ESA | EFTA Surveillance Authority

Brussels, 29 June 2022
Case No: 88531
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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by the

THE EFTA SURVEILLANCE AUTHORITY

represented by
Ewa Gromnicka, Erlend Møinichen Leonhardsen, Kyrre Isaksen,
Melpo-Menie Josephides,
Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-4/22

Stendi AS & Norlandia Care Norge AS

v

Oslo Municipality

in which Oslo District Court (Oslo tingrett) requests the EFTA Court to give 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 concerning Directive 2014/24/EU, Article 32 EEA on the exercise of official authority, Articles 31 and 36 EEA and reservation of contracts for non-profit organisations.

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Table of Contents

1 INTRODUCTION

1. Pursuant to Section 30-2a of the Norwegian Public Procurement Regulation,[1] it is possible to reserve tendering procedures for health and social services for non-profit organisations. Oslo Municipality has sought to rely on this system in a procurement for health and social services. The lawfulness of the procurement has been challenged by economic actors which were excluded from participating on the basis of their organisational form.
2. At issue here are the limits between the public procurement rules (which aim to ensure that the principles of free movement, equal treatment, non-discrimination, mutual recognition, proportionality and transparency are given practical effect) and the pursuit of social aims allegedly pursued by the Norwegian measure. The EFTA Surveillance Authority ("**ESA**") submits that these aims must be pursued within the framework of EEA procurement law as well as comply with the fundamental principles of EEA law.
3. ESA is convinced that the Procurement Directive gives each EEA Member State ample space to pursue various social aims and objectives within the confines of the flexible procurement tools (such as award criteria, specifications and contract performance conditions). EEA Member States are empowered (and indeed required) to take appropriate measures to ensure that the contracts comply with obligations in the field of environmental, social and labour law – be it EEA law, collective agreements or international requirements, as recognised by Articles 18 and 67 of the Directive.
4. The present case concerns whether it is possible to limit competition by excluding a provider from the procurement market based on how it is organised and operating. Whilst there are explicit grounds in the procurement directives which allow certain contracts to be reserved, in ESA's view, the Norwegian measure goes beyond the limits of these explicit grounds.

2 THE FACTS OF THE CASE

5. Stendi AS ("**Stendi**") is a Swedish-owned company, registered under the laws of Norway, and part of the Ambea Group that provides care-related services in

[1] In Norwegian: *Forskrift 12. august 2016 nr. 974 om offentlige anskaffelser (anskaffelsesforskriften),* available at https://lovdata.no/dokument/SF/forskrift/2016-08-12-974.

Norway, Sweden and Denmark. Norlandia Care Norge AS ("**Norlandia**") is a company registered under the laws of Norway and is part of Norlandia Health & Care Group AS, which is a group providing Care and Welfare services and is also engaged in real property development in Norway, Sweden, Finland, the Netherlands, Germany and Poland.

6. Oslo Municipality is the largest municipality in Norway, measured by number of inhabitants. In November 2020 the municipality's Nursing Home Agency, which is the entity responsible for the services offered by Oslo Municipality's nursing homes, published a procurement of long-term leasing and services agreements for up to 800 new, long-term places in nursing homes.
7. At issue in the main proceedings is this procurement by Oslo Municipality in the form of leasing and service agreements for long-term places in nursing homes. The agreement has two components. First, it has a real-estate component which provides for long-term leasing (30+10 years) of nursing home buildings. Second, it has a services component which consist in contracts (8+1+1 years) for the provision of nursing home services in the form of management of up to 800 long-term psychiatry- and somatic-related places in nursing homes. The value of the first part is NOK 155.3 million per year. The total contract value of the services component is estimated at NOK 710.4 million per year. The provider of the nursing home services is to operate day and night nursing home places in long-term care homes with all necessary accompanying functions. Long-term homes are long-term residential, health and care solutions offered to persons who can no longer live in their own home.
8. It is this services component of the procurement which is at issue in the main proceedings, as the tender specifications stipulate that the provider of nursing home services must be a non-profit organisation as defined in Section 30-2a of the Norwegian Public Procurement Regulation. Since Stendi and Norlandia (jointly referred to as "the **Plaintiffs**") are not non-profit organisations they were excluded from the tender. They have challenged their exclusion from the tender before the Oslo District Court.
9. Having doubts whether, following the entry into force of the current Public Procurement Directive, "*it is **still** possible for the EEA States to introduce national legislation providing that public contracting authorities may reserve procurement of*

contracts for health and social services for non-profit organisations,"[2] the Oslo District Court decided on 14 March 2022 to submit a Request for an Advisory Opinion to the EFTA Court.[3]

3 EEA LAW

10. Chapter 2, Right of Establishment, Article 31 of the EEA Agreement reads:

> *"1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*
>
> *2. Annexes VIII to XI contain specific provisions on the right of establishment"*

11. Article 32 of the EEA Agreement reads:

> *"The provisions of this Chapter 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."*

12. Article 36 of the EEA Agreement reads:

> *"1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*
>
> *2. Annexes IX to XI contain specific provisions on the freedom to provide services."*

13. Article 37 of the EEA Agreement reads:

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[2] ESA's emphasis. For the sake of good order, ESA notes that it is not aware of any case-law of the European Courts holding that such legislation is lawful.

[3] Request for an Advisory Opinion, page 4.

"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."

14. Chapter 3, Services, Article 39 of the EEA Agreement reads:

"The provisions of Articles 30 and 32 to 34 shall apply to the matters covered by this Chapter."

15. Directive 2014/24/EU on public procurement[4] ("the Directive") was incorporated into Annex XVI to the EEA Agreement at point 2 by Decision of the EEA Joint Committee 97/2016 of 29 April 2016,[5] which entered into force on 1 January 2017 and was published in Norwegian in the EEA Official Journal on 13 December 2018.[6] Annexes I, III and XI to the Directive were supplemented by Appendices 1 to 3 to Annex XVI to the EEA Agreement.

16. Recitals 1 and 2 of Directive 2014/24/EU read:

"(1) The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and 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. However, for public contracts above a certain value, provisions should be drawn up coordinating national

[4] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.
[5] Joint Committee Decision OJ L 300, 16.11.2017, p. 49, EEA Supplement No 73, 16.11.2017, p. 53.
[6] OJ EEA Supplement No 84, 13.12.2018, p. 556-635.

procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

(2) Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules […] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union." [7]

17. Recital 4 of the Directive reads:

"The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC. The [EEA] 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. It should be clarified that such acquisitions of works, supplies or services should be subject to this Directive whether they are implemented through purchase, leasing or other contractual forms.

The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question, not necessarily requiring a transfer of ownership to the contracting authorities. Furthermore, 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. Similarly, situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity,

[7] Footnotes omitted.

such as customer choice and service voucher systems, should not be understood as being procurement but simple authorisation schemes (for instance licences for medicines or medical services).”

18. Recital 114 provides that:

“[….] Member States and public authorities remain free to provide those services [services to the person such as certain social, health and educational 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.”

19. Article 1(1) and (2) of the Directive, under the title “Subject-matter and scope”, provide the following:

“1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.

[…]

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

5. This Directive does not affect the way in which the Member States organise their social security systems.”

20. Article 2(1) of the Directive, inter alia, lays down the following definitions:

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

(6) 'public works contracts' means public contracts having as their object one of the following: (a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II; (b) the execution, or both the design and execution, of a work; (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

(…)

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

21. Article 4 Threshold amounts provides:

"This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

[…]

(d) EUR 750 000 for public service contracts for social and other specific services listed in Annex XIV."

22. Article 10 of the Directive provides specific exclusions for service contracts including in letter (h)

"civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services;"

23. Article 20 Reserved contracts, provides:

"1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30 % of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

2. The call for competition shall make reference to this Article."

24. TITLE III of the Directive entitled "Particular Procurement Regimes" in its Chapter I, entitled "Social and other specific services" contains Articles 74-77.

25. Article 74 is entitled "Award of contracts for social and other specific services" and provides:

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

26. Annex XIV to the Directive lists relevant CPV codes of services referred to in Article 74. It is only with regard to compulsory social security services (CPV code 75300000-9) that the Directive footnotes that: *"These services are not covered by the present Directive where they are organised as non-economic services of general interest. Member States are free to organise the provision of compulsory social services or of other services as services of general interest or as non-economic services of general interest."*

27. Article 75 is entitled "Publication of notices" and provides:

"1. Contracting authorities intending to award a public contract for the services referred to in Article 74 shall make known their intention by any of the following means:

a) by means of a contract notice, which shall contain the information referred to in Annex V Part H, in accordance with the standard forms referred to in Article 51; or

b) by means of a prior information notice, which shall be published continuously and contain the information set out in Annex V Part I. The prior information notice shall refer specifically to the types of services that will be the subject of the contracts to be awarded. It shall indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing.

The first subparagraph shall, however, not apply where a negotiated procedure without prior publication could have been used in conformity with Article 32 for the award of a public service contract.

2. Contracting authorities that have awarded a public contract for the services referred to in Article 74 shall make known the results of the procurement procedure by means of a contract award notice, which shall contain the

information referred to in Annex V Part J, in accordance with the standard forms referred to in Article 51. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 30 days of the end of each quarter.

3. The Commission shall establish the standard forms referred to in paragraphs 1 and 2 of this Article by means of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 89(2).

4. The notices referred to in this Article shall be published in accordance with Article 51."

28. Article 76 is entitled "Principles of awarding contracts" and provides:

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

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

29. Article 77 is entitled "Reserved contracts for certain services" and provides:

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

2. An organisation referred to in paragraph 1 shall fulfil all of the following conditions:

a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1;

b) profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations;

c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and

d) the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.

3. The maximum duration of the contract shall not be longer than three years.

4. The call for competition shall make reference to this Article.

5. Notwithstanding Article 92, the Commission shall assess the effects of this Article and report to the European Parliament and the Council by 18 April 2019."

4 NATIONAL LAW

30. Directive 2014/24/EU is implemented in the Norwegian legal order by the Norwegian Public Procurement Regulation.[8] The Norwegian Public Procurement Regulation in Part IV, Chapter 30 concerns Procurement of health and social services. Section 30-1 deals with organisation of the competition for procurement of health and social services. Specifically, its paragraphs 2-5 provide:

"(2) The contracting authority shall conduct the competition in a manner that involves that the suppliers are treated equally and given the opportunity to become acquainted with the aspects the contracting authority will emphasize when choosing suppliers to participate in the competition and when choosing tenders.

(3) The contracting authority may take into account the characteristics of the service when carrying out the procurement, including in determining the requirements for the service, the contract terms, the qualification requirements

[8] See footnote 1 above.

and the award criteria. This applies in particular to the user's needs for quality, continuity, universal design, acceptable prices, availability and a comprehensive service offering, competence and experience, user participation, safeguarding the user's integrity, mastering and participation in society and mobilizing of resources in the user's immediate environment. The contracting authority can also emphasize its needs for diversity, continuity and innovation.

(4) The contracting authority may award contracts by user choice. In that case, user choice shall be the only award criterion.

(5) The contracting authority may enter into long-term contracts if this is necessary due to the users' needs, the purpose of the contract, investment costs or other relevant reasons. The contracting authority may enter into ongoing contracts with notice of termination."

31. Section 30-2 of the Norwegian Public Procurement Regulation provides:

"(1) The contracting authority may reserve the right to participate in competitions for health and social services as specified in Appendix 4, to organizations that meet the following conditions:

a. the purpose of the organization is to perform public tasks related to such services;

b. the employees own or participate in the management of the organization, or the employees, users or stakeholders actively participate in the management;

c. the organization's profits are used to achieve the organization's goals. Any distribution or redistribution of profits shall take place in accordance with the requirements for participation or participation as mentioned in letter b; and

d. the organization has not had a contract for the provision of the same services during the last three years with the same contracting authority pursuant to this provision.

(2) The duration of the contract shall not exceed three years.

(3) The announcement of the competition shall refer to this provision."

32. Appendix 4, *Health and social services covered by § 30-2,* reads as follows:

CPV code	***Description***
85000000–85323000	*Health and social services*
75121000	*Administrative educational services*
75122000	*Administrative healthcare services*

CPV code	***Description***
75123000	*Administrative housing services*

33. Regulation 13 February 2020 No 159[9] amended the Norwegian Public Procurement Regulation, adding a new Section 30-2a concerning contracts reserved for non-profit organisations which reads as follows:

> *"(1) The contracting authority may reserve the right to participate in competitions for health and social services (as set out in Appendix 3) for non-profit organisations if the reservation contributes to the realisation of social purposes, what is best for society and budgetary efficiency.*
>
> *(2) Non-profit organisations do not pursue return on investment as their primary purpose. They work solely for a social purpose for what is best for society, and reinvest any profits in activity that realises the social purpose of the organisation. A non-profit organisation can, to a limited extent, conduct commercial activities that support its social purpose.*
>
> *(3) The notification of the competition shall refer to this provision."*[10]

34. Appendix 3, entitled *Health and social services,* reads as follows:

CPV code	***Description***
85000000–85323000	Health and social services
85321000	Administrative services in connection with social services
85322000	Municipal action programs
98133100	Improving society and supporting services to the population
98513000–98514000	Labour services in private households and housework
75121000	Administrative education services
75122000	Administrative health services
75123000	Administrative housing services
75231200	Services related to the detention or rehabilitation of criminals
75231210–75231230	Imprisonment and prison escort services and prison services
75231240	Parole officer services
80000000–80660000	Services related to training and education

[9] In Norwegian: *Forskrift 13. februar 2020 nr. 159 om endring i anskaffelsesforskriften, forsyningsforskriften, konsesjonskontraktforskriften*, available at https://lovdata.no/pro/#document/LTI/forskrift/2020-02-13-159?from=SF/forskrift/2016-08-12-974/.

[10] All translations provided are ESA translations unless otherwise indicated.

35. The Act of 2 July 1999 No 63 on the Rights of Patients ("**the Patients' Rights Act**" or "**PRA**")[11] provides in relevant parts:

"§ 4A-1. Purpose

[1] The purpose of the rules in this chapter is to provide the necessary health care to prevent significant health damage and to prevent as well as limiting the use of coercion.

[2] The health care must be facilitated with respect for the individual's physical and mental integrity, and as far as possible be in accordance with the patient's right to self-determination.

§ 4A-3. Possibility to provide health care that the patient opposes

[1] Before health care can be provided without the consent of the patient, confidence-building measures must have been tried, unless it is clearly pointless to try this.

[2] If the patient maintains his or her resistance, or the health care personnel know that the person in question is very likely to maintain his or her resistance, a decision can be made on health care if

a. a failure to provide health care can lead to significant health damage to the patient, and

b. the health care is considered necessary, and

c. the measures are proportionate to the need for health care.

Even if the conditions in the first and second paragraphs are met, health care can only be provided where this, after an overall assessment, appears to be the clearly best solution for the patient. In the assessment of whether such health care should be provided, emphasis shall be placed on the degree of resistance and whether in the near future it can be expected that the patient will be able to regain his or her competence to consent.

§ 4A-5. Decisions on health care that the patient opposes

[1] Decisions on health care pursuant to this chapter are made by the health care personnel who are responsible for the health care. Decisions can only be made for up to one year at a time.

[2] If the health care involves a serious intervention for the patient, a decision shall be made by the health care personnel as mentioned in the first paragraph,

[11] In Norwegian: *Lov 2. juli 1999 nr. 63 om pasient- og brukerrettigheter,* available at: https://lovdata.no/dokument/NL/lov/1999-07-02-63?q=pbrl.

after consultation with other qualified health care personnel. In assessing what constitutes a serious intervention for the patient, consideration shall be given, among other things, to whether the measure involves intervention in the body, the use of prescription drugs and the degree of resistance. If the patient opposes that the health care is carried out by admission or detention in a health institution, or opposes the use of measures to prevent mobility, it must always be considered a serious intervention.

[3] Decisions about examination and treatment include the care and attention necessary to carry out the examination and treatment. If the main purpose of the health care is nursing and care, a separate decision must be made on this.

[4] Where possible, information shall be obtained from the patient's next of kin regarding what the patient would have wanted, before a decision pursuant to § 4A-5 first and second paragraphs is made."

36. The Act of 24 June 2011 No 30 on Health and Care Services ("**the Health and Care Services Act**")[12] provides in relevant parts:

"§ 1-2. Scope of the Act

[1] The Act applies to health and care services that are offered or provided in the realm by the municipality or private individuals who have an agreement with the municipality, unless otherwise provided by the Act here.

§ 2-1. Relationship to the Health Care Personnel Act

The Health Personnel Act applies correspondingly to personnel who provide health and care services in accordance with this Act. […]

§ 3-1. The municipality's overall responsibility for health and care services

[4] The municipality's health and care service includes publicly organized health and care services that do not belong to the state or county municipality.

[5] Services as mentioned in the first paragraph may be provided by the municipality itself or by the municipality entering into an agreement with other public or private service providers. The agreements cannot be transferred."

[12] In Norwegian: *Lov 24. juni 2011 nr. 30 om kommunale helse- og omsorgstjenester m.m. (helse- og omsorgstjenesteloven),* available at https://lovdata.no/dokument/NL/lov/2011-06-24-30.

5 THE QUESTIONS REFERRED

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

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?

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

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

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

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

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

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

39. On the reservation for non-profit organisations:

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?

6 LEGAL ANALYSIS

6.1 Introduction

40. The present Request for an Advisory Opinion concerns the question of exclusion of for-profit providers from public procurement related to operation of the nursing home services.
41. For the reasons set out in these written observations, ESA submits first that the contract in question falls under the scope of the notion of a contract relating to the provision of "services" under point (9) of Article 2(1) of the Directive as contracts for pecuniary interest.
42. Articles 31 and 36 EEA would only apply if the Directive does not apply. ESA considers that the Directive is applicable to the contract at issue in the main proceedings. ESA concludes that Articles 74-77 of the Directive preclude such 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 and therefore also the contract at issue in the main proceedings.
43. Finally, ESA submits that the Article 32 exception of exercise of official authority cannot be applied in the present case.

6.2 A contract relating to the provision of "services*" under point (9) of Article 2(1) of Directive 2014/24/EU*

44. The first question of the national court is, in essence, about whether the EEA rules on public procurement apply to the contract at issue in the main proceedings. At issue in the main proceedings is a procurement by Oslo Municipality of long-term service agreements of long-term places in nursing homes, as described in Section 2 above. The national court asks whether the contract for the services component of the procurement 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 the Directive.
45. The legal bases of the Directive in the Treaty of the Functioning of the European Union (**TFEU**) are, *inter alia,* Articles 53(1) and 62, which are found in Title IV of the TFEU in, respectively, Chapter 2 on the Right of Establishment and Chapter 3 on Services. Since the Directive is adopted in order to facilitate and to give substance

to Articles 31 and 36 EEA in the area of public contracts.[13] It should be examined whether the contract at issue falls within the scope of those freedoms,[14] in which case it would also, in principle, fall under the Directive and for the purposes of the contract at issue in the main proceedings, be considered a services contract.

46. In that respect, it appears sufficient to refer to Article 37(1) EEA, which provides: "*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*." (our emphasis)

47. It is not disputed that the contract at issue in the main proceedings involves health care activities provided for remuneration. It is settled case-law that health care activities fall within the scope of the freedom to provide services.[15] Furthermore, it

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[13] Advocate General Medina in Case C-436/20 *ASADE*, EU:C:2022:77, paragraph 46.

[14] It is often difficult to determine whether an economic activity falls under the freedom of establishment or the freedom to provide services. While the distinction between these two freedoms are typically found in the temporary nature of the activities in question, it is not necessary at this stage to determine conclusively which of the freedoms the activities falls under, seeing also that they together form the basis of the Directive.

[15] Joined Cases E-11/07 and E-1/08 *Rindal and Slinning v Norway*, [2008] EFTA Ct. Rep. 320, paragraph 42. See also Case C-157/99 *Smits and Peerbooms*, EU:C:2001:404, paragraph 53. Thus, the contracts at issue in the main proceedings, which concern services in the field of health care, appear to be different from, for instance, those at issue in Case E-13/19 *Hraðbraut ehf. v mennta- og menningarmálaráðuneytið, Verzlunarskóli Íslands ses., Tækniskólinn ehf., and Menntaskóli Borgarfjarðar ehf*. There, the Court found, in large part on the basis of Case 263/86, *Humbel* (in which the CJEU held that certain services in the field of education were not encompassed by the freedom to provide services) as well as on the basis of Case E-5/07 *Private Barnehagers Landsforbund* (which was also based on *Humbel,* see paragraphs 80-81) that: "*The provision of upper secondary education provided under a national education system in such circumstances cannot be regarded as a 'service'*". In Case C-393/17 *Kirchstein*, EU:C:2018:918, Advocate General Bobek at paragraph 54 of his Opinion referred to *Humbel* and the case-law based on it and stated that that case concerned "*the specific context of education*", adding that "*In order to determine whether there is a service under the Treaties, the Court made a further distinction on the basis of which entity provides that education and the way in which it is financed*.". ESA agrees with his conclusion that "*although Humbel itself concerned secondary education, that approach has gradually been extended to other forms of education, including higher education*". The present case, however, does not concern the specific context of education, but that of medical activities and health care. In the key case in that context, Case C-157/99 *Smits and Peerbooms,* Advocate General Ruíz Jarabo Colomer in paragraphs 29-30 of his Opinion referred to *Humbel* and proposed that the CJEU should follow the same approach with respect to the medical activities at issue, inviting the Court to find that the element of remuneration was not present. The CJEU did not comment on this, but simply stated in paragraph 54 that "*It is settled case-law that medical activities fall within the scope of Article 60 of the Treaty, there being no need to distinguish in that regard between care provided in a hospital environment and care provided outside such an environment*". See also similarly the Opinion of Advocate General Saggio in Case C-368/98 *Vanbraekel*, EU:C:2000:271, paragraphs 20-21, who made the same suggestion based on *Humbel.* This was not followed by the CJEU, which instead held in paragraphs 39-42 of its judgment that medical services fell within the scope of the freedom to provide services. ESA therefore considers it settled case-law that with respect to health care and medical activities, the freedom to provide services, as a fundamental freedom, is not subject to the approach taken by the courts in the specific context of education.

is also settled case-law that the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement.[16] Indeed, the CJEU has stated that healthcare, provided to patients, and irrespective of its financing, is a service.[17]

48. Therefore, ESA considers it clear that the contract at issue in the main proceedings falls within the scope of the freedom to provide services under the EEA Agreement.

49. Moreover, ESA recalls that, as stated in the fourth recital of the Directive that:

"The [EEA] 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 public contract."

50. The same recital clarifies that:

"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 purposed intended, does not usually fall within the scope of the public procurement rules. Similarly, situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity […] should not be understood as being procurement but simple authorisation schemes."

51. Article 1 of the Directive establishes the scope of its application and provides (in 1(1)) that it applies to public contracts, whose value is estimated to be not less than the threshold laid down in Article 4. Even if the value of the services provided is below the threshold, according to settled case-law, *'the award of contracts which, by their value, do not fall within the scope of that directive is subject to the fundamental rules and general principles […], in particular the principles of equal treatment and non-discrimination on grounds of nationality, and to the resulting obligation of transparency, provided that such contracts are of certain cross-border interest having regard to certain objective criteria'.*

52. Procurement within the meaning of the Directive covers the acquisition by means of a public contract of services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not those services are intended for a public use (Article 1(2)).

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[16] Case C-157/99 *Smits and Peerbooms,* EU:C:2001:404, paragraph 54.

[17] See Case C-158/96 *Kohll v Union des caisses de maladie*, EU:C:1998:171, Case C-120/95 *Nicolas Decker v Caisse de Maladie des Employes Prives*, EU:C:1998:167; Case C-385/99 *Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*; EU:C:2003:270.

53. The definition of "public service contracts" is found in Article 2(1)(9). Article 2(1)(5) defines public contracts as 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.

54. By virtue of the fact that the Directive's subject-matter and scope is limited by Article 1(1) to "public contracts",[18] the key question for its applicability here is whether contracts such as those at issue in the main proceedings are "for pecuniary interest". This is because only such contracts may constitute a public contract coming within the scope of Directive.[19] The notion of "pecuniary interest" requires that the service provided by the economic operator is subject to some kind of remuneration obligation on the part of the contracting authority,[20] and is therefore similar to the requirement that "services" for the purposes of Article 37(1) EEA have to be "normally provided for remuneration".

55. The CJEU has also held that a contract does not cease to be a public contract merely because its remuneration is limited to reimbursement of the costs incurred in providing the agreed service.[21] The fact that the government/municipality is purchasing on the market services that are ultimately provided for people who are not directly paying for the service also does not change the classification of the contract as a contract for pecuniary interest.[22] The synallagmatic nature of the

[18] The notion of "design contest", also covered by Article 1(1) of the Directive is clearly irrelevant in the context of the present case and can thus be left to one side here.

[19] See e.g. Case C-451/08 *Helmut Müller*, EU:C:2010:168, paragraph 48, citing Case C-399/98 *Ordine degli Architetti and Others*, EU:C:2001:401 and Case C-220/05 *Auroux and Others*, EU:C:2007:31; Case C-51/15 *Remondis*, EU:C:2016:985, paragraph 43, referring with approval to the Opinion of Advocate General Mengozzi in the same case, EU:C:2016:504, at paragraph 36; Case C-606/17 *IBA Molecular Italy*, EU:C:2018:843, paragraph 28.

[20] Case C-796/18 *Informatikgesellschaft für Software-Entwicklung (ISE) mbH,* EU:C:2020:395, paragraph 40; Case C-606/17 *IBA Molecular,* EU:C:2018:843, paragraphs 30 and 31; Case C-367/19 *Tax-Fin-Lex d.o.o. v. Ministrstvo za notranje zadeve*, EU:C:2020:685, paragraph 25.

[21] Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others*, EU:C:2012:817, paragraph 29.

[22] Advocate General Medina, in her Opinion in Case C-436/20 *ASADE*, paragraph 53, reminded that "*the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, that is to say, 'the activity must not be provided for nothing'. […] the decisive factor, which brings an activity within the scope of the FEU Treaty relating to fundamental freedoms, is its economic character, irrespective of who pays for the service – whether it is the user or the Member State. The Court has held, for example, that the fact that the State is involved in financing medical benefits does not mean that a medical activity is not to be classified as a service.*"

contract is thus an essential element of a public contract.[23] The reciprocal nature of a public contract necessarily results in the creation of legally binding obligations on both parties to the contract, the performance of which must be legally enforceable.[24]

56. According to the national court it is undisputed that "*contracts in the sense of contracts for pecuniary interest are to be concluded between Oslo municipality and the selected providers of nursing home services.*"[25] As the referring court is solely responsible for defining the legal and factual context of the questions to be referred,[26] the existence of pecuniary interest is, in the present case, a premise on the basis of which the Court has to base its interpretation of EEA law.

57. ESA's conclusions in this section are not affected by Oslo Municipality's arguments based on the Court's judgment in E-13/19 *Hraðbraut*, as summarised by the referring court. In that case, the Court stated: *"[a]ccording to the first paragraph of Article 37 EEA, only services normally provided for remuneration are to be considered services within the meaning of the EEA Agreement. For the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service rendered."* In *Hraðbraut*, in addition to the fact that the case concerned education, which is somewhat special when it comes to the definition of the freedom to provide services,[27] there was also no clear pecuniary interest. In contrast, a pecuniary interest is identified by the referring court in the present case.

58. ESA acknowledges that, in line with recital 4 of the Directive, public procurement rules are not intended to regulate all forms of disbursement of public funds, but only those for the purchase of works, supplies or services provided under a public contract. Recital 114 of the Directive reiterates that *"Member States and public authorities remain free to provide such services themselves or to organise social services in such a way that it is not necessary to conclude public contracts […]".* However, once an EEA State decides to conclude a contract that fulfils the definition

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[23] See to that effect Case C-51/15 *Remondis*, EU:C:2016:985, paragraph 43; Case C-796/18 I*nformatikgesellschaft für Software-Entwicklung*, EU:C:2020:395, paragraph 40; and Case C-328/19 *Porin kaupunki*, EU:C:2020:483, paragraph 47.

[24] Case C--451/08, *Helmut Müller*, EU:C:2010:168, paragraphs 60 to 62 and Case C-367/19 *Tax-Fin-Lex d.o.o. v. Ministrstvo za notranje zadeve,* paragraph 26.

[25] See page 2 of the Request for an Advisory Opinion.

[26] See e.g. Case E-16/14, *Pharmaq AS* v *Intervet International BV*, paragraph 60, as well as the Court's *Note for guidance on requests by national courts for Advisory Opinions*, available online at https://eftacourt.int/the-court/guidance-for-advisory-opinion/?wpdmdl=7446&ind=1627642656131 .

[27] See footnote 15.

of the Directive and falls within its scope, public procurement rules must be applied.[28]

59. In that context ESA notes that the Health and Care Services Act currently in force[29] provides in Section § 1-2 that rules on health and care services (and specifically nursing homes) are applicable to the municipality or private individuals who have an agreement with the municipality.[30] Further, section 3-1 of the same act provides that *"The municipality's health and care service includes publicly organized health and care services that do not belong to the state or county municipality.*

Services […] may be provided by the municipality itself or by the municipality entering into an agreement with other public or private service providers. The agreements cannot be transferred."

60. Hence, it is clear that social services in Norway are organised in a way that allows for the conclusion of contracts with private parties to provide nursing home services. Under the Health and Care Services Act, all operators of nursing homes have to fulfil the same regulatory substantive and procedural requirements. It therefore seems that the nature of nursing homes' operation as a service was not questioned under national law.

61. In the present case, the private parties have also in the past provided the services in question for remuneration. The only change in the national system was the introduction of a new provision in the Public Procurement Regulation allowing for effective exclusion of private service providers. The nature of the service (provided for remuneration) did not and cannot change just because the contracting authority decided to exclude for-profit providers.

62. Thus, the contract at issue in the main proceedings clearly falls within the remit of the freedom to provide services under the EEA Agreement and the Procurement Directive. As such, it is also a public contract having as its object the provision of services, as referred to in Article 2(9) of the Directive, and is consequently to be classified as a "public service contract".

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[28] Opinion of AG Medina in Case C-436/20 *ASADE*, paragraph 87.

[29] Health and Care Services Act no 30 of 24 June 2011; *Lov om kommunale helse- og omsorgstjenester m.m. (helse- og omsorgstjenesteloven)* Available at: https://lovdata.no/dokument/NL/lov/2011-06-24-30

[30] «*Loven gjelder for helse- og omsorgstjenester som tilbys eller ytes i riket av kommunen eller private som har avtale med kommunen, når ikke annet følger av loven her.*» The Act applies to health and care services that are offered or provided in the realm by the municipality or private individuals who have an agreement with the municipality, unless otherwise provided by the Act here […]" ESA's translation.

63. Therefore, a contract for pecuniary interest providing for 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. This is corroborated also by the wording of the contract notice published on the EU's Tenders Electronic Daily supplement to the Official Journal of the EU website ("TED") which provides in Section II.1.3 that the contract concerns services, and further in point II.1.4, states that the tenderers will receive remuneration during the operating period.[31]

6.3 The light touch regime of Articles 74-77 of the Directive and reservation of participation in tendering procedures for non-profit organisations

64. The third question concerns whether 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.
65. The answer to this question falls into two parts. In the first part, which examines Articles 74-77 of the Directive, ESA submits that the contract at issue and the national legislation it is based on falls under the light touch regime established by the Directive. ESA also submits that the Directive precludes reservations for non-profit organisations such as in the present case. It would only be if the contract for the services at issue were not to fall under the Directive that it would be relevant to examine it under Article 31 or 36 EEA.
66. ESA recalls that the principal objective of the EEA rules on public procurement, set out in recital 1 of the Directive is that the award of public contracts by the EEA States must comply with fundamental principles of EEA 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*."[32]

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[31] Contract notice 2020/S 233-576523 https://ted.europa.eu/udl?uri=TED:NOTICE:576523-2020:TEXT:EN:HTML&src=0

[32] Case C-285/18 *Irgita*, EU:C:2019:829, paragraph 48 and the case-law cited and Opinion of AG Medina in Case C-436/20 *ASADE*, paragraph 117.

67. During the 2014 reform of the Public Procurement Directives, it was recognised that for certain services – in particular those relating to social, health, education and community activities – separate rules should apply. By their nature, these services are often of limited cross-border interest and are also organised in different ways across the EEA, reflecting different cultural traditions.[33] For these reasons, a separate 'light touch regime' was established in Articles 74-77 of the Directive recognising their importance and special character. The light regime for social and other specific services sets a much higher value threshold for application of EEA rules to such services and gives EEA Member States more flexibility in putting in place national rules regarding their award.
68. Article 74 - *Award of contracts for social and other specific services* - establishes that the chapter (Articles 74 to 77 as applicable) applies to the award of public contracts for social and other specific services listed in Annex XIV to the Directive above a threshold of EUR 750,000.
69. Article 76 - *Principles of awarding contracts* - provides that States are to put in place national rules for the award of contracts in order to ensure compliance with principles of transparency and equal treatment. The basic EEA law principles of transparency and equal treatment, as well as the requirement to publish a notice advertising the contract and announcing its award, set out in Article 75, continue to apply.
70. The Directive also recognises the importance of taking into account a number of qualitative aspects and considerations when procuring these services. This is why national rules for light regime contracts must ensure that public buyers can take into

[33] See Recital 114 of the Directive *"Certain categories of services continue by their very nature to have a limited cross-border dimension, namely such services that are known as services to the person, such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst [EEA States], due to different cultural traditions. A specific regime should therefore be established for public contracts for those services, with a higher threshold than that which applies to other services. (…) Given the importance of the cultural context and the sensitivity of these services [services to the person, such as certain social, health and educational services], [EEA 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 and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers (…)In so doing, [EEA States] should also pursue the objectives of simplification and of alleviating the administrative burden for contracting authorities and economic operator."* The Commission issued guidance on socially responsible procurement, which provides examples of how it can be carried out throughout the procurement process - Commission Notice "*Buying Social - a guide to taking account of social considerations in public procurement (2nd edition)*", 26.5.2021, C(2021) 3573 final, pp. 53-60;

account: 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. National rules may also specify that the award criteria for such contracts must include quality and sustainability of services.[34] As noted by Advocate General Medina it is the specific nature of the services and the needs of users which justifies the existence of the light touch regime.[35]

71. Article 77 of the Directive provides that contracts for certain listed services can be reserved for organisations meeting conditions relating to public service mission, reinvestment of profits and employee, user or stakeholder participation, provided the organisation has not been awarded such a contract in the last three years and the contract is no longer than three years.

72. Chapter 30 of the Norwegian Public Procurement Regulation implements Articles 74-77 of the Directive into the Norwegian legal order. Articles 75-76 are implemented by Section 30 which sets out the procedure and principles. Article 77 allowing reservation of right to participate in certain contracts to non-profit organisations under certain conditions is implemented in Sections 30-2. Section 30-2a of the Norwegian Public Procurement Regulation introduces additional possibilities for contracting authorities to reserve contracts to non-profit organisations beyond the scope of Article 77 of the Directive.

73. ESA understands that the contract at issue in the main proceedings involves health and social work services listed under Annex XIV of the Directive, under code 85000000 and therefore falls under Articles 74-77 of the Directive. To ESA's knowledge relevant contract notice has been published on TED and marked by the contracting authority as concerning social services.[36]

74. The ultimate issue to be examined is the compatibility of the national legislation and the contract at issue in the main proceedings based on such legislation, with Articles 74-77 of the Directive, as well as whether the light touch regime allows introduction of further reservations.

75. ESA submits that national legislation allowing reservations such as in the present case and the conclusion of a contract itself thereunder are precluded under the

[34] *Ibidem*
[35] Opinion of AG Medina in Case C-436/20 *ASADE*, paragraph 122.
[36] https://ted.europa.eu/udl?uri=TED:NOTICE:576523-2020:TEXT:EN:HTML&src=0

Directive. When the Directive applies, no recourse to other secondary EEA law or to provisions under the main part of the EEA Agreement may "unpreclude" that legislation or the contract.

76. Articles 74-77 are in ESA's view intended to fully regulate the award of contracts for social and other specific services that fall within the scope of the Directive. Article 20 (which is not at issue here) [37] and Article 77 present an exhaustive list of cases that may be subject to contract reservation. Since they constitute a derogation from the general rules set out in the Directive they must be interpreted narrowly.[38]

77. Pursuant to Article 77(1), an EEA State may provide that contracting authorities may reserve the right for organisations to participate in procedures exclusively for health, social and cultural services which are covered by certain specific CPV codes. Participation in a tender may be reserved for such organisations if they meet a number of conditions relating to their objectives, reinvestment of profits, and employee ownership or participatory governance.

78. The list of services to which this reservation can be applied is exhaustive, meaning it cannot be applied to other services. In addition, an organisation awarded a contract under this reservation cannot have been awarded a contract for the same services by the same public buyer under the reservation during the previous three years. If during the three-year time frame an organisation has been awarded a contract for the services concerned by the same public buyer in the course of a non-reserved procurement, it will not incur this limitation.

79. Finally, the maximum duration of contracts awarded under the reservation is three years. These rules are intended to ensure that the reservation does not unduly distort competition. It is important to keep in mind that the use of reservations is optional. The fact that a given service is listed among those for which a reservation is available does not prevent the award of a contract for that service under a non-

[37] ESA notes the possibility to reserve contracts provided for in Article 20 is limited to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers. EEA Member States can adopt additional criteria defining the conditions of the contract, if those additional criteria contribute to ensure social and employment policy objectives pursued by Article 20. See to that effect Case C-598/19 *Conacee* C-598/19, EU:C:2021:810, paragraphs 24-28; and paragraph 40 of the Advocate General's Opinion in the same case.

[38] Case C-107/98 *Teckal*, EU:C:1999:562, paragraph 43, Case C-340/04 *Carbotermo and Consorzio Alisei*, EU:C:2006:308, paragraph 45; Case C-220/05 *Auroux and Others*, EU:C:2007:31, paragraph 59, and Advocate General Medina's Opinion in Case C-436/20 *ASADE*, paragraph 99.

reserved procedure in accordance with the light regime rules. These rules are intended to ensure that the reservation does not unduly distort competition.[39]

80. It follows from recital 118 to the Directive that that "*provision is limited in scope exclusively to certain health, social and related services, certain education and training services, library, archive, museum and other cultural services, sporting services, and services for private households, and is not intended to cover any of the exclusions otherwise provided for by this Directive. Those services should only be covered by the light regime*."

81. As AG Medina has pointed out, the procurement procedures under Article 77 are therefore "*merely a subset of the procurements which come under the simplified regime, and the conditions set out in that provision are therefore to be interpreted restrictively*."[40]

82. In that context it is important to note that it would appear that Section 30-2 of the Norwegian Public Procurement Regulation implements a reservation system for certain health and social services (listed in Appendix 4 to the national Regulation) under Article 77 of the Directive.[41]

83. As far as ESA is aware, it has at any rate not been argued by any of the parties to the proceedings that the contract at issue in the main proceedings falls under Article 77. It is therefore not necessary to examine whether any of the four cumulative criteria found in the second paragraph are fulfilled. It is also not necessary to examine the contract at issue in the main proceedings in light of the absolute requirement of Article 77(3) that the maximum duration of a contract under Article 77 is three years. ESA also notes that that the scope of services for which the reservations are possible under Article 77 is narrower than the whole category of social and other services to which the light regime is applicable. The services covered by Article 77 include services provided by medical personnel, services provided by nurses, home medical treatment services, residential health facilities

[39] Commission Notice "*Buying Social - a guide to taking account of social considerations in public procurement (2nd edition)*", p.60.

[40] Advocate General Medina's Opinion in C-436/20 *ASADE*, paragraph 109.

[41] This provision requires that organisations meet following conditions: the purpose of the organisation is to perform public tasks related to such services; the employees own or participate in the management of the organisation, or the employees, users or stakeholders actively participate in the management; the organisation's profits are used to achieve the organisation's goals. Any distribution or redistribution of profits shall take place in accordance with the requirements for participation or participation as mentioned in letter b; and the organisation has not had a contract for the provision of the same services during the last three years with the same contracting authority under this provision. Section 30-2 also provides for the limitation of duration of contract to 3 years.

services, social work services with accommodation, social work services without accommodation, welfare services for the elderly, or home for the psychologically disturbed services.

84. It is not certain whether the services provided for in the contract at issue in the main proceedings fall under any of the CVP codes listed in Article 77 of the Directive, but it would seem that the contracting authority had ample opportunity to reserve the contract for non-profit organisations in a manner compliant with Article 77, on the basis of Section 30-2 of the Norwegian Public Procurement Regulation.

85. Instead, Oslo municipality apparently decided to rely on the new Section 30-2a of Norwegian Public Procurement Regulation, which allows for the reservation of contracts for health and social services (set out in Appendix 3) *"for non-profit organisations if the reservation contributes to the realisation of social purposes, what is best for society and budgetary efficiency. Non-profit organisations do not pursue return on investment as their primary purpose. They work solely for a social purpose for what is best for society, and reinvest any profits in activity that realises the social purpose of the organisation. A non-profit organisation can, to a limited extent, conduct commercial activities that support its social purpose."* The reservation in Section 30-2a goes beyond the requirements set out in Article 77 of the Directive to allow reservations.

86. Norway in implementing Articles 74-76 has adopted an Appendix 4 with a list of services. On the other hand, the reservation of contract for non-profit in Section 30-2a refers to a new Appendix 3 which is more detailed. If that appendix goes beyond the scope of reservations allowed under Article 77 this in itself can constitute a breach of the Directive.

87. Thus, as the Court has found, where a sphere of economic activity has been the subject of exhaustive harmonisation at EEA level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not those of primary EEA law.[42]

88. Reserving contracts for certain 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. The CJEU has held that the only permitted exceptions

[42] Case E-09/11, *EFTA Surveillance Authority* v *The Kingdom of Norway,* paragraph 72.

to the application of the EEA Procurement Directives are those which are expressly mentioned in the directives.[43] The Directive only provides for reservations under Articles 20 and 77.

89. The above conclusion is reinforced in view of application of principle of equal treatment. The CJEU has described the principle of equal treatment as something which *"lies at the very heart of the EU rules on public procurement procedures"*.[44] It is settled case-law that the principle of equal treatment, which is a fundamental principle of EEA law, 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.[45] The comparability of situations must be assessed in the light of the subject matter and the purpose of the EEA measure, which makes the distinction in question.[46] In the field of EEA public procurement law, the CJEU has held that "*the principle of equal treatment, […] means, in particular, that tenderers must be in a position of equality when they formulate their tenders, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure".*[47]
90. In the present case Stendi and Nordlandia seem to be in the same situation as the organisations addressed in the tender for the contract at issue in the main proceedings with respect to the objective pursued by the light touch regime under Article 74 to Article 77 of the Directive.[48]
91. In ESA's view, companies such as Stendi and Nordlandia would be able to provide those services and ensure the specific needs of those users in the same way as the organisations addressed in the tender for the contract at issue, any differences in the quality of their approach being capable of being addressed through award criteria compliant with Article 76.
92. ESA therefore fails to see how it would not be the case that they are in comparable situation. Indeed, excluding a whole section of the market from being able to

[43] Case C-220/05, *Auroux*, EU:C:2007:31 paragraph 59, and the case-law referred to.
[44] Case C-131/16, *Archus and Gama*, EU:C:2017:358, paragraph 25 and the case-law referred to therein.
[45] Case C-598/19 *Confederación Nacional de Centros Especiales de Empleo (Conacee) v Diputación Foral de Gipuzkoa*, EU:C:2021:810, paragraph 35.
[46] Case C-236/09 *Test Achat*, EU:C:2011:100, paragraph 29.
[47] Case C-598/19 *Conacee*, paragraph 36; see also Case C-538/13, *eVigilo*, EU:C:2015:166, paragraph 33 and the case-law cited.
[48] See, by analogy, Case C-598/19 *Conacee,* paragraph 38 (which concerns Article 20 of the Directive) and the Opinion of Advocate General Medina in Case C-436/20 *ASADE*, paragraph 120.

participate in tenders would undermine the principle of equal treatment, because, as stated above, the aim of this principle "*is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure*".[49] ESA also observes that AG Medina recently characterised it as "*inconceivable*" that similar reservations could be justified.

93. It follows from settled case-law that, in accordance with the principle of proportionality, which is a general principle of EEA law, the rules laid down by the EEA States or contracting authorities in implementing the provisions of the Directive must not go beyond what is necessary to achieve the objectives of the Directive.
94. As recently noted by AG Medina in a similar context, it is clear that the case-law of the CJEU "*cannot be interpreted as allowing certain entities to be excluded from the application of the* [light touch regime] *owing solely to the fact that they are profit making*."[50] In particular, the Advocate General noted that automatically excluding profit-making entities does not appear to ensure that services are provided in an appropriate way, while simplifying and alleviating the administrative burden as mentioned in recital 114 of the Directive.
95. Furthermore, AG Medina also noted that such automatic exclusion does not appear to contribute to the quality, continuity, affordability, availability and comprehensiveness of the services in question. ESA concurs with this view. It can also be added that it does not appear to contribute to the needs of users. In comparison, as AG Medina also emphasised, when EEA States and contracting authorities implement the simplified regime, in order to contribute to those services and the needs of users it would appear more appropriate to focus on the ability to provide cost-effective, high quality social services, rather than on the nature of the entities providing those services.
96. ESA submits that the Directive by setting up a light touch regime for social and other specific services precludes 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 Section 30-2a of the Norwegian Public Procurement Regulation.

[49] Case C-598/19 *Conacee*, paragraph 37, Case C-697/17 T*elecom Italia*, EU:C:2019:599, paragraphs 32 and 33 and the case-law cited.
[50] Opinion of Advocate General Medina in Case C-436/20 *ASADE*, paragraph 124.

6.3.1 Application of Articles 31 and 36 EEA

97. The national court has asked whether Articles 31 and 36 EEA and Articles 74-77 of the Directive preclude the national legislation in question. In the previous section, ESA concluded that the contract at issue in the main proceedings, as well as the national legislation it is based on, is precluded by Articles 74-77 of the Directive. ESA submits that Articles 31 and 36 would only apply if the Directive were not to apply. Since ESA submits that the Directive applies and precludes the contract at issue in the main proceedings as well as the national legislation it is based on, it is not necessary to examine this question.
98. Should the Court however decide that the Directive is not applicable in the present case, ESA submits that Articles 31 and 36 of the EEA Agreement also 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 Section 30-2a of the Norwegian Public Procurement Regulation. Such contracts have a cross-border interest[51] and might well exceed relevant directive thresholds. The present case is brought forward by two companies operating on markets in a number of neighbouring EEA States and is well above the relevant directive thresholds. It would therefore be necessary to examine the contract in question and the national legislation it was based on in light of fundamental freedoms, and, in particular, of the principles of equal treatment and of non-discrimination and of the consequent obligation of transparency, as expressed in Article 31 and Article 36 EEA.[52]
99. With respect to which of those two provisions would apply, the scope of the freedom to provide services must be distinguished from the scope of the freedom of establishment. To that end, it is settled case-law that it is "*necessary to establish whether or not the economic operator is established in the Member State in which it offers the services in question. Where that operator is established in the Member State in which it offers the service, it falls within the scope of the principle of freedom of establishment, as defined in Article 49 TFEU. On the other hand, where the*

[51] Case C-57/12, *Fédération des mails de repos privées de Belgique (Femarbel) ASBL v Commission communautaire commune de Bruxelles/Capitale*, EU:C:2013:517, paragraph 53, second conclusion.
[52] See e.g. Case C-278/14, *SC Enterprise Focused Solutions SRL* v *Spitalul Județean de Urgență Alba Iulia,* EU:C:2015:228, paragraphs 16-23.

economic operator is not established in the Member State of destination, it is a cross-border service provider covered by the principle of freedom to provide services.[53] Given that both Stendi and Norlandia are established in Norway, ESA proceeds on the basis of the assumption that the contract at issue in the main proceedings involves the freedom of establishment pursuant to Article 31 EEA.

100. Article 31 EEA prohibits all restrictions on the freedom of establishment within the EEA. Measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, albeit applicable without discrimination on grounds of nationality, are an encroachment upon these freedoms requiring justification.[54]

101. Therefore, the national court should first examine whether the exclusion of companies other than non-profit organisations from the tender in connection with the contract at issue in the main proceedings as well as the national legislation it is based on is liable to hinder or make less attractive the exercise of the freedom of establishment.[55]

102. In that context, ESA recalls that the Court has already held that the freedom of establishment guaranteed under Article 31 EEA encompasses also the freedom to choose the appropriate legal form in which to pursue the activity in another EEA State.[56] This freedom of choosing the appropriate legal form would in ESA's view also encompass related aspects of a legal entity, such as its purpose as established by its statutes. Constraining that freedom is liable to hinder or make less attractive the exercise of the freedom of establishment.

103. Excluding a company which is lawfully established in an EEA State from exercising its core business activity in accordance with the normal system for that business activity in that EEA State would seem to be tantamount to a complete denial of the company's ability to enjoy the fundamental freedom of establishment. It would therefore appear that the exclusion of companies other than non-profit organisations from the tender, as well as having in place legislation allowing for such exclusion, would be a restriction, which must be justified.

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[53] Case C-502/20 *TP v Institut des Experts en Automobiles* EU:C:2021:678, paragraph 31.
[54] Case E-14/15 *Holship Norge AS* v *Norsk Transportarbeiderforbund*, paragraph 115.
[55] Advocate General Medina pointed out in Case C-436/20 *ASADE* that having limited selection criteria in itself may hinder or render less attractive the freedom of establishment (Opinion, paragraph 153).
[56] Case E-9/20 *ESA v Norway* paragraph 75, with further references.

104. To ESA, it appears that this kind of far-reaching restriction – with such major ramifications for a whole sector involving substantial public spending and which is of the highest importance for society as well as for the individuals, and with considerable negative consequences for the actors, such as Stendi and Norlandia, which have been operating in that sector for a long time – goes well beyond that which has been accepted in case-law of the European Courts.[57]
105. It is in that respect sufficient to refer to the discussion in paragraphs 94–95 above, which applies *mutatis mutandis*.[58]
106. For the sake of clarity, ESA will in this context address an issue brought up in the Request for an Advisory Opinion. The parties refer to the possibility to reserve the contracts for voluntary organisations as set out in two judgments of the CJEU *Spezzino*[59] and *CASTA.*[60] With regard to that argument it is sufficient to point out that the CJEU held, just as ESA has argued in this case, that when the directive in question applies there is no room for additional considerations under primary law.[61] In that context it can also be recalled that Directive 2004/18/EC, at issue in those cases, has been replaced by the Directive. The Directive is, as explained in Part 6.3 above, exhaustive when it comes to exceptions, such as demonstrated above with respect to the national legislation and contract at issue in this case. As a result, the role of primary law in this context appears to be diminished. As a specific example, *Spezzino* and *CASTA* concerned ambulance services provided by voluntary associations. Currently ambulance services are expressly dealt with under Article 10(h), which excludes contracts for certain emergency services, including ambulance services, from the scope of the Directive where they are performed by non-profit organisations or associations. The article had no equivalent in Directive 2004/18/EC.
107. It can also be noted that the *Spezzino* and *CASTA* very specifically only concern direct award of ambulance services and therefore only excluded a service from the market which, while essential, is comparatively limited. In the present case, the exclusion of services from the market in principle involves all health, care and social services in Norway.

[57] See in particular C-113/13 *Spezzino* EU:C:2014:2440 and C-50/14 *CASTA,* EU:C:2016:56.
[58] Opinion of Advocate General Medina in Case C-436/20 *ASADE*, paragraph 153.
[59] Case C-113/13 *Spezzino,* EU:C:2014:2440.
[60] Case C-50/14 *CASTA*, EU:C:2016:56.
[61] Case C-113/13 *Spezzino*, paragraph 44.

108. Therefore, *Spezzino* and *CASTA* may, first, support the conclusion that a limited exclusion from the market (at least in the specific Italian context were voluntary activities of citizens was enshrined in the constitution[62]) was suitable in order to achieve certain objectives (such as participation of voluntary associations in a public service and the principle of the good of the community and, as in CASTA, "*the findings of the referring court regarding the positive budgetary impact of contracts such as those at issue in the main proceedings*"[63]). However, it can in no way be concluded simply on that basis that an exclusion of a whole sector from the market, such as that provided for by Section 30-2a, is suitable to achieve Norway's objectives.
109. Second, that the small exclusion from the market in *Spezzino* and *CASTA* did not go beyond that which was necessary to reach the objectives at issue there, does in no way support the conclusion that Norway's much larger exclusion from the market does not go beyond that which is necessary to reach its objectives. Under EEA law, it is much more likely that a complete exclusion of a whole sector from fundamental freedoms goes further than that which is necessary than is the case with a partial exclusion of certain activities or professions.
110. Again for the sake of completeness, it can be mentioned that ESA in its Decision 154/17/COL ("**ESA's 2017 Decision**") referred to *Spezzino* and *CASTA* when examining a similar then applicable provision in Norwegian procurement law.[64] ESA concluded that the then-applicable provision as well as individual awards it examined "*fulfil the legal requirements laid down in case-law exceptionally allowing national contracting authorities to directly award public contracts having as their subject matter services in the social and health sector to non-profit organisations*".[65] This conclusion, however, was based on the premise that the exceptions expressed in *Spezzino* and *CASTA* had to "*be applied on the basis of a case-by-case assessment of the subject matter of the public contract to be awarded*".[66] Thus, ESA examined the stated Norwegian objectives in that case, among which were "*to*

[62] See *Ibid,* paragraph 9 and 53.
[63] Case C-50/14 *CASTA*, paragraph 57.
[64] EFTA Surveillance Authority Decision 154/17/COL of 20 September 2017, closing a complaint case arising from an alleged unlawful discrimination of private enterprises and breach of the EEA rules on public procurement. That case concerned a Norwegian provision, the then- applicable Section 2-1(3) of Regulation No. 402 of 7 April 2006 on public procurement
[65] *Ibid*, page 18.
[66] *Ibid*, page 9.

ensure that non-profit organisations can continue to provide health and social services". The result would be that "[a] *combination of public, commercial and non-profit providers of health and social services shall ensure a diversified offer, designed to fulfil the different needs of the population*."[67]

111. In the present case it appears rather that a consequence, if not the aim, of Norway's legislation, as well as the contract at issue in the main proceedings, may be the opposite of that set out in ESA's 2017 Decision. It might entail that for-profit companies such as Stendi and Norlandia will not, at least in part, be able to provide health and social services in Norway. The result could be that there would no longer be a combination of public, commercial and non-profit providers, which was Norway's stated objective according to ESA's 2017 Decision. Instead, it might lead to a less diversified offer of nursing home services, at least in Oslo municipality, which would be contrary to that objective. Consequently, the assessments made and the conclusions reached by ESA in the 2017 Decision with respect to the relevance of the *Spezzino* and *CASTA* judgments have no practical importance for the present case.

112. It can therefore be concluded that, if applicable, Article 31 or Article 36 EEA 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 Section 30-2a of the Norwegian Public Procurement Regulation if it goes beyond what is necessary to achieve a legitimate objective recognised by EEA law. It appears to ESA that Section 30-2a goes beyond that which is necessary to achieve the objectives referred to in the Request for an Advisory Opinion.

6.4 Ability to rely on Article 32 EEA and the exception for exercise of official authority

6.4.1 Introduction

113. The second question, which has four sub-questions, concerns the exception to the applicability of Articles 31 and 36 EEA which is expressed in Article 32 EEA read in light of Article 39 EEA (for ease of reference ESA refers simply to Article 32 EEA).

[67] *Ibid*.

114. Pursuant to Article 32 EEA, if the activities at issue have a sufficiently direct and specific connection with the exercise of official authority, then those activities are not of an economic nature,[68] and fall outside of the scope of Articles 31 and 36 EEA, as well as of the Directive. Thus, Articles 32 and 39 EEA set out the negative scope of the freedom of establishment and the freedom to provide services.

115. At the outset, as a general matter, ESA observes that the key question to be examined in this part is whether the decision to take, as well as the exercise as such, of coercive measures in the health sector in Norway involves the exercise of official authority for the purposes of Article 32 EEA. Some of these measures may, in principle and if strict conditions are fulfilled,[69] be taken against the consent of the patient, even if this happens only very rarely in practice. In that context, ESA considers it important to recall that health care should always be administered with the consent of the patient, unless not possible and only under the strictest conditions, including as a last resort, and in light of imperative health reasons. ESA also notes that these principles are recognized by international human rights law. In that context it appears sufficient to refer to Article 8 of *the European Convention of Human Rights and Fundamental Freedoms* ("**ECHR**"), Articles 5-8 of the Council of Europe's *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine* as well as Article 12 and 25 of the *Convention on the Rights of Persons with Disabilities*. The Norwegian Government is party to all these international agreements, which therefore forms part of the relevant legal background and context for the present case.

116. On that background, ESA recalls also that phrase "*exercise of official authority*" in Article 32 EEA involves an objective which is almost the opposite of the objective of the international human rights instruments referred to above. In them, the objective is, broadly, to protect the individual in vulnerable situations vis-à-vis the State. Under those instruments wide interpretations of governmental authority can be permissible and even necessary. Therefore for examples, this can result in acts

[68] Opinion of Advocate General Medina in Case C-436/20 *ASADE,* paragraph 62.

[69] See for such requirements in Norwegian law e.g. Section 4A-3 PRA, which sets out the conditions for providing health care without the consent of the patient. Providing health care in such an instance must be necessary and proportionate, an assessment that to ESA's understanding is similar to that under human rights law.

and omissions of medical staff in a public hospital being capable of engaging the responsibility of the respondent State under the ECHR.[70]

117. Article 32 EEA by contrast, like Article 28(4) EEA on the exception from free movement of employment in public service is to be interpreted restrictively, since it is an exception to the fundamental freedoms which the individual may rely on against an EEA State.[71] Therefore, posts of nurses in public hospitals, for example, do not constitute employment in the public service within the meaning of Article 28(4) EEA. [72]

118. ESA recalls in that vein the narrow understanding expressed by Advocate General Mayras, that "[o]*fficial authority is that which arises from the sovereignty and majesty of the State*";[73] official authority is "sovereign power".[74] In Case C-2/74 *Reyners*, the CJEU held:

> *"An extension of the exception allowed by Article 55* [of the Treaty of Rome, the Article 32/39 EEA equivalent applicable at the time] *to a whole profession would be possible only in cases where such activities were linked with that profession in such a way that freedom of establishment would result in imposing on the Member State concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority."*[75]

119. As a starting point, the exceptional nature of this exemption should be underlined. As Advocate General Cruz Villalón pointed out in 2010, it has been clear since the *Reyners* judgment "*that the case-law would confine the provision to a very narrow sphere. Evidence of that approach is the fact that, after over half a century of case-*

[70] See the judgment by the European Court of Human Rights in *Glass v The United Kingdom*, Application no. 61827/00, paragraph 71.
[71] Opinion of AG Medina in Case C-436/20, *ASADE*, paragraph 61 with further references
[72] Case C-307/84, *Commission v France*, EU:C:1986:222, paragraph 13.
[73] Opinion of Advocate General Mayras, Case C-2/74, *Jean Reyners v Belgian State,* EU:C:1974:59, *European Court Reports,* p. 657 at p. 664.
[74] Opinion of Advocate General Cruz Villalón in Cases: C-47/08 *Commission v Belgium,* EU:C:2010:513; 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*, paragraph 93.
[75] Case C-2/74 *Reyners* paragraph 46. See also Opinions of AG 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*, paragraph 87.

law and some 15 judgments, the Court has still not held that a particular activity is covered by Article 43 EC and the first paragraph of Article 45 EC."[76]

120. Today, after some 65 years of case-law, the CJEU has only once, as far as ESA is aware, found that a particular activity is covered by Article 51 TFEU.[77] It would be surprising if health care activities in Norway, as established by its national legislation, would be the second activity found by the European Courts to be subject to this exception.

121. The starting point under Article 32 is that the possible applications of the restrictions of fundamental freedoms which it entails "*must be considered separately in connexion with each [EEA State] having regard to the national provisions applicable to the organization and the practice of this profession*."[78]

122. ESA notes that, according to the PRA, the basis of any actions relating to health care is the patient's consent, cf. Section 4-1 PRA entitled *"Main rule of consent"*, according to which *"Health care can only be provided with the patient's consent, unless there is a legal basis or other valid legal basis for providing health care without consent. In order for the consent to be valid, the patient must have received the necessary information about their state of health and the content of the health care. […]."* In Chapter 2 the PRA frames the stay in a nursing home akin to a right and not a coercive measure as such: *"The patient or user has the right to stay in a nursing home or similar housing especially adapted for round-the-clock services if this, according to a health and care professional assessment, is the only offer that can ensure the patient or user the necessary and justifiable health and care services*."[79] At the same time the submissions from Oslo Municipality in the Request for an Advisory Opinion paint a picture that any stay at nursing home would necessarily include coercive measures.

123. There are a number of specific provisions in the Norwegian law that provide for the application of various levels of coercive measures taken also in the form of

[76] *Ibidem*, paragraph 87.
[77] This was in a very specific context, namely in a case concerning the validity of Regulation 765/2008, in light of national accreditation bodies set up under that Regulation, with decision making power and a power to monitor and to impose penalties. See Case C-142/20 *Analisi G. Caracciolo Srl*, EU:C:2021:368, paragraph 52.
[78] Case C-2/74 *Reyners*, paragraph 49 (ESA's underlining).
[79] See Section 2-1e(1) PRA.

contestable decisions – be it for the care of drug addicts,[80] mentally impaired persons[81] or psychologically impaired persons[82].

124. However, in ESA's understanding, the second question from the national court appears to be solely or primarily based on such national provisions and practice: health care personnel in Norway, pursuant to Chapter 4A of the Patients' Rights Act, may provide health care to persons without legal capacity to give consent and which health care those persons do not agree to receive, see Section 3.3.2 of the Request for an Advisory Opinion.

125. There is, as far as ESA is aware, nothing specific in Chapter 4A PRA which applies only to the patients who would use the nursing home services, or the health personnel which would perform them, to which the contract at issue in the main proceedings relates.

126. On the contrary, in ESA's understanding, Chapter 4A PRA applies, in principle and pursuant to strict conditions, to all patients who are present in Norway".[83] Secondly, it applies to all health care personnel, see PRA Section 4A-2, first paragraph. The Norwegian definition of "health care personnel" is very broad and not only includes authorised or licensed health care personnel, but also, *inter alia,* students in health professional education.[84] This appears to be the case even if, pursuant to Section 4A-5 PRA, first paragraph, "*Decisions on health care according to this chapter are*

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[80] *Health and Care Services Act*, chapter 10.

[81] *Health and Care Services Act*, chapter 9.

[82] *Mental Health Care Act* of 2 July 1999 No 62, available at https://lovdata.no/dokument/NL/lov/1999-07-02-62 (in Norwegian: *Lov 2. juli 1999 nr. 62 om etablering og gjennomføring av psykisk helsevern*).

[83] See Section 1-2 first paragraph, first sentence, pursuant to which the PRA "*applies to everyone who are present in the realm*". In Norwegian: «§ 1-2 *Virkeområde*
Loven gjelder for alle som oppholder seg i riket. (…)». Section 4A-2 further sets out the scope of Chapter 4A, such as establishing that the chapter only applies to patients over 16 years. Moreover, assessment and treatment of mental illness without a specific consent of the patient can only take place on the basis of the Mental Health Care Act.

[84] Health care personnel is defined in Section 1-3, sub-paragraph e as "*all persons who are referred to in Section 3 of Act 2 July 1999 No 64 on health care personnel*."
Section 3(1) of the Health Care Personnel Act provides a very broad definition of health care personnel:
"(1)*By health personnel is meant in this law:*
1. personnel with authorization pursuant to § 48 a or license pursuant to § 49,
2. personnel in the health and care service or in pharmacies who perform actions as mentioned in the third paragraph,
3. pupils and students who in connection with health professional education perform actions as mentioned in the third paragraph.
(…)
(3) *By health care is meant any action that has a preventive, diagnostic, treatment, health-preserving, rehabilitative or nursing and care purpose and that is performed by health personnel.*"

made by the health personnel who are responsible for the health care." Whether this in practice typically entails that it is the chief physician of a medical facility who makes those decisions, is immaterial.[85] The way in which health care activities without consent is set up under the PRA is therefore, in principle as an integral part of the health care activities of health care personnel to be performed under the PRA.

127. The Request for an Advisory Opinion provides a narrow approach to this issue, focusing on e.g. on "*the extent to which authorised use of coercive health care which may occur at Norwegian nursing homes" is sufficiently "qualified, extensive and frequent*" in order to fall under Article 32 (see Section 5.1.2.2.) In contrast, ESA submits that, given the way in which national law in this area is set up, where health care activities are governed generally by the PRA, with no specific provisions governing the use of coercive measures in nursing homes, the issue must for the purposes of the present proceedings, be examined equally as broad as the system under the PRA.[86]

128. All the health care personnel in Norway may, in principle and pursuant to strict conditions, perform health care against the consent of a patient. Does this entail that all health care activities, or at least those who are performed against consent, are to be considered as "activities" falling under the exemption in Article 32 EEA because they are connected to the exercise of official authority? An answer to this question in the affirmative would appear to involve exclusion of a whole

[85] Moreover, it follows from the preparatory works Ot.prp. no. 64 (2005-2006) p. 87 that while the health care personnel who makes such a decision must be qualified, and while this is normally a dentist or a doctor, it can also be others in certain situations, for instance relating to care. In each instance, who is qualified must be determined individually. (In Norwegian: «*Med heimel i første ledd er det helsepersonellet som er ansvarleg for helsehjelpa, som skal treffe vedtak om helsehjelp. Forsvarlegheitskravet i helsepersonellova § 4 må vere oppfylt. Det er som oftast ein lege eller tannlege som er ansvarleg for helsehjelpa, men i visse situasjonar kan også anna helsepersonell bli rekna som kvalifisert, til dømes ved avgjerder som har med pleie og/eller omsorg å gjere. Kven som blir rekna som kvalifisert, må vurderast i det enkelte tilfellet*.)».

[86] Thus, if national law was organised in a different manner, the issue might be different. For instance, an EEA State could organise the coercive health care activities in nursing homes in a specific way which would differ from other health care activities. It would then only be this specific organisation which would be examined. An EEA State could also, in principle, organise coercive acts in such a way that the decisions to perform such acts were undertaken by, for instance, an independent entity within a hospital. In principle, an EEA State could also have separate legislation for the most severe forms of coercive acts in the field of health care. Whether such organisations of coercive activities would entail that then would, in principle, be capable of falling under Article 32 EEA, is beyond the scope of the present written observations.

profession,[87] or indeed, sector, from the remit of the EEA Agreement, creating, to paraphrase Advocate General Tesauro,[88] an island beyond the reach of EEA law.

129. ESA recalls that it is settled case-law that only activities which "*in themselves are directly and specifically connected with the exercise of official authority*" will fall under the exemption in Article 32 EEA.[89] When examining whether an activity is covered by the exemption, the CJEU has, *inter alia,* consistently examined the purpose of the activity.[90] ESA considers on that basis that when health care personnel administer health care to a patient for medical purposes they are not exercising official authority. The activity does not fall under Article 32 EEA. This is the case even if the health care is administered against the consent of the patient. This is because such health care activities, the purpose of which pursuant to Section 4A-1(1) PRA is to provide necessary health care in order to prevent considerable health injuries and to prevent and limit the use of coercion,[91] are not themselves "*directly and specifically connected with the exercise of official authority*". Any coercive element, as well as the decision to perform health care against consent (decided upon by the same person as would provide the health care) is merely an integral part of the health care activity which it facilitates or makes possible.[92]

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[87] It is clear from the case-law of the CJEU that an "activity" is not synonymous with a "profession", see Advocate General Cruz Villalón in his opinion in case C-47/08 *Commission v Belgium*, paragraph 88. In Case C-2/74 *Reyners*, the CJEU found that the test is "whether the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole". It would appear that under Norwegian law, health care activities, with or without the consent of patients, are not separable from the profession of health care workers.

[88] Advocate General Tesauro, Opinion in Cases C-120/95 *Decker v Caisse de maladie des employés privés* and C-158/96 *Kohll v Union des caisses de maladie* EU:C:1997:399, paragraph 17.

[89] See e.g. Case C-327/12, *SOA Nazionale Costruttori,* EU:C:2013:827, paragraph 51.

[90] Cases C-47/02 *Anker*, paragraph 61, 114/97 *Commission v Spain*, EU:C:1998:519, paragraph 36, C-327/12 *SOA Nazionale Costruttori*, EU:C:2013:827, paragraph 54, C-593/13 *Rina Services and Others*, EU:C:2015:399, paragraph 20, C-151/14 *Commission v Latvia*, EU:C:2015:577, paragraph 60 and C-264/18 *P.M. and Others*, EU:C:2019:472, paragraph 39.

[91] In Norwegian: "§ 4A-1.Formål
Formålet med reglene i dette kapitlet er å yte nødvendig helsehjelp for å hindre vesentlig helseskade samt å forebygge og begrense bruk av tvang.»

[92] ESA notes that Oslo Municipality uses similar language at p. 20 of the Request for an Advisory Opinion "*taking a decision on and implementing coercive health care is an integral part of the activity at nursing homes and an integral part of the subject-matter of the contract*(…)", but reaches the opposite conclusion that all health care therefore is encompassed. This reasoning does not appear to rest on an analysis of the relevant legal basis in Norwegian law. At any rate, from the perspective of where the centre of gravity is located, it appears clear that the rare coercive decision being an integral part of the daily health care activities performed by health care personnel would mean that this is in reality health care activity. Oslo Municipality, in comparison, appears to argue that a rare coercive decision entails that all health care in fact involves the exercise of official authority.

130. Thus, the coercive elements in this case, integral to health care and solely for the purposes of health care, can be distinguished from the case-law in which the CJEU has found that coercive powers are to be considered "exercise of official authority". For example, in Case C-47/02 *Anker*, the CJEU found that "*the duties connected to the maintenance of safety and to the exercise of police powers constitute participation in the exercise of rights under powers conferred by public law for the purposes of safeguarding the general interests of the […] State*."[93]
131. Here, while the power in question is conferred by public law, the purpose of any coercive element is simply to enable a health care professional to provide health care to an individual in need of such health care. Even if such health care professionals are empowered to take certain measures in order to administer the health care, the acts and their function and purpose is far removed from official authority in the sense of powers conferred by public law for the purposes of safeguarding the general interests of the state, as in *Anker*.[94]
132. Conversely, health care activities, even against consent, are not performed in order to safeguard the interests of the state or the public and do not have that function. Their function and purpose is solely that of providing health care to an individual patient in need of that health care. Similarly, ESA also recalls that the CJEU has held that "*in view of the nature of the functions and responsibilities which they involve, posts of nurses in public hospitals do not constitute employment in the public service within the meaning of* [the EU equivalent to Article 28(4) EEA]"[95]
133. In comparison with these health care activities, and for the sake of completeness, ESA notes that it has in a similar context previously examined whether the Norwegian Child Welfare Act and the Child Welfare Regulation may fall under Article 32 EEA.[96] In that case, the issues concerned internment and coercive

[93] Case C-47/02 *Anker*, paragraph 61. See to the same effect Case C-264/18 *P.M. and Others*, paragraph 39, where the CJEU held that *"[i]n the third place, as regards legal services involving activities connected, even occasionally, with the exercise of official authority, covered by Article 10(d)(v) of Directive 2014/24, those activities and, therefore, those services are excluded, under Article 51 TFEU, from the scope of the provisions of the Treaty relating to the freedom of establishment and from those relating to freedom to provide services under Article 62 TFEU. Such services are different from those falling within the scope of the directive in that they directly or indirectly participate in the exercise of public authority and in functions the purpose of which is to safeguard the general interests of the State or other public authorities"* (our underlining).

[94] The official authority power in *Anker* coincides fully with the narrow definition of official authority referred to in paragraph [118] above, as *"that which arises from the sovereignty and majesty of the State"*.

[95] Case C-307/84 *Commission v France*, paragraph 13.

[96] See footnote 66.

measures towards "*minors who, due to the special protection they require, are placed under the care and the surveillance of the State. The conditions for their – voluntary or compulsory – internment in the institutions in question are regulated in detail in national legislation. The same applies to the conditions for the adoption of a number of measures, aimed at ensuring the fulfilment of the tasks, such as body searches, search of rooms and personal belongings, confiscation and destruction of dangerous objects and drugs, control of mail as well as the recovery of minors who have escaped from the institutions."*[97]

134. The activities in that case were not akin to health care without consent. Instead, they concerned powers with a different purpose,[98] directly and specifically connected with the exercise of the prerogatives of the State in the form of internment and far-reaching coercive measures. Those sovereign powers, which restrict *inter alia* the child's right to liberty, the right for respect of a family, home and correspondence as well as the right to property, permeates the legislation at issue in that case.

135. In light of the above, ESA considers that the fact that on the basis of the PRA all health care personnel in Norway may perform health care activities towards a patient without the consent of that patient is not sufficient for those activities to fall under Article 32 EEA

136. In the alternative, should the Court find that the general competence for health care personnel to take decisions upon and provide health care to persons without legal capacity to give consent and which health care those persons do not agree to receive pursuant to Chapter 4A PRA does constitute an exercise of official authority within the meaning of Article 32 EEA, ESA submits first that such health care, as

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[97] *Ibid*, page 13.

[98] See Section 4-24 of the Child Welfare Act (in Norwegian: *Lov 17. juli 1992 nr. 100 om barneverntjenester)* entitled *"Placement and detention in an institution without own consent"* according to which children who have shown severe behavioural difficulties in case of, *inter alia*, serious or repeated crime or persistent drug abuse, can be placed in a child welfare institution without consent. The coercive measures that can be used in such institutions are listed in Regulation on rights and the use of coercion during stays in child welfare institutions (in Norwegian: *Forskrift 15. november 2011 nr. 1103 om rettigheter og bruk av tvang under opphold i barneverninstitusjon*). Notably, in Section 13, it is stated that *"Less intrusive physical coercion or force, such as short-term detention or expulsion from common areas, may, however, be used when this is clearly necessary as part of the institution's responsibility to provide proper care or for the sake of safety and well-being for all at the institution."* (our underlining). The use of coercive measures with the purpose of ensuring the safety and well-being also of others, i.e. public order and safety is exactly an exercise of official authority insofar as it is a duty incumbent on the state "for the purposes of safeguarding the general interests of the […] State" or society, cf *Anker* paragraph 46. In contrast, safeguarding only the interests of the individual concerned is not such an exercise, cf. the purpose stated in in Section 4A-1(1) PRA.

well as the decision to administer it, constitutes a separate activity under Article 32 EEA. Secondly, as held by the CJEU in *Reyners*, that the exception allowed for exercise of official authority cannot be extended to the whole profession when *"the activities connected with the exercise of official authority are separable from the professional activity in question.*" The coercive competences pursuant to Chapter 4A PRA can clearly be separated from the administering of health care in general – this is demonstrated, first, by the separate chapter in the PRA. Second, it is demonstrated by the decision-making system for coercive health care under the PRA, whereby an administrative decision must be taken prior to administering health care without consent. Thus, also in practice the decision pursuant to Chapter 4A PRA to administer health care without consent as well as administering it is an activity wholly separate from other health care activities of the PRA. As a result, it is solely the activity of taking a decision to administer health care against consent and administering it which may be considered an exercise of official authority and be subject to the exemption in Article 32 EEA.

137. For the sake of completeness, ESA will briefly consider each of the four sub-questions, the two first of which can be considered together.

6.4.2 Previous provision of services and non-consistent practice by various contracting authorities

138. ESA submits that Article 32 EEA, read in conjunction with Article 39 EEA, must insofar as possible be interpreted in a similar way as Article 28(4) EEA.[99] In case 152/73 *Sotgiu*, the CJEU found that since foreign workers had already been admitted to the public service in question, the interests which justified the

[99] Opinion of Advocate General Mayras, Case C-2/74, EU:C:1974:59, p. 657 at p. 664 ("*Quite recently you have had the occasion to rule on the scope of Article 48 (4), which likewise creates an exception, which concerns employed persons and is related to Article 55 in that it excludes such persons from the right to be employed in the public service. You have asserted the strictest interpretation by declaring that 'taking account of the fundamental nature, in the scheme of the Treaty, of principles of freedom of movement and equality of treatment of workers within the Community, the exceptions made by Article 48 (4) cannot have a scope going beyond the aim in view of which this derogation was included': Case 152/73 Sotgiu [1974] ECR, 162. The same attitude must guide you in the interpretation of Article 55.*"). See, conversely, for instance the Opinion of Advocate General Jacobs in Case C-283/99 *Commission v Italy*, EU:C:2001:102, paragraph 26, noting that "*in several judgments the Court has interpreted Article 39(4) EC* [the Article 28(4) EEA equivalent] *in such a way as to align it with Article 45* [the Article 32 EEA equivalent]."

exceptions to the principle of non-discrimination permitted by Article 48(4) (of the Treaty of Rome, the Article 28(4) EEA equivalent) were not at issue.[100]

139. In ESA's understanding this means that if an EEA State has allowed non-nationals to serve in a public position, it cannot justify denying that to other non-nationals on the basis of Article 28(4). This is because it has shown through its acts that it was not necessary to reserve the position to its own nationals.

140. Similarly, ESA considers in principle that in order to ensure that the derogation from fundamental freedoms is as limited as possible, and does not go beyond that which is genuine, EEA States must be consistent in their practice of Articles 32 and 39 EEA.[101] If an EEA State has in its practice, or its inactions, made an activity subject to fundamental freedoms, the requirement of consistency in principle precludes it from claiming that this activity is subject to the derogation found in Articles 32 and 39 EEA. This is because a particular activity either constitutes an exercise of official authority or it does not. It cannot fall under Article 31 or 36 EEA and at the same time be exempted from those provisions by virtue of Articles 32 and 39 EEA.

141. With respect to the first sub-question, if services such as health care activities in nursing homes with a cross-border element 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 then are excluding for-profit providers from the possibility to compete for a contract, then this would fall foul of the principle of consistency. This would also be the case if a contract with cross-border value and which involves powers, the purpose and function of which are sufficiently similar to those at issue here, has been tendered out. For the purpose of the present proceedings, this could for instance involve a contract for services in the form of personnel for homes for persons with disabilities in the sense covered by Chapter 9 of the Municipal Health and Care Services Act. That act, like the PRA Chapter 4A allows for various coercive measures which may be used if strict conditions are fulfilled. If those coercive measures are sufficiently similar to

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[100] Case 152/73, *Giovanni Maria Sotgiu v Deutsche Bundespost,* EU:C:1974:13, para 4.

[101] Compare Advocate General Cruz Villalón in his opinion in case C-47/08 *Commission v Belgium,* paragraphs 83-85, concluding that Article 51 TFEU [check] lends itself to a proportionality test which it is necessary to apply if an activity falls under Article 32 EEA ("*in those cases in which it has had to rule on the interpretation of the first paragraph of Article 45 EC, the Court has been able to do so without contemplating the detailed meaning of 'official authority'. On the other hand, if the answer to the question is yes, the Court must provide a fuller line of reasoning. In the latter case, the task of interpretation consists in determining, in the light of the extent to which the activity is connected with the exercise of official authority, whether the national measure in question is necessary to achieve the objectives pursued by Article 43 EC and the first paragraph of Article 45 EC.*").

those under the PRA Chapter 4A, an EEA State cannot claim that one of these is subject to Article 32 and the other not.

142. Moreover, ESA submits that this principle applies *mutatis mutandis* also to justifications of unequal treatment under the Directive.

143. With respect to both the first and second sub-question ESA recalls that in Case E- 1/06 *ESA v Norway* the Court held that "*Restrictions based on legitimate grounds of overriding public interest must be consistent with similar measures already taken.*"[102] It noted further that this principle "is of general relevance". In Case C-169/07 *Hartlauer*, which concerned health care, the CJEU held *"that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner"*.[103]

144. With respect to the second sub-question, this concerns the scenario where other public contracting authorities in the same State have opted to conclude contracts for equivalent services with both non-profit organisations and other (not non-profit) providers. ESA submits that this will only preclude the ability of the State to apply Articles 32 and 39 EEA to activities included in those services when two conditions are fulfilled. First, those other public contracting authorities, while opting to conclude contracts for equivalent services with both non-profit organisations and other (not non-profit) providers, do so subject to fundamental freedoms. In particular, this requires the presence of a cross-border element. Second, the national rules governing the activities and the practice of the profession at issue must be the same or sufficiently similar. It is important in this context that it is the States which are parties to the EEA Agreement. The acts and omissions of various sub-state entities, such as municipalities, are therefore attributable to the State.[104] As a consequence, one municipality cannot act as if a certain activity is covered by Article 32 EEA while other municipalities subject those same activities to fundamental freedoms.

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[102] Case E-1/06 *EFTA Surveillance Authority v the Norway Government*, paragraph 43.
[103] Case C-169/07 *Hartlauer,* EU:C:2009:141, see paragraph 55 with further references.
[104] See e.g. Case E-4/17 *EFTA Surveillance Authority* v *the Norway Government*, in which the Norwegian Government was held liable for a tender procedure carried out by a municipality in a manner which was not in accordance with Directive 2004/18/EC.

6.4.3 Is it relevant for Article 32 whether decision making power is not placed directly with the contracting public authority's contractor, but rather with the health personnel working for the contractor

145. ESA has above submitted that even if coercive health care is administered only pursuant to decisions, this does not, under a system such as the PRA, mean that this activity falls under Article 32 EEA. This is regardless of these decisions themselves being decisions pursuant to Norwegian administrative law, subject to appeals, external oversight and judicial review.
146. However, in the event that such activities would fall under Article 32 EEA it would not matter whether they are not placed directly with the contracting public authority's contractor, but rather with health personnel working for the contractor.
147. This is because the activities would be governed by the PRA, regardless of the contractual and organisational setup and employment relationship of the health care personnel performing the activities falling under Article 32 EEA. Thus, for the purpose of Article 32 EEA it is the rules governing the activities potentially falling under it which must be examined, not the contractual, organisational or employment rules those performing the activities may be subject to.

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

148. Above, ESA has concluded that the activities in question do not fall under Article 32 EEA. This is regardless of the wording "even occasionally" found in that provision. In ESA's view, this phrase can be explained due to the fact that the exemption in Article 32 EEA only covers "activities" - it does not encompass "professions" as such. This is also distinct from Article 28(4) EEA which exempts "employment in the public service" from free movement of workers, but where the words "even occasionally" does not appear. Thus, Article 28(4) EEA may encompass concrete positions and therefore all activities which are performed in those positions. Conversely, Article 32 EEA does not encompass professions as such, but merely certain activities.
149. In general, the practice of a profession covers "a *certain number of separate activities; some are essential, others are only ancillary, complementary or even occasional*."[105] As pointed out by AG Mayras almost five decades ago, insofar *"that*

[105] Opinion of Advocate General Mayras in Case C-2/74 *Reyners*, point 3.1.

one of these activities, even pursued occasionally, is connected with the exercise of official authority, it is by reason of this fact excluded from freedom of establishment. But that does not mean that the exclusion is extended to the profession as a whole."[106]

150. This does not, however, mean that it is in principle not possible for an EEA State to organise its health care in such a way that it includes an activity which does involve the exercise of official authority. For instance, taking a decision to administer health care to a patient without consent, and administering it, can in principle be considered a separate activity of the health care profession. It being so would depend on national law, unlike the PRA at issue in this case, organising these activities in such a way that this would be the conclusion – for instance if that decision is taken by an external administrative entity. The result would in that case be that only that activity would not be encompassed by Articles 31 and 36 EEA. In a procurement context, in light of the principle of proportionality,[107] that would mean that only that activity could be excluded from a procurement, should the State consider that to be appropriate.

151. In the present case however, following an analysis of the relevant Norwegian law, ESA has concluded that the activities in question are not encompassed by the exception in Article 32 EEA, regardless of whether they are carried out on the basis of the consent of the patient. When not, the decision to perform that health care, which is made by the health care personnel in question, is an integral part of the health care which it facilitates and makes possible.

152. Thus, ESA submits that the wording "even occasionally" in Article 32 EEA has to be interpreted in view of the whole provision, in light of its purpose and in light of the whole system of fundamental freedoms in EEA law of which it is a component. This interpretation then entails that a given activity may well fall outside the scope of Chapters 2 and 3 of the EEA Agreement if it is sufficiently connected with the exercise of official authority within the meaning of Article 32 EEA. This is the case even if the connection of that activity with the exercise of official authority only manifests itself occasionally. Health care activities and the decision to perform them, with or without consent, under the Patients' Rights Act are not, however, even

[106] *Ibid*. and also compare the judgement in the Case C-2/74 *Reyners*, paragraph 46.
[107] See the Advocate General Cruz Villalón in his opinion in case C-47/08 *Commission v Belgium.*

occasionally, connected with the exercise of official authority within the meaning of Article 32 EEA.

7 CONCLUSION

Accordingly, the Authority respectfully requests the Court to answer the questions from the national referring court as follows:

1. **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**

2. **Articles 74 to 77 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 must be interpreted as precluding national legislation which allows 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.**

3. **Health care activities and the decisions to perform them, with or without consent, under the Patients' Rights Act are not even occasionally, connected with the exercise of official authority within the meaning of Article 32, which therefore cannot be relied on in connection with a public contract concerning services pursuant to the Patients' Rights Act.**

Ewa Gromnicka, Erlend Møinichen Leonhardsen, Kyrre Isaksen,
Melpo-Menie Josephides

Agents of the EFTA Surveillance Authority