency and equal treatment, or that the reservation contributes to the attainment of the social objectives pursued by the national social welfare system in question, since this would amount to a less restrictive interference than a direct award.

4.2.3 Reservation of the contract in the case at hand to non-profit organisations

(71) As set out above, public contracts for health and social services that fall within the Light Regime are subject to two requirements.

(72) First, Article 75 requires contracting authorities to comply with the rules on publication of tender notices for such contracts. In doing so, that requirement is an expression of the principle of transparency. As set out above, the contract awards in *Spezzino* and *CASTA* were, awarded directly, and as such, in the absence of transparency, did not comply with the principle of equal treatment (but the derogation was nevertheless justified). In Norwegian national law, the obligation to publish a tender notice in respect of contracts for health and social services is set out in section 30-2a (3) of the Norwegian Public Procurement Regulation, cf. section 30-5. According to the request for an advisory opinion, Oslo municipality has complied with this requirement.

(73) Second, Article 76(1) of Procurement Directive requires States to put in place national rules for the award of such contracts, in order to ensure that contracting authorities comply with the principles of transparency and equal treatment. Further, Article 76 (1) states that Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take account of the specificities of the services in question.

(74) According to settled case-law, the principle of equality requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way, unless such treatment is objectively justified.[49] As set in para. 48 above, a difference in treatment of entities under national legislation depending on their status and objective, such as non-profit or charitable status, is compatible with the free movement rules, provided that the national legislation at issue is not to the detriment of entities established in another Member State compared to those established in the relevant state, having the same status or objective.[50]

(75) This is supported by Article 76(2), which states that 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. Such objectives may be precisely objectives which non-profit organisations pursue in their provision of services.

[49] Case C-210/03 *Swedish Match*, para. 70
[50] Case C-153/08 *Commission v Spain*, paras. 29-35

(76) Under section 30-2a of the Public Procurement Regulation, a contracting authority "may" reserve the right to participate in a tender procedure for health and social services contracts to non-profit organisations where such reservation contributes to the attainment of social objectives, the good of the community and budgetary efficiency. As such, the provision is not an automatic exclusion of profit-making entities. The reservation is made by each contracting authority on the basis of a *case-by-case assessment* of the subject of the contract to be awarded.

(77) Oslo municipality has reserved the right to participate in its tender procedure for the provision of long-term places in nursing homes to non-profit organisations pursuant to section 30-2a. The question is, therefore, whether this reservation complies with the principle of equal treatment.

(78) First, the Norwegian Government would stress that like in *Sodemare*, the reservation in the case at hand is not liable to place profit-making companies from other EEA states in a less favourable factual or legal situation than profit-making companies from the EEA states in which they are established. The Norwegian Government refers to para. 33, in which the CJEU states that:

> *"Moreover, the fact that it is impossible for profit-making companies automatically to participate in the running of a statutory social welfare system of a Member State by concluding a contract which entitles them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature is not liable to place profit-making companies from other Member States in a less favourable factual or legal situation than profit-making companies from the Member State in which they are established."*

(79) Moreover, the reservation in the case at hand concerns the provision of long-term places in nursing homes. Equally, *Sodemare* concerned the provision of nursing homes for elderly people. In respect of that specific service, the CJEU held that the right of establishment did not preclude national legislation in which the possibility to enter into contracts was reserved solely for non-profit organisations. As set out in section 4.2.2 above, there is nothing to suggest that the right to reserve contracts to non-profit organisations was precluded by the entry into force by the Procurement Directive. In the Norwegian Government's view, *Sodemare*, therefore applies to the case at hand.

(80) In *Spezzino* and *CASTA*, however, the contract awards were liable to place non-profit organisations from other Member States in a less favourable factual situation than non-profit organisations from the relevant Member State, since the contracts were awarded directly, without any prior advertising. As Oslo municipality has publish a tender notice in respect of the contract, this is not the situation in the case at hand. As set out in more detail in para. 83 below, the derogation from the principle of equal treatment was, however, justified in *Spezzino* and *CASTA*.

(81) Further, the Norwegian Government notes that the Light Regime is established for certain social services in light of the importance of the cultural context and sensitivity of services to

the person. In the context of the relevant service, the Norwegian Government, therefore, submits that profit-making companies and non-profit organisations are not in comparable situations. It follows from *Sodemare* that the admission to a national health system could be subject to the condition that operators are non-profit making. Non-profit entities are not driven by the need to deprive profit from the services so at to enable them to pursue social aims as a matter of priority.[51] Non-profit organisations provide a value-add for health and social services and confer advantages on the society beyond the relevant service. Non-profit organisations are e.g., concerned with user participation in the provision of the service, have a culture of creating new services, and making use of volunteers in supporting roles for patients. As such, in the performance of health and social services, non-profit organisations confer advantages on the society as a whole, as opposed to only providing the health and social service that is the subject of the specific contract. As set out above in para. 75, those are objectives which States pursuant to Article 76(2) shall ensure for contracts under the Light Regime.

(82) Although under a contract with Oslo municipality, profit-making organisations and non-profit making organisations would be required to perform the same services and to the same level of quality, non-profit organisations nevertheless provide a value-add in the provision of those services. Further, the provision of long-term places in nursing homes is offered to the most seriously ill and elderly persons. As set out in the request for an advisory opinion, residents in Oslo municipality's nursing homes are on average 85 years old, and, as such, are vulnerable residents provided with end-of-life care. Further, approximately 85 % suffer from cognitive impairment or varying degrees of dementia. The highly sensitive nature of the services to such persons, combined with the inherent purpose of non-profit organisations to pursue social aims as a matter of priority, entails that profit-making organisations and non-profit organisations are not in comparable situations due to the nature of the service in question.

(83) Should the reservation to non-profit organisations nevertheless not comply with the principle of equal treatment, a derogation from that principle may, according to the case-law of the CJEU, be justified on the basis of public health and social welfare consideration. In this respect, account must be taken of the fact that the health and life of humans rank foremost among the interests protected by the Treaty, and that it is for the States to decide on the degree of protection they wish to afford to public health and for the way that degree of protection is to be achieved in national law.[52] Indeed in *Spezzino* and *CASTA*, the CJEU held that a Member State, in the context of its discretion to decide the level of protection of public health and to organise its social security system, could award contracts for health and social services directly to voluntary associations, provided that this contributed to the social purpose and the good of the community and budgetary efficiency.[53] Similarly, section 20-3a of the Public Procurement Regulation states that contracting authorities may reserve the right to participate in tender procedures for health and social services to non-profit organisations if this

[51] *Sodemare*, para. 31,
[52] *Spezzino*, para. 56, and *CASTA*, para. 60.
[53] Spezzino, para. 55-60, and *CASTA*, para. 61-62.

contributes to the attainment of social objectives, the good of the community and budgetary efficiency.

(84) As set out in the consultation paper in respect of section 30-2a, the social objectives which the provision is aimed to achieve, includes the greater breadth and variation of the overall provision of social and health care services. Further, according to Oslo municipality, the reservation shall ensure a diversified offer, designed to fulfil the different needs of the population. In the Norwegian Government's view, the objective is, therefore, to safeguard public health and social welfare, which are legitimate grounds which justify a derogation from the principle of equal treatment. As the CJEU has repeatedly emphasised, EU/EEA law does not detract from the power of the States to organise their health and social security system. The right to reserve contracts for certain health and social services, which aim is to increase the involvement of non-profit organisations in the national health and care system and preserve the diversity of service providers, must be regarded as one of many considerations that States may take when exercising their discretion as regards the manner in how they wish to organise their national public health system.

(85) Whether the condition that the service providers must be non-profit organisations in fact contributes to the social purpose and the good of the community, is for the referring court to determine. As set out in paras. 81-82 above, the condition does in the Norwegian Government's view indeed seem suitable for ensuring the aim of increasing the involvement of non-profit organisations in the national health system and to preserve the diversity of service providers.

(86) In respect of budgetary efficiency, the Norwegian Government notes that this was one of several objectives pursued by the national legislation in *Spezzino* and *CASTA*, where the contracts were awarded directly, on a preferential basis, to voluntary associations, without any competition between potential providers. The Norwegian Government cannot, however, see that States may take measures that pursue social objectives in the organisation of their public health system only if that measure also contributes to budgetary efficiency. This would run counter to the sensitive nature of the services to the person, such as the provision of long-term places in nursing homes. Further, under Article 76(1) States are free to determine the procedural rules applicable as long as they take account of the specificities of the service in question. Contracting authorities, therefore, cannot be obliged to carry out a tender procedure that attaches importance to cost-efficiency of the service provider. In any event, Oslo municipality has in the case at hand carried out a tender procedure. As such, there is competition between the non-profit organisations that are deemed suitable for ensuring the contribution to the social purpose and the good of the community.

4.2.4 Articles 31 and 36 of the EEA Agreement

(87) In question 3, the referring court also asks whether Articles 31 and 36 of the EEA Agreement precludes national legislation which allows contracting authorities to reserve the right to participate in a tender process for health and social services contracts to non-profit organisations. In respect of whether those provisions apply, the Norwegian Government refers to its submissions on question 1. Assuming that those provisions do apply, the CJEU held in

Sodemare that the right of establishment did not preclude national legislation in which the possibility to enter into contracts for the provision of nursing homes for elderly people was reserved solely for non-profit organisations.

(88) Further, a derogation from the freedom to provide services and freedom of establishment may be justified on the basis of public health and social welfare considerations. The Norwegian Government, therefore, refers to its submissions in section 4.2.3 in respect of the principles of equal treatment and transparency under the Procurement Directive in the case at hand.

4.2.5 Proposed answer to question 3

(89) For the reasons set out above, the Norwegian Government respectfully proposes that the answer to question 3 should include that:

> "*Articles 31 and 36 of the EEA Agreement and Articles 74–77 of Directive 2014/24/EU do not preclude national legislation pursuant to which contracting authorities may reserve the right to participate in a tender procedure for contracts for the provision of health and social services to non-profit organisations, provided that the reservation complies with the principles of transparency and equal treatment as set out in Articles 75 and 76 of Directive 2014/24/EU. As such, an EEA state may, in the exercise of the power it retains to organise its social welfare system, reserve the right to participate in a tender procedure for the provision of long-term places in nursing homes, with a view to obtaining its social objectives, to non-profit organisations*."

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