Oslo, 29 June 2022

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

STENDI AS & NORLANDIA CARE NORGE AS

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in CASE E-4/22

Stendi AS & Norlandia Care Norge AS v Oslo kommune

in which the District Court of Oslo (Oslo tingrett) requests the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Surveillance and Court Agreement in its case 21 -021 79 1 TVI-TOSL/01.

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1 Introduction

1.1 General introduction and background

1. The District Court of Oslo (Oslo tingrett) has requested the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Surveillance and Court Agreement in its case 21 -021 79 1 TVI-TOSL/01 (the "Request"). The case before the District Court concerns whether the Municipality of Oslo (the "Municipality" or the "defendant") may lawfully reserve a procurement of high-value nursing home services (the "Procurement") for so-called "ideal organisations" ("ideelle organisasjoner").[1] While the lawsuit before the District Court specifically involves one such reserved contract, the Municipality is currently using the same legal justification in order to exclude non-ideal service providers from numerous similar contracts.[2]

2. The Municipality's reservation implies that all other private providers than ideal organisations are excluded from participating in the public procurement competition. The Procurement has been contested before the District Court of Oslo by Stendi AS and Norlandia Care Norge AS, which are the plaintiffs in the main proceedings before the referring court (the "plaintiffs"). The plaintiffs are ordinary, non-ideal private providers of health and social services, including nursing home services. Stendi AS is under Swedish ownership, and both plaintiffs offer their services throughout the whole of Scandinavia and/or Northern Europe.

3. The estimated total value of the part[3] of the Procurement which concerns nursing home services is more than 700 million Euros over the course of the 10-year contract period. The total market for public procurement of health and social services in Norway is worth billions of Euros.

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[1] See explanation in footnote below on why the plaintiffs prefer to use the term "ideal" also in English, instead of *e.g.* "non-profit organisation".

[2] The plaintiffs are aware of two contracts for the provision of nursing home services (Rødvedt sykehjem, Smestadhjemmet and Paulus sykehjem, Hovseterhjemmet), which were announced earlier this year. Both contracts, worth hundreds of millions of NOKs, are reserved for "ideal" providers and non-ideal providers such as plaintiffs are excluded from participating in the tender competition. Plaintiffs have requested that the Municipality await the award of all contracts until the EFTA Court has rendered its decision so as not to risk the long-term unlawful foreclosure of the market. The Municipality has refused.

[3] Notably, the Procurement also has a non-reserved part concerning development and hiring of the land and nursing home infrastructure which will be further addressed below.

4. "Ideal organisations", in the meaning of the National Reservation Basis,[4] appears to differ quite substantially from the content and character of organisations referred to as "non-profit" or "voluntary" in many other EU/EEA States.[5] In essence, the only factor distinguishing Norwegian "ideal" providers of health and social services from other private providers is the obligation for the ideal providers to ultimately reinvest obtained profits into the organisation's overall activities, including the organisation's purely commercial activities. Except for that, their access to capital and financing, the size and professionality of their workforce, and their commercial focus and profile fully matches that of other private providers of health and social services.

1.2 The questions referred and the plaintiffs' main responses to those questions

5. The Request put forward several questions regarding three main topics. The *first topic* concerns whether the performances of nursing-home services are services in the meaning of point (9) of Article 2 (1) of Directive 2014/24/EU (the "Directive"), *cf.* also the notion of services referred to by Article 37 EEA. The plaintiffs take the view that the nursing-home services acquired by the Procurement fall within the notion of "services" in the meaning of the Directive, as the Municipality procures nursing-home services in a market against renumeration. It remains a "service" even where a third party like the contracting authority is the entity paying renumeration.

6. The *second topic* concerns criteria relevant for assessing whether the official authority exception of Article 32 EEA is applicable to procurements of nursing-home services. In essence, the first two sub-questions ask whether it impacts the opportunity to apply Article 32 EEA, that both "ideal" and non-ideal service providers long since have been admitted to the activity in question and provided with the same coercive powers that the Municipality now claims brings the procurement outside the scope of the EEA Agreement. Based on case-law of the European Court of Justice ("ECJ"),[6] the plaintiffs argue that Article 32 EEA

[4] By "National Reservation Basis" the plaintiffs' mean Section 30-2a of the Public Procurement Regulation. See Item 3.1 of the Request.

[5] Therefore, the plaintiffs prefer to use the term "ideal" organisations or providers in order to mark that this concept may have a particular legal and factual content in the Norwegian context, compared to *e.g.* "voluntary" or "non-profit" organisations in other EEA States.

[6] This argument is based on a test set derived from *Sotgiu v Deutsche Bundespost*, Case 152/73, EU:C:1974:13 ("Sotgiu"), paras 2-6 and *Commission v Italy*, Case 225/85, EU:C:1987:284, para 11. As the plaintiffs will develop further below, they take the view that in order to lawfully apply Article 32 EEA, an EU/EEA State must comply

cannot serve to justify unequal treatment between service providers which have already been admitted to the activity in question. The plaintiffs also argue that the conditions for application of Article 32 EEA are in any event not met in this case, *inter alia* because the coercive powers in question are vested with the individual health personnel, are not connected to the exercise of "public authority" but rather individual health care and are not exercised on a regular basis, *cf.* the two latter sub-questions regarding the second topic.

7. The *third topic* asks whether the right of establishment (Article 31 EEA), the freedom to provide services (Article 36 EEA) as well as articles 74 to 77 of the Directive, preclude national legislation allowing contracting authorities to exclude other providers than "ideal organisations" from participating in public procurements of nursing-home services. According to the plaintiffs, the exclusion of non-ideal service providers from the procurement of nursing-home services cannot be justified by the exemptions set out in the Directive and amounts to a non-justified infringement of the equal treatment obligation set out by Article 76(1) of the Directive.

2 Legal and factual background to the case at hand

2.1 The legal framework and the market

8. As a point of departure, it is undisputed that the Municipality is not compelled to procure nursing home services from the market and pursuant to the Directive. First; it is undisputed that the Municipality may decide whether it shall produce the relevant nursing-home services itself or whether it should procure the same services from the market. The rules of public procurement and the Directive regulate the latter and not the first situation. Second; it follows from Articles 74 and 4(d) that where the value of the health and social service contract is lower than 750 000 Euro, the procurement in question falls outside the scope of

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with two related but yet independent, separate and cumulative legal tests: (i) The *Sotgiu* test, referred to above, which essentially is designed to check if the invocation of *the official authority exception* is genuine and consistent, and thus not only an attempt to circumvent the Directive or the freedoms of establishment and services. And separately, the (ii) *Reyners* test, *i.e.* the line of case-law built upon *Reyners v Belgian State*, Case 2/74, EU:C:1974:68 ("Reyners"). The latter case prescribed a qualitative test limiting the Article 32 exception to activities *"which in themselves involve a direct and specific connection with the exercise of official authority".* Thus, it is exactly to the point, when Robert Schütze, *European Union Law* (Cambridge University Press 2015) page 609, describes *Sotgiu* as *"a separate jurisprudential line*" from *Reyners* implying that when you have been *"admitted"* to the activity in question, you *"benefit from the equal treatment principle".* As *Sotgiu* was about the TFEU equivalent of Article 28(4), *i.e.* the public service exception regarding employed workers, Schütze specifies that the *"reasoning under Article [28(4)] applies, mutatis mutandis, to Article [32] and restrictions to professions involving public power".*

the Directive.[7] Third; the Directive's Article 10(h) (certain contracts provided by non-profit organisations), Article 20 (certain excluded service contracts) and Article 77 (reserved contracts for certain health, social and cultural services) contain specific and exhaustive exceptions from the general legal framework of the Directive, which provide the Municipality with sufficient flexibility.

9. However, despite the freedom to produce nursing-home and other health and social services in-house, the Municipality and other Norwegian contracting authorities are purchasing considerable volumes from external providers. The Norwegian market for public procurement of health and social services is of considerable cross-border interest. Each year, the Norwegian State and its municipalities purchase health and social services – including nursing home services – for approximately 2 to 3 billion Euro. Out of the latter amount, the public purchases of nursing home and home care services are worth around 1 billion Euro.[8] These contracts attract significant cross-border interest.

10. According to its webpage, the Municipality has 37 nursing homes with long-term slots. Out of these, 20 nursing homes are operated by the Municipality's own internal agency. Thus, 17 nursing homes are operated by external, private service providers. As a consequence of the Municipality's political policy decision to exclude non-ideal operators from public tender competitions, there is currently only one on-going contract where the supplier is a non-ideal provider.[9] When that contract expires in the spring of 2023, the Municipality will no longer have any non-ideal providers of nursing home services left and all non-ideal providers will have been phased out.

11. This deliberate policy of exclusion was initiated by the Municipality in 2015 and has been systematically implemented ever since. When contracts previously held by non-ideal providers expired, the Municipality has either taken the nursing home back into in-house operation or reserved the public tender competition seeking a new external provider for "ideal organisations". In 2015, before the Municipality's incumbent city government took

[7] Normally, a contract of less than 750 000 Euro would not be considered to be of cross-border interest, thus excluding it also from the scope of EEA primary law.
[8] These market value estimates are taken from a study conducted by consultants Menon Economics for the Confederation of Norwegian Enterprise (NHO): *Ideelle og kommersielle aktører i helse- og omsorgssektoren* of October 2021, see page 17.
[9] One of the plaintiffs, Nordlandia Care Norge AS is the provider in that contract.

office and adopted this policy, the nursing homes operated by external providers had a mix of "ideal" and non-ideal providers as around half of the nursing home service contracts were held by "ideal" and non-ideal providers, respectively.

12. Even at national level the incumbent government has flagged an intention to increase the number of reserved public procurements for nursing home and other health and social services.[10] Available numbers seem to confirm that since 2016 there has been an actual increase in the number of health and social service procurements reserved for "ideal providers".[11]

13. Yet, despite this apparent political intention to increase the number of such reserved contracts, the Norwegian Government has on some occasions signalled uncertainty about the EEA law compatibility of the reservation policy. When the National Reservation Basis was adopted and published, the Norwegian Government published a press release *inter alia* stating that *"[t]he relationship to EEA law is not clear. The EFTA Surveillance Authority (ESA) has questioned whether the measure is contrary to EEA law. This means that contracting authorities applying the possibility to reserve tender competitions for ideal can risk claims for compensation, if it later turns out that the provisions of the regulation are contrary to the EEA Agreement".*[12] Furthermore, in a legal opinion from Fredrik Sejersted of 2 June 2014, the then professor concluded that the former Norwegian legal basis for reserving public health and social service contracts, could not be continued under Directive 2014/24.[13] Based on that, the Norwegian Government, in the proposition to the Parliament when proposing changes to the Public Procurement Act in connection with the implementation into national law of Directive 2014/24 (Item 8.1 Prop. 51 L 2015-2016), the Government subscribed to Professor Sejersted's assessment and stated that it considered that an exception for "ideal" organisations would be contrary to the Directive and EEA law. Later the Norwegian Government has taken a different position, as the National Reservation Basis bear witness of.

[10] See *e.g.* pages 59, 60, 71 and 72 of the Government's political declaration ("Hurdalsplattformen").
[11] See Item 3.1 of the report *Ideal and commercial players in the health and care sector* done by Menon Economics, commissioned by the Confederation of Norwegian Enterprises (NHO Service & Handel).
[12] Press release published 19 February 2020 on regjeringen.no.
[13] The former reservation basis had much in common with the current, but was even more open-ended.

2.2 The "voluntary associations" given priority in *Spezzino* and *CASTA* cases differ substantially from the Norwegian concept of "ideal organisations"

2.2.1 Italian legislation contains specific requirements to ensure that favoured organisations were genuinely voluntary

14. Before we revert to the cases C-113/13 *Spezzino* and C-50/14 *CASTA*,[14] which the Norwegian Government relies heavily on as justification for the National Reservation Basis, it is worth pointing out the following: When the judgments of *Spezzino* and *CASTA* found – subject to strict and narrow conditions – that EU primary law at the time did not preclude Italian regional authorities from awarding public emergency ambulance service contracts by direct award, the beneficiaries in those cases where *"voluntary associations"*.[15] The *"voluntary associations"* referred to in those judgements had to comply with strict national legal obligations securing that these associations were genuinely voluntary and were genuinely in line with the subsidiarity principle laid down in the Italian constitution.[16]

15. For example; according to relevant Italian legislation: *"[A] voluntary organisation is any organisation set up with the aim of undertaking voluntary activities having overall and primary recourse to the individual, voluntary and unpaid services of its members.* Furthermore, the same article of the Italian act states that "*employed or self-employed workers"* can be used "*only to the extent necessary for [the voluntary organisation's] day-to-day functioning or having regard to* the type or specialisation of the activity".[17] Also, Italian "voluntary associations" are not allowed to use *"business methods to ensure their competitivity on the market (such as advertising, illuminated signs, premises equipped on a commercial basis, trade marks)".*[18] Moreover, in both *Spezzino* and *CASTA*, the voluntary associations which provided the services only received reimbursement for costs actually incurred.[19] Even in C-436/20 *ASADE*, the remuneration received by the *"non-profit organisations"* was limited to *"reimbursement of costs, which does not entail any business profit"*.[20]

[14] The judgments in C-113/13, *Spezzino* and *CASTA and Others v Azienda sanitaria locale di Ciriè, Chivasso e Ivrea (ASL TO4) and Regione Piemonte* ("CASTA"), C-50/14, EU:C:2016:56 .
[15] See *e.g.* the operative part of these judgments.
[16] C-113/13, *Spezzino*, paras 9 to 18.
[17] C-113/13, *Spezzino*, paras 13.
[18] C-113/13, *Spezzino*, paras 14.
[19] C-113/13, *Spezzino*, paras 32 and 27; C-50/14 *CASTA*, paras 51 and 52.
[20] AG opinion of C-436/20, *ASADE*, para 28.

2.2.2 Norwegian legislation has no voluntary requirement and allows "ideal organisation" to act as any other commercial business

16. In contrast, Norwegian "ideal organisations" are free to employ a professional workforce. Many of them employ a large and professional workforce at all levels. Neither Norwegian legislation nor public service contracts requires that "ideal organisations" shall use volunteers when providing the services performed under at public contract. Also, there are numerous of examples of "ideal" providers organising the part of the business where they supply health and social services to public contracting authorities via limited liability companies (*aksjeselskaper*) (see also Item 3.2.2 of the Request). As further elaborated on below, the "ideal organisations" are also *de facto* allowed to organise other commercial activities in limited companies which they own alone or together with purely commercial investors.

17. Moreover, many of the "ideal organisations" providing health and social services have a business strategy, a business behaviour, and an administrative set-up as well as access to financing and capital, which is very similar to any large, ordinary (non-ideal) provider of health and social services. For example, some "ideal" providers of health and social services own and manage a considerable real estate portfolio where they rent out business premises in the ordinary commercial market.[21]

18. Some "ideal organisations" are conducting offensive, expansive and commercially directed business strategies. LHL, an "ideal organisation" which until March 2022 provided nursing-home services to the Municipality following a reserved public procurement competition, stated in a public strategy document that it shall be a *"challenger and competitor to public and commercial"* service providers. LHL acquired the commercial health insurance supplier Vertikal Helse in order to enter the insurance market and thus become vertically integrated. LHL offers special medical services in the market for supply of health services to insurance companies,[22] and as a supplier to the Norwegian State under public service contracts. Also, LHL acquired the commercial specialist medical services providers NIMI and Forusakutten. The two latter providers offers medical services on commercial terms to insurance companies, self-paying patients and, to some extent, the Norwegian State under

[21] See page 162 of Norwegian Official Report (NOU) 2012:12 *Ideell opprydning*.
[22] In addition, LHL provides specialist medical services to the Norwegian State under public service contracts. LHL also provides specialist medical services on market terms to self-paying patients.

public service contracts. Just under half of the shares of Forusakutten were held by non-ideal, purely commercial owners.

19. Another example: after the Municipality's adoption of the policy implying that all new public nursing-home service contracts shall be reserved to "ideal organisations", the multi-national health and social service provider Unicare sold its Norwegian nursing-home services business to the "ideal" service provider Stiftelsen Diakonissehuset Lovisenberg ("Lovisenberg"), which then took over the public service contracts Unicare at that moment had with the Municipality. At the time (2019), Unicare ran five nursing-homes on behalf of the Municipality, but the public service contracts where soon to expire. In a statement to the press, the CEO of Unicare's Norwegian business referred to the Municipality's reservation policy as the reason behind Unicare's withdrawal from the Norwegian market for supplying nursing-home services to the municipalities.[23] Unicare is owned by the pan-European healthcare investment fund G Square Capital. One of the nursing home service contracts acquired by Lovisenberg from Unicare was until March 2022 held by LHL, after the latter won the reserved tender competition for the current public service contract. In March 2022, Lovisenberg took over the two nursing-home service contracts LHL had with the Municipality as Lovisenberg purchased all the shares of LHL Omsorg AS, LHL's nursing-home and care business. As stated above, when the last contract expires in 2023 the Municipality will have phased out all non-ideal providers of nursing home services.

2.2.3 "Ideal organisations" may earn unlimited profits from reserved public health and social service contracts and are free to allocate those profits to other purely commercial business areas

20. From the Norwegian Official Report (NOU) 2020:30, it may be derived two important features that form an integral part of the Norwegian policy to reserve the award of public health and social services contracts to "ideal organisations": First, "ideal" providers are free to include an unlimited profit in the prices they offer to the contracting authority when competing in a reserved public procurement competition, *i.e.* there are no limits on the profits "ideal" providers may earn for reserved public contracts and correspondingly no requirement that the ideal provider should offer its services at prices merely reflecting costs. Indeed, one of the reasons for excluding non-ideal providers from public tender competitions was that ideal organisations were unable to prevail in competition with their

[23] Nettavisen.no on the 26 November 2019.

non-ideal competitors as they were regularly too expensive.[24] As pointed out on page 6 and 7 of the Request, even the Norwegian Government's consultation paper which proposed the National Reservation Basis recognised that *"[R]eserving tendering procedures for health and social services for non-profit operators will be a form of regulation that leads to less competition in the award of public contracts […] [and] which may lead to higher prices and poorer quality for the welfare services provided to society […]. [This] may ultimately lead to a greater burden for taxpayers […]"* [the plaintiffs' emphasis]

21. Secondly, there are no legal barriers against transferring revenues and profits generated by public health and social services contracts to other business areas within the "ideal organisation".[25] For example, profits from reserved nursing home contracts may be spent on the real estate part of the business. Similarly, an "ideal" provider of specialist medical services like LHL, may sponsor its competitiveness as provider of specialist medical services to insurance companies with profits stemming from reserved public contracts. These activities by the ideal organisations are not considered to breach the National Reservation Basis, including its requirement that an "ideal organisation" may "*to a limited extent, engage in commercial activity that supports the business's social objectives"*.[26] [the plaintiffs' emphasis]

22. The plaintiffs have been granted access to a complaint submitted by Lovisenberg i 2019, where this ideal organisation contested the Municipality's award of a nursing home service contract to LHL, another ideal organisation. According to Lovisenberg's complaint, LHL's commercial activities went beyond what can be accepted from an "ideal" provider. Still, the Municipality dismissed Lovisenberg's complaint and awarded the contract to LHL. It follows, that the legal requirement referred to in the preceding paragraph does not in any substantial way limit the commercial activity of "ideal" organisations.

23. The legal and factual background presented above confirms that the single feature distinguishing "ideal" providers from non-ideal providers is the obligation to ultimately reinvest any profits into the activities controlled by the organisation. Yet, that reinvestment

[24] *Veikart for ideell vekst*, report produced by Virke ideell og frivillighet, page 12 i.f. «In a pure price competition, without special measures to protect ideal organisations, there is a tendency that non-ideal commercial organisations prevail, as we have observed in Sweden." [office translation]
[25] See the Norwegian Official Report 2020:13 *Private players in the welfare state* on page 469.
[26] See the National Reservation Basis, second paragraph, fully quoted in item 3.2.1 of the Request.

obligation does not require that any profits are reinvested into the same activity, *i.e.* the provision of a certain health and social service to a contracting authority. Nor does that reinvestment obligation require any profits to be reinvested into any genuinely *voluntary work* conducted by the "ideal organisation", *i.e. voluntary work* in the meaning of non-economic activities conducted towards society or certain groups for which the organisation does not receive any remuneration, but for which the organisation receives direct public financial funding. Rather, the "ideal organisations" are free to reinvest any profits stemming from reserved public health and social service contracts into purely commercial activities like real estate investments and ownership in other businesses, like *e.g.* insurance and bank services.

24. An example of the latter is The Church City Mission of Oslo (Kirkens bymisjon), which currently runs three nursing-homes based on public contracts with the Municipality, entered into following a tender competition where non-ideal providers were excluded. The Church City Mission is a shareholder in an insurance company co-owned by several Christian "ideal organisations".[27] The largest shareholder in that insurance company is called Knif AS, in which The Church City Mission is the largest shareholder together with the Salvation Army. Knif AS is a holding company owning several companies offering a variety of business management support services. Obviously, both the insurance company and the business management support companies owned by The Church City Mission and other "ideal organisations" are offering their commercial services against remuneration on a market in competition with other providers of such commercial services.[28]

[27] The insurance company Knif Trygghet Forsikring AS.

[28] As it is not a topic in the questions asked by the Request to the EFTA Court, the plaintiffs will not specifically address the issue of State aid in the meaning of Article 61(1) EEA. The plaintiffs will only point out that the issue of potential State aid occurs in at least two situations. First, it may be questioned whether "ideal organisations" being awarded contracts following a reserved tender competition receive an advantage in the form of being paid a potential "over-price" for the services, due to the reduced competition for the contract as non-ideal providers are excluded from the procurement, *cf.* the criteria which can be derived from case *Altmark Trans v Nahverkehrsgesellschaft Altmark*, C-280/00, EU:C:2003:415. In several instances, the ideal organisations are not able to meet the demand under the tender competition and this situation therefore excludes price competition even among several ideal bidders. The plaintiffs are of the opinion that the suppliers of nursing homes and other health and social services are engaged in economic activity in the meaning of Article 61(1) when supplying nursing home and other health and social services to the Municipality and other Norwegian contracting authorities. Second, as there is no requirement on having separate accounts or no prohibition against allocating profits from reserved public health and social services contracts to other commercial activities like the real estate and insurance company investments described above, any advantage accumulated from reserved contracts may flow freely to the other commercial activities of the "ideal" providers.

2.2.4 Obligation to retain profits within the "ideal organisation" can be circumvented

25. As mentioned above, the National Reservation Basis' definition of "ideal organisations" does not preclude limited liability companies from being considered as "ideal organisations". An "ideal" limited company may even have natural persons or non-ideal limited companies as its shareholders, if it can be substantiated that the reinvestment obligation is still being fulfilled.[29] At the same time, the consultation paper behind the National Reservation Basis accepts that an "ideal" limited company may purchase goods and services including the rental of real estate from its non-ideal owner, provided that the transactions are not above market price. Hence, the non-ideal owner of an "ideal" limited company is free to earn normal profits from *e.g.* renting out property to the "ideal" provider and offering manning and management support services to the same.

2.2.5 The reservation policy indirectly discriminates service providers from other EU/EEA States

26. In principle, reserved public procurements are open also for "ideal organisations" from other EU/EEA States. However, except for one example, the plaintiffs are not aware of any examples where "ideal organisations" with foreign ownership or foreign primary establishment, have submitted tenders or been awarded public health and social service contracts in Norway.[30] The Procurement in question is illustrative in this respect: Clearly, the Procurement is of great cross-border interest due to its very high value. Still, the Municipality only received bids from five different "ideal" providers, all of them Norwegian.

27. The Procurement also encompasses a property part where the Municipality shall enter into contracts regarding the development and long-term rental of the nursing home infrastructure, including premises. The property part is not, as such, reserved for "ideal" providers. However, in order to participate in the tender competition for the property part contracts, a property development provider needs to "team up" with an "ideal" provider of nursing home services. The Municipality only accepts joint bids, either as two main suppliers or as a main supplier and a sub-supplier. As there is only a handful Norwegian "ideal" organisations with the necessary capacity to undertake nursing home contracts of

[29] See page 10 of the consultation paper proposing the National Reservation Basis.

[30] The Lighthouse (Fyrlykta) has provided childcare services under contracts with Norwegian contracting authorities. The latter is a foundation (stiftelse) established in Norway but coming out of a multi-state organisation which claims to be "ideal".

this size, property development players have very few alternative partners. Clearly, this link between the property part and the nursing home part of the Procurement is artificially narrowing the competition, in particular for the property part of the Procurement. The link makes it *de facto* much more difficult for foreign property players to compete for the property part of the Procurement.

2.2.6 No empirical foundation for presuming that "ideal" providers offer better quality

28. In Norwegian Official Report 2020:13 "Private players in the welfare state", an expert group appointed by the Norwegian Government reviewed available research into whether there can be identified quality differences between "ideal" and non-ideal providers.[31] The conclusion was that there cannot be identified any quality differences based on the distinction between "ideal" and non-ideal private providers. That conclusion is supported also by other studies. The same conclusion was reached by a study published in 2019 commissioned by the Confederation of Norwegian Enterprises. The latter study was not able to identify quality differences between "ideal" and non-ideal providers.[32]

29. Based inter alia on its findings regarding quality of services, the "*majority of the [above-mentioned] expert group are therefore of the opinion that it currently is uncertain what the public authorities may gain of desired effects by excluding non-ideal service providers from supplying services."*[33] In turn, this led the majority of the public expert group to adopt the following conclusion: "*[T]there is not a sufficient knowledge basis providing any reliable information about the effects of giving preferential treatment to "ideal" providers in tender competitions for public welfare service contracts. The majority therefore recommends, at least as a point of departure, that there should not be an increased use of reservations."*[34] [the plaintiffs' emphasis, office translation]

[31] See Item 17.3 "Research on quality" and Item 17.4 on pages 277 to 284.
[32] Study published August 2019 conducted by Rambøll Management Consulting commissioned by the Confederation of Norwegian Enterprises (NHO Service & Handel). The report investigated certain objective (the health of patients, the ratio between health workers and patients, access to educated and trained health personnel) and subjective quality factors (like the satisfaction of the patients and their families, the feeling of being safe, the patients' well-being etc.).
[33] Norwegian Official Report 2020:30 page 469.
[34] Norwegian Official Report 2020:30 page 472. All translations from the latter document are office translations.

2.2.7 Factual background of relevance for the invoked official authority exception in Article 32 of the EEA Agreement

30. As far as the plaintiffs are aware, it was not until 2015 Norwegian contracting authorities started to invoke Article 32 EEA as a legal basis for reserving public tender competitions for health and social service contracts for "ideal organisations".[35] The first tender competition when Article 32 was invoked – a childcare service acquisition initiated by the Directorate for Children, Youth and Family Affairs in the summer of 2015 – is very illustrative for the inconsistency in relying on Article 32: This procurement was conducted in two steps: The first step was reserved for "ideal" providers, while the second step was open for all service providers. Via the second step, the contracting authority sought to cover the residual need for capacity (in terms of places in childcare institutions) which the reserved first step had not been able to cover. Still, the content of the services purchased via the two steps were identical, including the fact that non-ideal providers and their institution management became vested with identical coercive powers as "ideal" providers. For the acquisition of childcare services such a two-step approach is commonly used by contracting authorities.

31. As alleged justification for reserving public procurements of nursing home services for "ideal" providers, Article 32 was not invoked by Norwegian contracting authorities until the Municipality did it for the first time in 2016. Yet, as already explained above, at that time both "ideal" and non-ideal providers had for years been providing nursing home services to the Municipality and other contracting authorities. An integrated part of the performance of those nursing home services was that both the "ideal" and non-ideal providers' health personnel held identical coercive powers.

32. By a letter to the EFTA Surveillance Authority ("ESA") – submitted on the 10 October 2016, as a response to a request for information from the Authority in the context of a complaint case – the Norwegian Government *inter alia* stated that *"[t]he Norwegian authorities would like to underline that the separation of procurement procedures does not indicate an understanding that only non-profit organisations are qualified providers of child welfare services. The authorities have merely invoked a legally based exemption [i.e. Article 32] in order to achieve political aims of diversified offer etc., as elaborated upon*

[35] Norwegian Official Report 2016:12 *Ideell opprydning* page 51.

above. It is the opinion of the Norwegian authorities that the motivation of the State when invoking a legally justified exemption should be of no relevance for the Authority's assessment of the case".[36] [the plaintiffs' emphasis]

33. The Norwegian Government's response, cited above, effectively confirms that the Norwegian Government is only invoking Article 32 as a tool for excluding non-ideal providers from certain procurements and not because it seeks to retain extra control over which service providers are admitted to hold the relevant coercive measures invoked as a factual background for the application of Article 32. Indeed, the very fact that both "ideal" and non-ideal providers have been equally admitted to exercise such coercive measures shows that the Norwegian Government's motivation for invoking Article 32 is entirely disconnected from the alleged exercise of official authority, *i.e.* the exercise of coercive measures.

34. Item 4.4 of the Request refers to statistics stating that in the four years 2018 to 2021 there were adopted, respectively, 196, 187, 198 and 221 decisions on the use of coercive measure on all the 37 nursing homes of the Municipality. Those numbers should, however, be nuanced in the sense that the relative occurrence of decisions on coercive measures is still very low when seen in light of the fact that the nursing homes of the municipality host 1,5 million overnight stays distributed over its 4100 full-day places. In addition, the Municipality has 500 daytime-only places. Based on a stated yearly patient count of 8000, and taking the highest number of decisions on coercions, 221 in 2021, that still only indicates that coercive measures are necessary for less than 2.8% of patients.

[36] Page 3 of a letter dated 10 October 2016 from the Norwegian Ministry of Trade and Fisheries to the Authority. The statement was part of the Norwegian Government's response to questions with the following wording: *"Explain whether, in the Norwegian Government's opinion, only non-profit organisations can ensure the satisfactory and cost-efficient performance of a public contract having as its subject matter activities, which require the use of coercive measures such as in child welfare institutions[?] In, the Norwegian Government's opinion, potential candidates other than non-profit organisations are less suitable for the performance of certain contracts, provide reasons for this conclusion[?]"*

3 On whether the procurement comes within or falls outside the concept of services: 1) Is a contract for pecuniary interest providing for the provision of long-term places in nursing homes, the procurement of which is effected under the conditions described [in the request], to be regarded as a contract relating to the provision of "services" under point (9) of Article 2(1) of Directive 2014/24/EU?

35. The plaintiffs submit that the above-mentioned question should be answered in the affirmative. Hence, the plaintiffs submit that procurements of nursing home services in the factual and legal context described by the Request shall be regarded as contracts concerning the provision of *"services"* under point (9) of Article 2(1) of Directive 2014/24.

36. In line with paragraph 90 of case *Hraðbraut*,[37] the plaintiffs assume that the substantive content of the concept of *"services"* is identically under both point (9) of Article 2(1) of the Directive and under Article 37 EEA. When the plaintiffs in the following refer to *"services",* they refer equally to both those provisions unless otherwise specified.

37. Whether something constitutes economic activity regarded as *"services"* is a question of whether the activity consists of offering services that normally are provided against remuneration.[38] As the plaintiffs will return to below, it is not a condition that the remuneration is paid by the end-users themselves. It may remain a *"service"* even where a third party is paying the remuneration,[39] including situations where that third party is an EU/EEA State.[40] It can thus be concluded that nursing homes services provided by both "ideal" and non-ideal providers to a contracting authority, against remuneration received

[37] E-13/19 *Hraðbraut v The Ministry of Education, Science and Culture and others*
[38] See, among others, *Congregación v Ayuntamiento de Getafe* ("Congregación"), C-74/16, EU:C:2017:496, paras 45 and 47, *Jundt v Finanzamt Offenburg* ("Jundt"), C-281/06, EU:C:2007:816, para 28 and E-14/15 *Holship v Norsk Transportarbeiderforbund*, para 69.
[39] See *e.g.* C-74/16, *Congregación*, para 49.
[40] Several cases have considered activities as *"services"* even if financed by the state, and even if the remuneration to the service provider has been paid by the state in situations where the service is free of charge or almost free of charge for the end-users, see for example *Smits v Stichting Ziekenfonds and Peerboms v Stichting CZ Groep Zorgverzekeringen* ("Smits and Peerboms"), C-157/99, EU:C:2001:404, paras 55-58; *Vanbraekel v ANMC*, C-368/98, EU:C:2001:400, paras 38-43; *Müller-Fauré v Onderlinge Waarborgmaatschappij and Van Riet v Onderlinge Waarborgmaatschappij*, C-385/99, EU:C:2003:270, paras 37-40. In *Josep Peñarroja Fa*, Joined Cases C-372/09 and C-373/09, EU:C:2011:156, para 38, the hiring of expert court translators on a fixed rate set by a public authority was considered a "service". See also AG Medina, in her opinion in *ASADE v Consejería de Igualdad y Políticas Inclusivas* ("ASADE"), C-436/20, EU:C:2022:77, who clearly states that public funding can constitute remuneration, see para 53. Reference is also made to case C-281/06, *Jundt*, paras 28 to 31, where the last paragraph is of particular interest.

from that contracting authority as consideration for its contractual performances, are services in the meaning of point (9) of Article 2(1) of the Directive.

38. Also, the fact that Articles 74 to 77 and Annex XIV encompass health and social services[41] indicates that the legislator – at least from the outset – considered that health and social services provided against remuneration are *"services"* in the meaning of the Directive.[42]

39. The defendant mainly bases its contrary view on the judgments in cases *Humbel*, *Private Barnehagers Landsforbund* and *Hraðbraut*. However, those cases concern the education sector and municipal-owned kindergartens. Common for all those cases is that the schools or public kindergartens in question received public funding directly over public budgets. These schools and kindergartens did not receive market-based remunerations for supplying a performance which is in detail regulated by a contract of a synallagmatic (quid pro quo) nature. Also, those schools and kindergartens operated their activities in accordance with a public law regulatory framework governing the substantive content of the school and kindergarten activities offered.[43] The schemes of *Humbel*, *Private Barnehagers Landsforbund* and *Hraðbraut* can be characterised as schemes where the activities in question are integrated into the public education or kindergarten system.[44]

40. In contrast, when Norwegian contracting authorities purchase nursing home and other health and social services via tender competitions, the performance of the services is strictly regulated by a detailed *"public contract"* in the meaning of Article 2(5) of the Directive.[45] Furthermore, the remuneration paid by the contracting authority and received by the service provider is alone shaped by the market in the sense that the size of the remuneration is decided by the offers from the bidders in the tender competition, *i.e.* the remuneration is genuine and market-based and a direct consideration for the contractual performances

[41] Certain other services are also encompassed by the "light regime" prescribed by the mentioned provisions.
[42] For the sake of completeness, the plaintiffs note the footnote of Annex 1 which delimits against non-economic services of general interest. However, as the plaintiffs argue above and below, the provision of public nursing home service contracts is not organised as a service of non-economic interest in the Norwegian context.
[43] See C-74/16, *Congregación*, paras 50 and 55-56.
[44] See C-74/16, *Congregación*, paras 50. Notably, *Private Barnehagers Landsforbund* concerns municipality-owned kindergartens, not private kindergartens.
[45] For the sake of completeness, it is specified that the defendants do not dispute that such nursing home contracts constitute quid pro quo-based *"public contracts"* in the meaning of Article 2 point (5) of the Directive.

provided.[46] In the absence of an external service provider, the contracting authority would have to produce those services itself, with the accompanying internal costs. In that sense, contracting authorities have an obvious financial interest in the contractual services provided as it discharges the contracting authority from the commitment of producing the services itself. Under such a scheme, external service providers are not integrated into the public service. Instead, the contracting authorities have turned to the market to purchase the services in question.[47] The features mentioned in this paragraph further underpin that it is not decisive that the remuneration is paid by the contracting authorities and financed via public budgets, and not paid by the end-users themselves. Also, the features mentioned in this paragraph underpin that it cannot be decisive that contracting authorities, when procuring health and social services from the market they have created, are not seeking revenues but fulfilling its legislative obligations vis-à-vis their population.

41. The considerations submitted above, are also in line with other relevant case-law. In *Spezzino* and *CASTA* the ECJ, rather summarily, concludes that the framework agreements in question fell under Directive 2004/18, although the remuneration for the contract performance was limited to reimbursement of costs.[48] Furthermore, AG Medina quickly arrived at a similar conclusion in her opinion in C-436/20 *ASADE*.[49]

42. In C-157/99 *Smits and Peerboms* it was an issue whether hospitals, which provided medical services to members of the compulsory Dutch sickness insurance fund, provided *"services"* in the meaning of EU free movement law. The members of the sickness insurance scheme, the citizens, received the medical services free of charge, but the sickness insurance fund remunerated the hospitals based on a pre-set specific formula. In line with the contentions from several governments,[50] the AG suggested an approach similar to that applied by the

[46] Regarding this concrete issue of interpretation, the plaintiffs do not consider it relevant that it otherwise can be critically questioned whether a correct market-price is achieved via tender competitions reserved for "ideal organisations", as the reservation will considerably reduce the number of bidders.
[47] A market which it can be said that the contracting authorities in some contexts have created themselves by turning to the market to procure services that in previous times, at least to a greater extent, was produced "in-house" by the contracting authorities themselves.
[48] See C-113/13, *Spezzino*, paras 32-38. See also C-50/14, *CASTA*, where it just seems to be implicitly presumed that the contract in question constitutes a "service", see for example para 41 and 52.
[49] See the Opinion of AG Medina in C-436/20, *ASADE,* para 87. See also paras 82 and 83. Notably, even in ASADE the remuneration received by the non-profit service providers are limited to reimbursement of costs, *cf.* para 40 of the AG opinion.
[50] C-157/99, *Smits and Peerboms*, paras 49 to 52; the opinion of AG Ruiz-Jarabo Colomer in the same case, EU:C:2000:274, paras 30 to 32.

ECJ in the field of education and relied inter alia on *Humbel* and case C-109/92 *Wirth.* However, the ECJ reached the opposite conclusion and found that hospitals provided "services*": [T]he fact that hospital medical treatment is financed directly by the sickness insurance funds on the basis of agreements and pre-set scales of fees is not in any event such as to remove such treatment from the sphere of services within the meaning of Article [37 EEA][…] First, it should be borne in mind that Article [37 EEA] does not require that the service be paid for by those for whom it is performed […]. Second, Article [37 EEA] states that it applies to services normally provided for remuneration and it has been held that, for the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question […] In the present cases, the payments made by the sickness insurance funds under the contractual arrangements provided for by the ZFW, albeit set at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character."*[51] [the plaintiffs' emphasis]

43. The features invoked by the defendant in its effort to substantiate that public nursing home service contracts are outside the concept of "services" are present in many contexts and sectors where public authorities procure services which they offer to their citizens free of charge. For example, public roads and public buildings are financed over public budgets and the use of them are – at least from the outset – offered free of charge to all users. Also, when constructing roads, the relevant public authorities are obviously not engaging itself in gainful activity. If the defendant's reasoning were to prevail, the procurement of road construction contracts and a whole range of other services provided by public authorities to the citizens – but procured from external service providers – would fall outside the Directive and EEA free movement law. Clearly, that result could not be legally sustained.

[51] C-157/99, *Smits and Peerboms*, paras 53 to 58. Refence is also made to C-281/06, *Jundt*, paras 28 to 31 which essential applies the same approach as *Smits and Peerboms*, but in the field of education, on a situation where a public university turned to an external service provider. Para 31 reads: "*The main proceedings in the present case, however, do not relate to the teaching activity of the universities themselves, financed by public funds. On the contrary, the present case and the national legislation in question concern services provided on a secondary basis by natural persons called upon by universities to help them fulfil their mission. Payment for those services may constitute remuneration on the part of the university concerned."* [the plaintiffs' emphasis]

44. Hence, the plaintiffs consider that this question from the referring court should be answered as follows: A contract for pecuniary interest, providing for the provision of long-term places in nursing homes, awarded based on a procurement procedure, as described by the Request, shall be regarded a contract for the provision of "services" under point (9) of Article 2(1) of Directive 2014/24/EU.

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

4.1 1. Is the 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 "ideal" organisations and other (not non-ideal) providers?

b) other public contracting authorities in the same State still opt to conclude contracts for equivalent services with both ideal organisations and other (non-ideal) organisations?

45. The plaintiffs' position is that Article 32 EEA, for several independent reasons, is inapplicable in this case and to the nursing-home services in questions. In this section we will consider question 1 a) and b) of the Request, which we think should be examined together.

46. As a point of departure, it should be noted that if defendant's interpretation of Article 32 prevails, all health and social services and presumably all similar services would be removed from the scope of the EEA Agreement. The market relevant in this case alone, represents billions of euros in annual purchases and has for years been the subject of cross-border establishment by providers from other EEA member states. The defendant's position could also be adopted in other EEA member states and with respect to other markets with similar legal characteristics, with the effect that large health care markets and other markets in the EEA are brought outside the reach of the EEA Agreement and, e.g. potentially reserved for national operators. The implications for the functioning of the internal market would be significant and cannot in the plaintiffs' opinion be reconciled with the restrictive interpretation of the exemption adopted by the ECJ.

47. The plaintiffs consider that the fact that non-ideal providers have already been admitted to perform the *"activit[y]" in* question and, indeed, currently and in the future are and will be

admitted to the *"activit[y]"* via ongoing and future public nursing home service contracts in Norway, precludes the application of Article 32 EEA in this relevant context. The fact that both "ideal" and non-ideal providers of nursing home services have long since been admitted to the "activity" in question – *i.e.* to provide nursing home services under public service contracts where the health personnel working for the "ideal" or non-ideal service provider are vested with the same coercive powers[52] – prevents the Municipality or other Norwegian contracting authorities from selectively invoking Article 32 EEA in order to shield its unequal treatment of the service providers from the demands of the EEA Agreement.

48. The Municipality has through many years awarded numerous nursing home contracts to non-ideal providers and one non-ideal providers still supplies nursing home services to the Municipality until that contract expires in 2023. Also; throughout Norway non-ideal providers have been awarded nursing home contracts by municipalities for years, and there is no indication that Norwegian municipalities generally will stop awarding such nursing home contracts to non-ideal providers. Thus, non-ideal providers will continue to have access to at least part of the Norwegian market for nursing home contracts in the future, meaning that non-ideal providers will continue to hold contracts where their health personnel are vested with coercive powers. In essence, the situation is the same for all other health and social service areas where the institution or the personnel have some form of coercive powers. Yet, both "ideal" and non-ideal provers have been admitted to such contracts.

49. Allowing contracting authorities in Norway to selectively invoke Article 32 EEA in these circumstances would, in effect, allow them to turn the EEA Agreement "on and off" at will, based entirely on discretionary and political decisions which has nothing to do with the underlying rationale behind Article 32 EEA.[53]

[52] The coercive powers of health personnel working for "ideal" and non-deal providers are also equal with the coercive powers of health personnel working for municipality-owned nursing home (in-house production), as these powers are derived directly form the from the Patient and User Rights Act for all health personnel independently of which employer it has.

[53] The fact that contracting authorities, technically speaking, may invoke Article 32 in all procurements of *e.g.* nursing home services, also in non-reserved procurements open for all, does not change that the d*e facto* consequence is that the EEA Agreement is turned "on" and "off" depending on whether there is a political wish to reserve a public procurement for "ideal" providers. Because in non-reserved, open procurements, the invocation of Article 32 has no consequence as they are conducted in line with the Directive and the equal treatment principle.

50. The plaintiffs argue that Article 32 EEA cannot be used to justify discriminatory framework conditions for different categories of service providers long after the relevant category of service providers have been given access to the *"activity*" and the alleged exercise of official authority. This interpretation can be inferred from Case 152/73 *Sotgiu* and Case *225/85 Commission v Italy*.[54]

51. As a point of departure, both the ECJ's case-law and legal theory suggest that Articles 28(4) and 32 EEA pursue the same purposes and must be construed identically *mutatis mutandis.* Thus, the fact that *Sotgiu* concerned the TFEU Treaty provision corresponding to Article 28(4) EEA does not reduce the transferability of the reasoning in *Sotgiu* to the factual situation at hand, where non-ideal providers have long since been admitted to provide nursing home services, including to exercise the coercive powers vested on the health personnel working for non-ideal providers.

52. Case 152/73 *Sotgiu* concerned an Italian national employed by the Deutsche Bundespost. Mr Sotgiu, whose family still lived in Italy, enjoyed a separation allowance from the Deutsches Bundespost for being employed away from home. In accordance with a ministerial circular, only those with families living in other parts of Germany could enjoy a raised rate of the allowance. The rate remained unchanged for those having their families in other EU Member States. Mr Sotgiu then brought actions before German courts claiming that such discriminatory treatment was incompatible with secondary legislation implementing the EU Treaty provision equivalent of Article 28(4) EEA. The federal labour court stayed the proceedings and requested a preliminary ruling from the ECJ. Before the ECJ the German Government argued that the free movement rules were inapplicable, claiming that Mr Sotgiu's was an employee of the *"public service"* in the meaning of Article 28(4) EEA.

53. By one single paragraph the ECJ dismissed Germany`s contention, holding that when the German Government had already admitted Mr Sotgiu to the post, its opportunity to

[54]Case 152/73, *Sotgiu*, paras 4 and 6; Case 225/85, *Commission v Italy*, para 11 and the opinion of AG Lenz in the same case, EU:C:1987:36, para 27 *in fine*. As regards the latter judgment, the plaintiffs take the opportunity to specify that the Request's reference to this case was incorrect as i referred to Case 225/86 instead of 225/85. The latter is the correct reference. The parties in both of these judgements were the Commission against Italy.

discriminate based on Article 28(4) had been exhausted: *"Taking account of the fundamental nature, in the scheme of the Treaty, of the 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. The interests which this derogation allows Member States to protect are satisfied by the opportunity of restricting admission of foreign nationals to certain activities in the public service. On the other hand this provision cannot justify discriminatory measures with regard to remuneration or other conditions of employment against workers once they have been admitted to the public service. The very fact that they have been admitted shows indeed that those interests which justify the exceptions to the principle of non-discrimination permitted by Article 48 (4) are not at issue."*[55] Paragraph 6 further confirmed the interpretation by stating that Article 28(4) EEA *"concerns only access to posts forming part of the public services"* [the plaintiffs' emphasis] and not the subsequent conditions of employment once admitted.

54. Case *225/85 Commission v Italy* – which concerned Italy's application of discriminatory work conditions for foreigners employed by the Italian research council – confirmed and developed the approach taken by *Sotgiu*: *"As the Court held in its judgement in [Sotgiu],even if employment in the public service within the meaning of Article [28(4)] is involved, that provision cannot justify discriminatory measures with regard to remuneration or other conditions of employment against workers from other member states once they have been admitted to the public service."*[56] Thus, the ECJ agreed with the AG opinion of the same case which had found that: *"[O]ne cannot dismiss the Commission's argument that it is possible to infer from the fact that the researchers had already been employed by the [research council] for some time that the Italian Republic impliedly admits that the general interests of the State or exclusive tasks of the public authorities are not involved in this case."*[57] [the plaintiffs' emphasis]

55. In its assessments in *Sotgiu* and *Commission v Italy*, the ECJ particularly concluded that even if the positions in question involve activities which otherwise – if they had been assessed only based on their qualitative content – could potentially have been considered as

[55] Case 152/73, *Sotgiu*, para 4.
[56] Case 225/85, *Commission v Italy*, para 11.
[57] Opinion of AG Lenz in Case 225/85, *Commission v Italy*, para 27 *i.f.*

part of the *"public service"* in the meaning of Article 28(4), the fact that the workers had already been admitted to the positions (already forming a part of the *"public service"*), precluded the respective Member States' opportunity to rely on the *"public service"* exception of Article 28(4).

56. In other words, the mere fact that the respective employees of *Sotgiu* and *Commission v Italy* had been admitted to these posts was an independent and sufficient ground for dismissing the Member States' opportunity to rely on the *"public service"* exception of Article 28(4). Once workers from another EU/EEA State have been admitted to the position in question, it is implicitly confirmed that the underlying needs and interests justifying the *"public service"* exception of Article 28(4) are not at stake. Consequently and logically, once admitted, the *"public service"* exception of Article 28(4) cannot serve to justify unequal conditions of employment. Thus, when certain qualitative conditions are fulfilled, Article 28(4) may serve to justify restricted *initial* access to positions in the "public service", but not to justify unequal working conditions once employed to the post in question. This interpretation is supported also in legal theory, for example by *Craig/De Burca*, who adds that if one first is found good enough to be admitted, *"there can be no grounds for"* subsequent unequal terms.[58]

57. As already presented above, the plaintiffs assert that this rule and reasoning derived from *Sotgiu* and *Commission v Italy* fully extends to Article 32 EEA and the factual situation of the main proceedings. This can be derived both from the case-law of the ECJ and legal theory. Articles 28(4) and 32 EEA essentially have similar content and pursue the same objectives. The former concerns employed work whilst the latter concerns the provision of self-employed services on a permanent or temporary basis (freedoms of establishment and services). Already in the AG opinions of *Sotgiu* and *2/74 Reyners*, the similar underlying objectives and functions of Articles 28(4) and Article 32 were emphasised.[59] Also, co-

[58] Paul Craig and Grainne De Burca, *EU Law* (5th edn, Oxford University Press 2011) page 740. See also Sejersted *et al*., *EØS-rett* (3rd edn, Universitetsforlaget 2011) page 365 and thereafter page 397 (fourth paragraph under Point 20.2.5).

[59] See the AG`s opinion in 152/73, *Sotgiu*, EU:C:1973:148, at page 170 (right column) and the AG`s opinion in 2/74, *Reyners*, EU:C:1974:59, at page 665 (left and right column). In the right column at page 665 the AG applies the approach and terminology of *Sotgiu* in his analysis of the Article 32 issue of *Reyners.* See also case *Commission v Belgium*, Case 149/79, EU:C:1980:297 (free movement of workers) where the ECJ essentially adopted the same test as in *Reyners (*right of establishment, *i.e.* self-employed). Compare paras 42 and 43 of *Reyners* with paras 10 and 11 of *Commission v Belgium*.

reading of the judgements in *Sotgiu* (paragraph 4) and *Reyners* (paragraph 42) more than suggests that a similar interpretative approach should be adopted to both Article 28(4) as to Article 32.

58. From legal theory it can be derived, first, that the content and objectives of Article 28(4) EEA extend to Article 32 EEA in general. Secondly, it can even be derived that the *admittance test* set out by *Sotgiu* (paragraphs 4 and 6) and Commission v Italy (paragraph 11) – *i.e.* limiting the applicability of the *"public service"* exception to conditions for *admittance*, delimiting its scope against unequal conditions of employment once admitted – fully extends to the official authority exception of Article 32 EEA:

59. Dashwood et al. inter alia states that*: "Article[s] [28(4)] and [32 EEA] have essentially the same aim, and should be interpreted in an analogous way", and further specifies that "[i]n view of the Court`s decision in Sotgiu (concerning an employed person) it would seem that Article [32 EEA] should be interpreted by analogy as applying only to access to activities connected with the exercise of official authority, not as authorising discriminary conditions of self-employed work once a person had been allowed to take up such activities."*[60] [the plaintiffs' emphasis]

60. Schütze addressed paragraph 4 of *Sotgiu* directly and stated that: *"In a separate jurisprundential line, the Court has also clarified that the public service exception only justifies restrictions on the access to – but not discrimination inside – a position involving public power. Thus, where foreigners have been admitted to public service post, they will benefit from the equal treatment principle. […]. The reasoning under Article [28(4) EEA] applies, mutatis mutandis, to Article [32 EEA] and restrictions to professions involving public power."*[61] [the plaintiffs' emphasis]

61. In the same vein, Kaczorowska-Ireland – in the summary of a chapter addressing in parallel the TFEU equivalents of Articles 28(4) and 32 EEA – concludes that: *"Articles [28(4) EEA] and Article [32 EEA], being exceptions to the fundamental freedoms, have been interpreted strictly by the ECJ. Differing terms are used in Articles [28(4)] and [32] although they have*

[60] Alan Dashwood et al., *Wyatt and Dashwood's European Union Law* (6th edn, Hart Publishing 2011) pages 569 and 571
[61] Robert Schütze, *European Union Law* (Cambridge University Press 2015) pages 607 and 609.

much in common and, indeed, the ECJ has often referred to one of them when interpreting the other. They apply only to access to the employment/activity concerned in that once a migrant worker or a self-employed person is authorised to carry out employment/activity in a host Member State such person must be treated in the same manner as a national worker/self-employed person".[62] [the plaintiffs' emphasis]

62. Sejersted concludes that when an employee or self-employed natural or legal person once is admitted to a public post or to a certain service activity, the opportunity of discriminating against that employee or self-employed person based on Articles 28(4) and 32 EEA is lost, regardless of whether that post or that activity otherwise – based on the qualitative content of the activity – could have fallen under the exceptions of Articles 28(4) and 32 EEA.[63] Sejersted even provides the following argumentative example: *«If a foreign undertaking is allowed to exercise official authority, is it therefore not possible to pay that undertaking less than if a similar domestic undertaking was awarded similar tasks".*[64]

63. The plaintiffs consider that Schütze is exactly on the mark when labelling the *admittance test* of *Sotgiu* and *Commission v Italy* "*a separate jurisprudential line*". Hence, to justify unequal treatment which otherwise would be contrary to Article 76(1) of the Directive by relying on Article 32 EEA, that difference in treatment must pass both the qualitative test derived from the *Reyners* (paragraph 45), implying that only activities directly and specifically connected with and inseparable from the exercise of official authority may fall under Article 32, and pass the *admittance test* of *Sotgiu* and *Commission v Italy,* implying that Article 32 cannot serve to justify unequal framework conditions after the service provider or category of service providers have been admitted to perform the services in question, like *e.g.* public nursing home service contracts where health personnel working for the service provider are vested with coercive powers. Failing to pass any of the two independent and cumulative tests have the consequence that Article 32 EEA is inapplicable and cannot serve to justify the unequal treatment in question.

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[62] Alina Kaczorowska-Ireland, *European Union Law* (2nd edn, Routlegde 2013) page 826.
[63] Sejersted et al., *EØS-rett*, (3rd edn, Universitetsforlaget 2011) page 365 and thereafter page 397 (fourth paragraph under Point 20.2.5).
[64] Sejersted et al., *EØS-rett*, (3rd edn, Universitetsforlaget 2011) page 397 (fourth paragraph under Point 20.2.5) (office translation).

64. Consequently, the exception in Article 32 EEA cannot be viewed as a purely objective and qualitative limitation of the scope of the EEA Agreement beyond the competence of judicial review of the courts and the EU/EEA surveillance bodies, as the defendant seems to argue. Notably, the question of whether Article 32 EEA applies to a given *"activity"* arises only if the reliance on Article 32 EEA is connected to an infringement of the equal treatment principle in Article 76(1) of the Directive or a restriction on the freedoms of establishment or services. Only then must it be determined whether Article 32 EEA can justify the infringement/restriction in question. Hence, the *admittance test* derived from *Sotgiu* and *Commission v Italy* precludes that an EEA State can confine oneself to only undertake a purely qualitative assessment of whether the activity in question has a certain qualitative content completely detached from the further context, *e.g.* the fact that this category of service providers have already been admitted to perform that particular activity. It is recalled that the Norwegian Government openly admits that its invocation of Article 32 has nothing to do with consistently reserving the alleged coercive powers to a certain category of economic operators but is only invoked in order to reserve procurements for "ideal organisations" (see the Norwegian Government's letter to the Norwegian Government referred to in paragraph above).

65. Lastly, the scope of the *admittance test* cannot be limited only to cases where Article 32 EEA is invoked to justify discrimination based on nationality.[65] There is nothing in the wording, structure, objective, context or previous application of Article 32 EEA which would support such an interpretation. Also; such an interpretation would erroneously imply that Article 32 EEA would exempt more widely in cases where the restriction in question was not based on nationality, in clear breach of the strict interpretation instructed by the ECJ. Moreover, such an interpretation would also be inconsistent with the historical context of the provision, which was to allow member states to place their own nationals in positions where official authority was exercised.

66. Also, the equal application of Article 32 EEA - including the *admittance test* – to both nationality-based discrimination as well as non-nationality-based unequal treatment, can

[65] Thus, the plaintiffs take the view that ESA interpreted relevant legal source incorrect when its Decision 154/17/COL found that the admittance test of *Sotgiu* and *Commission v Italy* only catches nationality-based discrimination (see Item 4.2.4, pages 15 and 16, in particular the two final paragraphs). In this and the next paragraph the plaintiffs argue against that interpretation.

logically be inferred from C-438/08 *Commission v Portugal*. In that case, the ECJ held that since Article 31 EEA also encompasses indistinctly applicable restrictions not based on nationality, then the exception of Article 32 EEA must also be able to exempt indistinctly applicable restrictions.[66] In turn, the logical implication of this is that the narrowing of the scope of the exception in Article 32 following from *Sotgiu* and *Commission v Italy*, must also extend to unequal treatment not based on nationality but between different categories of economic operators, like *e.g.* "ideal" and non-ideal service providers. That is a logical consequence flowing from the fact that the relevant fundamental freedoms as well as the exceptions of Articles 28(4) and 32 also are applicable to indistinctly applicable restrictions. If not, the result would be an asymmetry between the application of Article 32 EEA on nationality-based discrimination and the application of Article 32 EEA on situations of non-nationality-based unequal treatment.

4.2 1. Is the 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:

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?

67. The plaintiffs consider that also this sub-question must be answered in the affirmative. First, it is the health personnel working for the service provider and not the service provider who is vested with the relevant coercive powers. This precludes the application of Article 32 EEA to the situation at hand. Second, since the coercive powers in these cases are granted in order to provide a patient with health care and therefore a safe and secure environment, it lacks the nexus to "any exercise of official authority." Article 32 EEA is inapplicable also for this reason.

[66] See *Commission v Portugal*, C-438/08, EU:C:2009:651, paras 13-14 and 32-33, where it inter alia reads: "*Article [31 EEA] includes not only a prohibition of discrimination but also a prohibition of all restrictions rendering the exercise of the freedom of establishment less attractive. Article [32 EEA] containing a general exception clause to the principle of freedom of establishment laid down in Article 43 EC, its application cannot, consequently, be restricted to discriminatory measures alone*".

68. First; It is the health personnel working for the service provider who are given the competence to exercise the relevant coercive powers.[67] This applies irrespective of whether the services are produced in-house or by external, private "ideal" or non-ideal providers. In other words, the authority to exercise coercive health care is conferred on authorised health personnel pursuant to relevant sectoral legislation and does not derive from the contractual relationship between a supplier and contracting authority.

69. Any decisions on the use of coercive health care are taken by authorised health personnel, autonomously and based on the conditions laid down in the law and professional health care assessments. This means that health personnel, if they qualitatively can be said to exercise official authority in the meaning of Article 32, do so based on powers delegated to them personally, rather than powers delegated to the service provider.

70. Thus, in accordance with paragraph 47 in *Reyners,* the alleged exercise of official authority conducted by the health personnel must be considered separable from the service provider's contractual services. Only the health personnel's own activities may potentially be directly and specifically connected with the alleged exercise of official authority.[68] Otherwise, the exception in Article 32 would be given *"a scope which would exceed the objective for which this exemption clause was inserted*".[69]

71. As an illustration, the plaintiffs point to the cases on whether captains and officers of merchant vessels are employed in the *"public service"* under Article 28(4) EEA. In considering that question, the Court stated that it was of no relevance whether they were employed publicly or privately, because "*in order to perform the public functions which are delegated to them, masters act as representatives of public authority in the service of the general interests of the flag state*".[70] In other words, even privately employed positions can

[67] As informed by Item 3.3.2 of the Request, already referred to above, the term "health personnel" encompasses *"both personnel holding an authorisation or licence (including medical practitioner and general nurse) and personnel in the health and care service and pupils and students in training as health personnel who provide health care".*
[68] Case 2/74, *Reyners*, para 45.
[69] Case 2/74, *Reyners*, para 43.
[70] See the judgements in *Anker and others v Deutschland* ("Anker"), C-47/02, EU:C:2003:516, para 62, *Marina Mercante Española v Administración del Estado* ("Marina Mercante Española"), C-405/01, EU:C:2003:515, para 43. Notably, while they were delegated powers which qualitatively appeared to qualify for application of Article 28(4) EEA, these powers were not exercised on a sufficiently regular basis to actually qualify for use of the exemption.

be delegated public powers which are clearly separate from their ordinary employment by a private undertaking, in that they act as a representatives of public authority when exercising those powers.

72. In that regard it is worth mentioning that the ECJ, in an earlier ruling, had clarified that exempting the whole maritime transport sector would be a too general and remote application of the *"public service"* exception, even if some posts could be covered.[71] The cases, together, illustrate that while individuals can be exempt as employed in the *"public service"* when they are delegated certain public powers, those public powers are separable from the general work they do for a private undertaking and in that industry or sector more generally. Extending Article 32 EEA to cover the legal entity which is the contractually-based provider of nursing homes services when the powers to exercise coercive powers are conferred upon the individual health personnel, would therefore amount to a too remote and general application of Article 32 EEA.

73. Like in those maritime cases, health personnel are delegated the same public powers regardless of whether they are employed privately or by the state, and regardless of which private employer the state procures the nursing home services from. In fact, when a new service provider – be it "ideal" or non-ideal – wins a public nursing home service contract, the health personnel working at that nursing home are normally transferred to the new service provider in line with Chapter 16 of the Working Environment Act. As far as the plaintiffs understand, the defendant's contracts with new nursing home service providers normally includes an obligation to take on employees from the former service provider.

74. Also, any decision on the use of coercive power by health personnel must be supervised within a set time period by the County Governor, either if appealed or by its own initiative.[72] This supervision only concerns itself with the few specific instances of decisions on coercion, and not the wider organisation and provision of nursing home services. For the sake of completeness, it is mentioned that the ECJ has previously concluded that nurses in

[71] See the judgement in *Commission v Hellenic Republic*, C-290/94, EU:C:1996:265, paras 34-35.
[72] For the importance of State supervision, we would point to C-438/08, *Commission v Portugal* where direct state supervision was a central reason why private vehicle inspection did not constitute exercise of official authority – which, in other words, still remained with the state due to its direct supervision – see paras 38-45. See also *Commission v Germany*, C-404/05, EU:C:2007:723, paras 43-44.

public hospitals do not fall under the *"public service"* exception of Article 28(4) EEA.[73] The plaintiffs fail to see any reason why the conclusion should be different for nursing homes under Article 32 EEA.

75. Second; the coercive powers vested with the individual health personnel is provided in order to provide safe and secure health care for the patients. Patients in nursing homes may due to sickness and age require a certain level of protection from themselves and each other. The power to use coercion vested with the individual health care personnel therefore stems from the need to provide health care and not to exercise official authority. As such, the coercive powers cannot be invoked to justify the application of Article 32 EEA since this provision presupposes that the coercion is employed as a part of the exercise of "official authority."

76. Finally, if Article 32 EEA comes into play on public nursing home contracts based on the coercive powers that health personnel working at nursing homes are vested with, the plaintiffs predict that the Norwegian Government and contracting authorities will seek to extend the application of Article 32 EEA to all health and social services where the personnel have some degree of coercive powers. The immediate consequence would be the "switching off" of EEA public procurement and free movement rules. This would be contrary to the objectives of the fundamental freedoms and public procurement rules, including the objectives behind the establishment of the "light regime" in Article 74 to 77 of the Directive. Also, it would be contrary to Article 32 itself, as it – according to the case-law of the ECJ – shall be construed narrowly and not be given a scope going beyond the objectives behind Article 32.

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

77. By the third sub-questions regarding the official authority exception, the Request asks the EFTA Court to give guidance on *"how the wording "even occasionally" in Article 32 of the EEA Agreement, read in conjunction with Article 39, [shall] be construed?"*

[73] See the judgement in *Commission v France*, Case 307/84, EU:C:1986:222, paras 11-13 and Case 149/79, *Commission v Belgium*, para 9.

78. The plaintiffs submit that the wording *"even occasionally"* must be disregarded or at least not emphasised, when interpreting Article 32 EEA. In the plaintiffs' view, Article 32 should instead be read in line with its wider purpose and in relation Article 32 EEA which essentially pursues the same underlying objectives.[74]

79. As will be elaborated below, the plaintiffs submit that Article 32 EEA and its purpose, in line with the similar exception in article 28(4) EEA, require *that such rights are in fact exercised on a regular basis by those holders and do not represent a very minor part of their activities."*[75] In *Anker* and *Marina Mercante Española,* captains of fishing vessels had certain duties connected to the maintenance of safety and the exercise of police powers. Despite this, the position as captain was not accepted as part of *"public service",* because the exercise of those public powers *de facto* constituted an insignificant part of their powers.[76]

80. The plaintiffs submit that the view taken in *Anker* is fully transferable to Article 32, even though Anker concerned the derogation for workers under Article 28(4) EEA, and even though the wording of Article 32 EEA contains the terms *"even occasionally".*[77] Both Article 28(4) and Article 32 have the same underlying function and objectives.[78] In the same way, and for the same reason, both of them must also be interpreted restrictively, limited to what is necessary to safeguard the interests it allows the EEA States to protect.[79]

81. Such an interpretation is supported in legal theory by Sejersted. He first points at the fact that a purely textual interpretation would encompass activities which *"even occasionally"*

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[74] Teleological and systematic interpretations are generally given preference over strict adherence to a literal interpretation of the text. That is even more so the case for the often-vague provisions in primary law, see Rudolf Streinz (2021) *Interpretation of EU Primary Law* in Karl Reisenhuber (Ed.) *European Legal Methodology* (2nd edn, Intersentia 2021) pages 167-171 and Koen Lenaerts and José A. Gutiérrez-Fons (2020) *Les méthodes d'interprétation de la Cour de justice de l'Union européenne* (Bruylant 2020) pages 26-28 and 54.
[75] C-47/02, *Anker,* para 63. See similarly in C-405/01, *Marina Mercante Española,* para 44.
[76] C-47/02, *Anker,* para 65. See similarly in C-405/01, *Marina Mercante Española,* para 45 and *Commission v France,* C-89/07, EU:C:2008:154, paras 15-16, which both state the same more generally for the merchant navy, and also in regard to officers/chief mates.
[77] See also the opinion of AG Spuznar in *Gebhart Hiebler v Walter Schlagbauer,* C-293/14, EU:C:2015:472, para 33, where he was clear that this reasoning was also applicable to article 51 TFEU, corresponding to article 32 EEA. The judgment of the Court did not need to address article 51 TFEU, because it found that article 45(4) TFEU applied.
[78] For the objectives pursued by the provisions, see the opinions of AG Wahl in *Iraklis Haralambidis v Calogero Casilli,* C-270/13, EU:C:2014:1358, para 35 and AG Mayras in Case 2/74, *Reyners,* page 665.
[79] C-404/05, *Commission v Germany,* para 37.

are connected with official authority. However, in the next sentence he states that there *"must be a lower limit for how small the occurrence of exercise of official authority can be in order for the exception in Article 32 EEA to come into play. It is reason to believe that the court will give a narrow interpretation, and apply similar principles as for workers. As mentioned, it is a condition under Article 28(4) that official authority is exercised regularly and represents not just a very minor part of the position in question."*[80]

82. The plaintiffs have above provided information on the low relative frequency of use of coercive powers within the nursing homes of the Municipality. These numbers indicate that coercive measures are necessary for less than 2,8 % of patients. Thus, viewed in relation to the number of patients, very few decisions on coercive health care are adopted.

83. Against that legal and factual background, and even assumed that exercise of coercive powers *prima facie* would fall under Article 32 based on the qualitative content of the relevant coercive powers, the plaintiffs submit – based on paragraph 63 of *Anker* – that the alleged exercise of coercive powers are not exercised on a sufficiently regular basis, as they constitute only a very minor part of the health personnel's overall tasks.

84. Therefore, the plaintiffs suggest that the EFTA Court should answer this sub-question as follows: The wording of *"even occasionally"* should be disregarded or at least not emphasised. Article 32 should instead be understood in the same manner as Article 28(4), in the sense that it shall be construed to require that the alleged exercise of official authority must take place om a regular basis.

[80] Sejersted et al., *EØS-rett*, (3rd edn, Universitetsforlaget 2011) page 397.

5 On the reservation for non-profit [ideal]organisations:

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

5.1 Introduction and main contentions

85. The plaintiffs submit that the EFTA Court should answer this question in the affirmative, and thus conclude that Article 76(1) of the Directive precludes the reservation of public procurements of health and social contracts for "ideal organisations" on the terms laid down in the relevant national legislation.

86. More concretely, the principle of equal treatment, which according to Article 76(1) shall be observed by national rules on the award of contracts subject to the "light regime" of Articles 74 to 77 of the directive, precludes the exclusion of non-ideal service providers on the terms laid down by the National Reservation Basis.

87. In support of the above-mentioned main conclusion, the plaintiffs firstly submit that "ideal" and non-ideal providers are in a comparable situation and that the exclusion of non-ideal providers from public procurements thus amounts to a *prima facie* infringement of the equal treatment principle. Non-ideal organisations are excluded from participating in tender competitions whereas the ideal organisations are allowed. This clearly infringes the equal treatment obligation, as non-ideal organisations are prevented access to a market for certain contracts. Secondly, the plaintiffs submit that the *prima facie* unequal treatment cannot be considered objectively justified.

88. In the next section below, the plaintiffs will systematically address every of the above-mentioned steps of the equal treatment assessment foreseen by Article 76(1). First, however, in the following paragraphs, the plaintiffs present a brief introduction into the relevant changes brought by Directive 2014/24, compared to the previous procurement directive (2004/18). Also, the plaintiffs provide their view on the legal implications which can be derived from the introduction of the Directive, including its concrete implications for the National Reservation Basis.

89. In practice, public health and social service contracts fell outside the scope of the previous directive 2004/18.[81] Only when the public service contract at issue was *"of certain cross-border interest"* – for example due to a high contract value and an accessible geographic location – would EEA primary law come into play.[82] For contracts of non-cross-border interest there was no transparency obligation at all, while for contracts of cross-border interest it was sufficient to advertise them at local or regional level.[83]

90. Directive 2014/24 repealed the distinction between Annex II A services (priority services) and Annex II B services (non-priority services) and made public health and social service contracts subject to considerable regulation by the Directive, via the introduction of the "light regime" of Articles 74 to 77, and by the introduction of three socially motivated situation-specific exemptions for non-profit-based emergency ambulance services (Article 10 (h)), sheltered workshops (Article 20) and non-profit-based employee-owned suppliers of certain services (Article 77).

91. During the early preparatory stages of the European Commission's preparatory works behind the proposal for the act which later became Directive 2014/24,[84] it was identified a desire for more cross-border competition for public health and social service contracts, as – despite the high level of public spending on the public procurement of such services – the level of transparency and advertising were very low. In response, Directive 2014/24 Article 75(1) requires EEA-wide advertising for all such contracts above the 750 000 Euro threshold referred to in Article 74. While Article 76(1) and (2) prescribe that national rules governing such procurements must be introduced in compliance with the principles of

[81] Public health and social service contracts above a certain threshold fell under Category 25 of Annex II B and were thus subject solely to Articles 23 and 35(4).
[82] C-113/13, *Spezzino*, para 46.
[83] AG opinion in C-436/20, *ASADE*, para 133.
[84] The above-mentioned practical implications of Directive 2004/18's regime for public health and social service contracts was an important backdrop for the European Commission when it started to prepare the new public procurement directive which later became Directive 2014/24. During the early preparatory stages, the Commission published an evaluation report identifying that *"some sectors appear to advertise a high proportion of their contracts in the OJEU while others do not. There are three sectors, in particular, health, social services and education where there are high levels of expenditure but low levels of publication. […] [A]round 94% of expenditure in the health or social services sector is not spent through contracts advertised in the [Official Journal of the European Union (hereinafter the "OJEU"]. […] [O]f the 5% of GDP spent by governments on health social security and education, only a marginal amount is subject to publication in the OJEU. […]. Procurement of education, health and social services are exempt from the full provisions of the directives, in so far as they are services covered by Annex II B of the Classic Directive."* [the plaintiffs' emphasis], see the Commission Staff Working Paper, *Evaluation Report, Impact and Effectiveness of EU Public Procurement Legislation Part 1*, SEC(2011) 853 final, pages 27-28.

transparency and equal treatment, and facilitating that contracting authorities may put decisive or even sole emphasis on socially motivated qualitative criteria when designing and applying contract award criteria.

92. In other words, and contrary to the situation under Directive 2004/18, where public health and social contracts either fell completely outside the ambit of EEA law or were only subject to EEA primary law, public health and social service contracts above the 750 000 Euro threshold are now subject to the above-mentioned rules of Directive.

93. From this the plaintiffs derive, that for public health and social service contracts falling under Articles 74 to 77 of the Directive, there is in practice no room left for the difference in treatment which the National Reservations Basis implies.[85] In other words – and in particular due to the possibility contracting authorities have to put decisive or even full emphasis on socially motivated qualitative criteria when designing and applying contract award criteria, *cf.* Article 76(2) – it seems inconceivable and merely theoretical, that it should be possible to objectively justify a *prima facie* infringement of the equal treatment principle, where a certain category economic operators is automatically pre-excluded from public procurements of health and social service contracts, like the National Reservation Basis allows for just based on the fulfilment of vague general presumptions.

94. To be clear, the introduction of the requirements and opportunities inherent in Articles 75(1) and 76(1) and (2) – in combination with the assumingly exhaustive list of socially motivated exemptions in Article 10(h), 20 and 77 – leaves no room behind for further carve-outs from the scope of the Directive and its "light regime" in Article 74 to 77. Any such further carve-outs would seem contrary to both the system and structure of the Directive and the assumed

[85] Directive 2014/24 has made public health and social contracts above the 750 000 Euro value threshold subject to the Directive via its systematic regulation of such contracts. The services which the Spezzino case concerned were mixed in the sense that the transport aspect was covered by Annex II A of Directive 2004/18, while the medical aspect of the contractual performance was covered by Annex II B of the same directive. Against that backdrop, the ECJ concluded in paragraph 44 that *"[i]f the value of […] the transport services exceeds that of the medical services, it must be held that Directive 2004/18 precludes legislation such as that at issue in the main proceedings which provides that the local authorities are to entrust the provision of urgent and emergency ambulance services on a preferential basis and by direct award, without any advertising, to the voluntary bodies mentioned in the agreements"*. [the plaintiffs' emphasis] *Spezzino* paragraph 44 could then be read in light of that judgment's paragraph 41, which describes supplementary requirements that Annex II A services were under in terms of putting "contracts to competition by means of prior advertising" and rules on "contract award criteria". These latter criteria are exactly those that have now been made applicable for such contracts via Articles 75 and 76 of the Directive.

intentions of the legislator, as the latter confined itself to the above-mentioned three exemptions and did not introduce a more general one. Illustrative for that latter point, is the proposal put forward by the European Parliament's «Committee on employment and social affairs» during their reading of the proposal for the directive which later was adopted as Directive 2014/24. The committee put forward the following proposal for a new Item 2a in Article 76: *"Contracting authorities may choose to limit the participation in a tender procedure for the provision of social and health services to non[-]profit organisations, provided that a national law that is compatible with European law provides for restricted access to certain services for the benefit on non[-]profit organisations, in line with the ECJ's jurisprudence. The call for competition shall make reference to this provision. The basic principles of transparency and equal treatment should be respected".*[86] However, this proposal was not included in the finally adopted Directive 2014/24.

95. Above, the plaintiffs have submitted that there is in practice no room left for objectively justifying prima facie infringements of the equal treatment principle prescribed by Article 76(1). Yet, for the sake of completeness, the plaintiffs will nevertheless provide a more comprehensive application of the Directive's application of Article 76(1) on the National Reservation Basis. The structure of that assessment is as follows: In Item 5.2.1 the plaintiffs present some general remarks on the scope of the Directive and EEA law in the field of health and social services. Thereafter, in Item 5.2.2, the plaintiffs substantiate that "ideal" and non-ideal providers are indeed in a comparable situation in the meaning of Article 76(1) of the Directive. Furthermore, in Item 5.2.3, one paragraph is spent to specify that a *prima facie* infringement of the equal treatment principle exists. Finally, in Item 5.2.4, the plaintiffs substantiate that the requirements for considering the prima facie infringement of the equal treatment principle as objectively justified, are not fulfilled. Item 5.2.4 is divided into several sub-sections as the plaintiffs first address the legitimate objectives invoked, the National Reservation Basis' suitability for pursuing any legitimate objectives, and, finally, the proportionality of the National Reservation Basis. Even the proportionality part is divided into sub-sections to highlight the arguments made. At last, the plaintiffs conclude that the Directive precludes national legislation of such content as the National Reservation Basis.

[86] The Committee's proposal was dated 26 September 2012.

5.2 Concrete application of the Directive on the National Reservation Basis

5.2.1 Preliminary remark : Even though the National Reservation Basis concerns the health and social sector a genuine review of EEA law compatibility must take place

96. Directive 2014/24 and its Articles 74 to 77 has made the public procurement of health and social service contracts subject to systematic regulation by EEA secondary law. That legislative development confirms and specifies that the EEA States' competence to regulate their health and social sectors must take place within the substantive boundaries of EEA law. The latter point was elegantly spelled out by the AG in case C-120/95 *Decker: "[T]he fact that the national rules in question concern social security by no means has the effect of removing them, at least not automatically, from the scope of the Community rules on the movement of goods and provision of services. And I would add straight away that the Court's consistent view that `Community law does not detract from the powers of the Member States to organise their social security systems' by no means implies that the social security sector constitutes an island beyond the reach of Community law [….]".*[87] [the plaintiffs' emphasis]

97. After citing the AG Tesauro's opinion from *Decker* delivered in 1997, the AG in *ASADE* added: *"That was true back then and it is all the more so now. While Member States remain autonomous as regards the organisation of their social security systems, that autonomy does not prevent the application of the fundamental freedoms laid down in the Treaties, of which public procurement rules are parts and parcel."*[88] [the plaintiffs' emphasis]

98. Consequently, which is also explicitly prescribed by Article 76(1); the principle of equal treatment extends to the procurement of public health and social service contracts above the 750 000 Euro threshold referred to by Article 74 of the Directive. As the principle of equal treatment referred to in Article 76(1) of the Directive is derived from the freedoms of establishment and services, it is clearly relevant that ECJ case-law, applying EU/EEA primary law, has genuinely reviewed whether national measures regarding health and social services amounts to unjustified restrictions on the fundamental freedoms or unjustified

[87] Opinion of AG Tesauro in *Decker v Caisse de maladie des employés privés,* C-120/95, EU:C:1997:399, para 17.

[88] AG opinion in C-436/20, *ASADE,* para 5. Thus, the provision included in Article 1(5) of the Directive does not say more than which can be derived from the case-law cited here, *i.e.* that despite the outset which is that the EEA States are free to organise their social security systems, these systems must be compatible with EEA law, something which is subject to the review of national courts, the Authority and the EFTA Court.

infringements of the equal treatment principle. Case C-169/07 *Hartlauer* (paragraph 33 and 41),[89] *Spezzino* (paragraphs 52 and 53) and the AG's opinion in *ASADE* (from paragraph 114) illustrate that a genuine and strict review of *inter alia* the National Reservation Basis' proportionality must take place.[90]

5.2.2 First step of the application of the equal treatment principle on the National Reservation Basis: "Ideal" and non-ideal providers are in comparable situations

99. When reviewing whether the National Reservation Basis amounts to an unjustified infringement of the equal treatment principle, the first step of the analysis is to verify that "ideal" and non-ideal providers of nursing home and other health and social services are in comparable situations in the meaning of the equal treatment principle.[91] The *"comparability of situations must be assessed in the light of the subject matter and purpose of the [relevant EEA law] measure […]".*[92]

100. Thus, applied on the situation at hand, it will have to be determined whether "ideal" providers are in the same situation as non-ideal providers as regards the objectives pursued by Articles 74 to 77 of the Directive.[93]

101. The plaintiffs submit that "ideal" and non-ideal providers are in comparable situations within the meaning of the equal treatment principle.

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[89] See the judgement in *Hartlauer Handelsgesellschaft v Wiener Landesregierung and Oberösterreichische Landesregierung*, C-169/07, EU:C:2009:141.
[90] See also C-157/99, *Smits and Peerboms*, para 54.
[91] AG opinion in C-436/20, *ASADE*, para 119; *Conacee v Diputación Foral de Guipúzcoa and Feacem* ("Conacee"), C-598/19, EU:C:2021:810, para 38. Regarding *Conacee* it shall be specified that it concerned the interpretation of Article 20 of the Directive. Specifically, the question was whether EU/EEA States can set stricter and more narrow criteria than prescribed by the wording of Article 20 and thereby exclude for-profit economic operators encompassed by Article 20's wording. Notably, Directive 2014/24 had extended the scope of the Article 20 exception compared with a quite similar exception provided by Article 19 of Directive 2004/18. The plaintiffs assume that this particular context made the AG and the court more inclined to accept justifications for unequal treatment compared to the Article 74 to 77 context which the case at hand concern. In other words, the plaintiffs submit that the room for considering unequal treatment justified is even smaller under Article 76(1) than under Article 20(1). That said, *Conacee* prescribes a strict proportionality test (para 44), where the referring court is instructed to verify whether the non-profit providers can actually achieve the relevant objectives *"as effectively"* as the non-profit providers. If the national court answers that question in the affirmative, our understanding is that the national court shall find the unequal treatment to be disproportionate.
[92] AG opinion in C-436/20, *ASADE*, para 119 and the case-law referred to there.
[93] AG opinion in C-436/20, *ASADE*, para 120; C-598/19, *Conacee*, para 38.

102. In that regard, reference is firstly made to Article 19 of the Directive which can be seen as a *lex special* of the equal treatment principle referred to by Article 76(1). Article 19 specifies that economic operators – *i.e.* someone offering goods or services in a market – shall not be rejected from public procurements due to their legal form. According to the *Parsec* case,[94] Italian legislation excluding non-profit entities from public procurements – instead requiring them to be limited companies – was contrary to Article 19. The National Reservation Basis excludes non-ideal providers based on their lack of legal status as "ideal organisation". Hence, the plaintiffs submit that already Article 19 and the equal treatment principle suggest that the point of departure should be that economic operators able to perform the same services in terms of content and quality are in comparable situations. Recital 14 of the Directive further reinforces the latter point, as it states explicitly that the concept of *"economic operator"* is *"to be interpreted 'in a broad manner', so as to include any persons or entities active on the market 'irrespective of the legal form under which they have chosen to operate".*[95]

103. Secondly, as already indicated in the final sentence of the last paragraph, economic operators able to perform the same services in terms of price and quality should be considered to be in comparable situations, as the objective of Article 74 to 77 precisely is to facilitate that economic operators offer resource-efficient health and social services subject to the level of quality requested by the EEA State. As substantiated in Item 2 above, there is no factual basis for claiming that nursing home or other health and social services provided by "ideal" providers are of better quality.

104. Based on the considerations in the last paragraph above, the plaintiffs agree with the AG opinion in *ASADE,* which in paragraphs 122 and 123 went far in concluding that when two categories of economic operators *"perform similar social services, and provide services with the same level of quality at similar costs [they are in] a comparable situation as regards the objective of the regime under Article 74 to 76 of Directive 2014/24".*

[94] *Parsec v Ministero delle Infrastrutture e dei Trasporti* and ANAC ("Parsec"), C-219/19, EU:C:2020:470 paras 26 and 29.
[95] C-219/19, *Parsec,* para 22.

105. Also, *Conacee* (paragraphs 38 and 39), *Spezzino* (paragraph 52), *CASTA* (paragraph 56) and the AG opinion of *Sodemare* (paragraph 37)[96] expressly or implicitly conclude that non-profit or voluntary organisations are in a comparable situation as ordinary for-profit making providers.

106. Moreover, if EEA primary law's freedom of establishment had been applied directly on a national measure which excludes a certain category of economic operator from a considerable part of the market, like the National Reservation Basis effectively does, that would clearly have amounted to a *restriction*, without having to examine explicitly whether the two categories of economic operators are in a comparable situation.[97] In the plaintiffs view, this latter perspective further underpins that "ideal" and non-ideal providers are in a comparable situation as the equal treatment principle prescribed by Article 76(2) flows from the freedom of establishment and services.

107. Also, with obvious relevance for this assessment of whether "ideal" and non-ideal providers are in a comparable situation in the meaning of the equal treatment principle, reference is made to Item 2 above, where the plaintiffs substantiate the ***de facto*** commercial character of the "ideal" organisation's business model, including but not limited to the facts that they employ professional workforces in all aspects of their activities, are allowed to earn profits from the reserved public health and social service contracts, are allowed to freely allocated those profits to all other aspects of their business, including purely commercial activities as real estate investments and management, and the investment and ownership in insurance companies, management support services and other. According to the plaintiffs, the factual features listed in this paragraph and in Item 2 above, further support that "ideal" and non-ideal providers are in a comparable situation in the meaning of the equal treatment principle.

108. Against the background of the considerations in the preceding paragraphs, the plaintiffs submit that "ideal" providers are in a comparable situation with non-ideal providers, as both categories of economic operators are equally able to satisfy the objectives set out by Article 74 to 77, in particular the list of qualitative objectives listed by Article 76(2).

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[96] See the opinion of AG Fennelly in C70/95, *Sodemare*, EU:C:1997:55.
[97] AG opinion in C-436/20, *ASADE*, para 130 and the case-law further cited there; Case C-400/08, *Commission v Spain*, paras 63-70

5.2.3 Existence of *prima facie* unequal treatment between *"ideal"* and non-ideal providers

109. Above, the plaintiffs have found that "ideal" and non-ideal providers are in a comparable situation. In light of that, it can be concluded that the difference in treatment between "ideal" and non-ideal providers amounts to a *prima facie* infringement of the principle of equal treatment.[98]

5.2.4 The difference in treatment cannot be considered as objectively justified

110. The plaintiffs contend that the *prima facie* difference in treatment between economic operators in a comparable situation which the National Reservation Basis authorises, cannot be considered as objectively justified.[99]

111. First, reference is made to Item 3.2.1 of the Request where the invoked objectives behind the National Reservation Basis are referred.

112. One invoked objective can be summarised as a desire to preserve "ideal organisations" as suppliers under public health and social service contracts to maintain *"a welfare mix"* between "ideal" and non-ideal providers. The objective of protecting and facilitating the existence of a certain category of economic operators to maintain a certain industry structure cannot *as such* be considered a legitimate objective capable of justifying the *prima facie* infringement of the equal treatment principle.[100]

113. Another objective invoked by the consultation paper behind the National Reservation Basis is that of compensating for *the "historical pension costs"* that certain "ideal" providers have had due to previous requirements set by contracting authorities. However, as explained in Item 2 above, that alleged drawback has already been tackled and mitigated via a financial support scheme for the relevant providers of childcare services and specialist medical services. Hence, that invoked objective can no longer serve as a legitimate objective

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[98] C-113/13, *Spezzino,* para 52. In the AG opinion in C-436/20, *ASADE,* paras 122-124 this step of the assessment, *i.e.* to conclude that the National Reservation Basis implies *prima facie* unequal treatment, is undertaken implicitly and not spelled expressly out. Similarly, C-598/19 *Conacee* does not address this step expressly but implicitly, *cf.* paras 39-41.

[99] See the review of objective justification conducted in the AG's opinion in C-436/20, *ASADE,* paras 124-125; C-113/13, *Spezzino,* from para 56.

[100] C-400/08, *Commission v Spain,* paras 95-98.

capable of justifying the prima facie infringement of the equal treatment principle which the National Reservation Basis constitutes.

114. Thus, the remaining objectives invoked as reasoning behind the National Reservation Basis can clearly be seen as qualitative objectives connected to the alleged qualities of the "ideal" organisations and the services they supply, including potential innovation and development of such services, and alleged positive synergies going beyond the mere contract performance. However, also these considerations cannot qualify as an objective reasoning, cf. further below.

5.2.5 The plaintiffs dispute that the National Reservation Basis may qualify as an objective justification

115. Plaintiffs do that "ideal" providers are more suitable for achieving such qualitative objectives. For example, as specifically addressed in Item 2 above, there is no empirical foundation supporting that provide health and social services of higher quality. Consequently, the plaintiffs dispute that the National Reservation Basis is a suitable mean for achieving the invoked qualitative objectives, as tender competitions open for all economic operators would provide contracting authorities with a much broader selection of offers in terms of both quality and price. Based on this and the preceding paragraphs, it can already here be concluded that the National Reservation Basis is not meeting the objective justification criteria as the difference in treatment is not a suitable mean for achieving the invoked qualitative legitimate objectives.

5.2.6 The National Reservation Basis is disproportionate and cannot be justified

5.2.6.1 Structural and substantive changes introduced by Directive 2014/24 highlights the disproportionality of the difference in treatment allowed by the National Reservation Basis

116. As set out above, the plaintiffs' point of departure is that the structural and substantive changes introduced by the Directive – compared to the regime under Directive 2004/18 – have the legal consequence, that there is no practical room left for objectively justifying the kind of difference in treatment which the National Reservation Basis establishes. Logically, it is inherent in that argument that such a difference in treatment cannot satisfy the proportionality requirement. As above, reference is made to the content of Article 76(2) which confirms the opportunity contracting authorities have to put decisive or sole emphasis on qualitative criteria when designing and applying contract award criteria.

117. Moreover, the introduction and existence of the three exemptions in Articles 10 (h), 20 and 77 – combined with the absence of a more general reservation basis in the Directive – suggest that the legislator deliberately avoided the inclusion of such a more general reservation. The above-mentioned non-adopted proposal for a general reservation basis from the European Parliament's Committee on employment and social affairs further substantiates such a contention. In other words, it seems to be an adequate interpretation of the Directive that the three specific exemptions represent an exhaustive list of exemptions. At least, those exemptions suggest that a strict proportionality review should be adopted.

118. Furthermore, the final paragraph of recital 114 of the Directive confirms that *"Member States and public authorities remain free to provide those services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided that such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination."*

119. The structural and substantive features addressed in this sub-section – alone and together – substantiate that difference in treatment allowed by the National Reservation Basis, must be considered disproportionate. Partly as the existence of the three specific exemptions suggest that they are exhaustive, and partly due to all the alternatives to unequal treatment pointed out by Article 76(2) and recital 114 of the Directive, of which the application of targeted qualitative criteria appears as the most accurate means in order to ensure the desirable level of service quality.

5.2.6.2 Relevant case-law under Directive 2014/24 prescribes a strict proportionality assessment

120. However, for the sake of completeness, the plaintiffs will nevertheless provide their view on the proportionality criterion, which also must be fulfilled to consider a difference in treatment as objectively justified.

121. With regard to the proportionality criterion, the plaintiffs submit that contracting authorities' opportunity to design and put decisive or even sole emphasis on socially motivated qualitative contract award criteria, like the ones explicitly listed in Article 76(2),

makes it disproportionate with national rules authorising predetermined exclusions of a certain category economic operators from public procurements just based on *de facto* general presumptions about the qualitative objectives which allegedly can be achieved by automatically reserving public contracts for another category of economic operators.

122. In that regard, the plaintiffs agree with the approaches taken to the proportionality review by the AGs in *ASADE* and *Conacee*. In *ASADE* the AG makes a reference to paragraph 42 of the judgement in *Conacee* and states that *"it is clear to me that the case-law of the Court cannot be interpreted as allowing certain entities to be excluded from the application of the simplified regime owing solely to the fact that they are profit-making. In particular, I do not see how the automatic exclusion of profit-making entities from the scope of national legislation ensures that the services at issue are provided in an appropriate way […]. Moreover, such automatic exclusion does not appear to contribute to the quality, continuity, affordability, availability and comprehensiveness of those services, as required by Article 76(2) of Directive 2014/24. In implementing the simplified regime, it would appear more appropriate to focus on the ability to provide cost-effective, quality social services, rather than on the nature of the entity providing those services. Consequently, it is inconceivable, in my view, that such an exclusion is either justified or proportionate; it is therefore contrary to the principle of equal treatment."*[101] [the plaintiffs' emphasis] Notably, as also mentioned in Item 2 above, even in *ASADE* the remuneration received by the "non-profit organisations" in question limited to *"reimbursement of costs, which does not entail any business profit".*[102] Yet, the AG made the difference in treatment subject to such a strict proportionality review, finding it "inconceivable" that the exclusion of for-profit making service provider could be proportionate and justified.

123. While the AG's opinion in *Conacee* held that*: "[T]he requirement that the Special Employment Centres must take the particular legal form of a not-for-profit entity or satisfy the ownership requirements in question would, in my view, appear to go further than what is necessary in order to achieve those objectives. It is difficult to see how the exclusion of a large subset of economic operators that have previously been serving, are currently serving, and intend to serve in the future exactly those social aims and that population segment,*

[101] See the opinion of AG Medina in C-436/20, *ASADE,* paras 124-126.
[102] AG opinion of C-436/20, *ASADE*, para 28.

merely because of the legal form in which those economic operators are constituted or because of the legal form of their ultimate owners, would not go beyond what is necessary to ensure the attainment of the legitimate objective of social and professional integration or reintegration of disabled or disadvantaged persons". [the plaintiffs' emphasis]

124. In further support of the plaintiffs' position in this respect, reference is again made to the background aspects presented earlier and in Item 2 above, which in short implies that "ideal" organisations are allowed to conduct their business activities as any other commercial market player. Moreover, even the Norwegian Government itself has predicted that the use of reserved procurements will lead to higher prices and more public spending, *cf.* Item 3.2.1 of the Request and Item 2 above. These background aspects referred further underpins the disproportionality of predetermined exclusions of a certain categories economic operators when Article 76(2) confirms the opportunity to design and put decisive or even sole emphasis on qualitative contract award criteria.

5.2.6.3 Disproportionality reinforced by the National Reservation Basis' acceptance of general presumptions

125. Item 2 above also addresses another point of obvious relevance for the proportionality assessment, namely the fact that according to the consultation paper behind the National Reservation Basis, contracting authorities are *de facto* being allowed to base themselves on general presumptions when – for each procurement – they shall assess whether a reservation will comply with the conditions of *"(i)contribute[.] to the attainment of social objectives, (ii) the good of the community (iii) and budgetary efficiency"*. [the numbering added by the plaintiffs][103]

126. It can be derived from paragraphs 24 to 26 of *Parsec*, that an EEA State and its contracting authorities cannot just base themselves on presumptions about the qualities or characteristics of certain categories of economic operators as factual basis for excluding a certain category of economic operators from public procurements. Just as in *Parsec*, the National Reservation Basis and its preparatory works, *"[have] not established the existence*

[103] For more factual substantiation of how the National Reservation Basis is allowing contracting authorities to base themselves on general presumptions, see Item 2 and above.

of any specific correlation between […] the quality of the service provided, and, on the other hand, the legal form of the economic operator providing that service".[104]

127. Instead, as presented above, the National Reservation Basis is allowing that fulfilment of the three conditions cited above, is *de facto* based on general presumptions. For example, regarding the condition of contribution to *"budgetary efficiency",* the consultation paper behind the National Reservation Basis states that there *"is […] a presumption that [ideal] operators contribute to budgetary/economic efficiency, economise on resources for the State and avoid waste".* Similarly, Item 5.3 (first paragraph) of the consultation paper, states that the qualitative consideration made by the contracting authority does not have to be connected to the concrete procurement alone, but can be based on more general considerations on how "ideal" providers can contribute to attain the qualitative objectives listed by the National Reservation Basis as preconditions for reserving a procurement, *i.e.* the conditions numbered (i) and (ii) above.

128. The plaintiffs submit that this point from *Parsec*, implying that an EEA State or contracting authority cannot just base itself on presumptions as factual basis for excluding a certain category of economic operators from public procurements, extends also to public health and social service contracts, as Article 19(1) of the Directive can be seen as a specification of the equal treatment principle set out by Article 76(1). Also, as already indicated above, the plaintiffs consider that this point from *Parsec* has relevance for the proportionality assessment. Clearly, to base an exclusion of a category economic operators just on general presumptions – instead of concrete case-by-case-specific facts – makes an already far-reaching and restrictive measure even more disproportionate.

129. In that regard, it is highly illustrative that the *procurement documents* of the Procurement, do not present any justification to substantiate the alleged fulfilment of conditions (i), (ii) and (iii). The *procurement documents* are all silent about condition (i), (ii) and (iii). They do not even invoke any of the presumptions set out by the consultation paper.

[104] C-219/19, *Parsec*, para 25.

130. As pointed out on several occasions above, the National Reservation Basis relies heavily on the *Spezzino* and *CASTA* judgments. Conditions (i), (ii) and (iii) above are apparently sought to mirror conditions derived from *Spezzino* and *CASTA.* However, as also pointed out above, in reality, the interpretative guidelines set out by the consultation paper take a much more lenient approach than the ECJ did in *Spezzino* and *CASTA*, something which the acceptance of such factual presumption as basis for reservations is a clear example of. Thus, conditions (i), (ii) and (iii) above do not substantively mirror the much stricter justification requirements set out by *Spezzino* and *CASTA.* Contrary to the National Reservation Basis, *Spezzino* and *CASTA* do not accept that unequal treatment is based on mere presumptions. Instead, *Spezzino* and *CASTA* expressly require that the preferential treatment of the voluntary associations *"must actually contribute to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that system is based."*[105]

131. In the same vein, *Spezzino* and *CASTA inter alia* also require – and even label it as *"essential"* – that *"voluntary associations do not pursue objectives other than those mentioned in the previous paragraph of the present judgment* [i.e. the objectives stated in the previous paragraph of this paper], *do not make any profit as a result of their services, apart from the reimbursement of the variable, fixed and on-going expenditure necessary to provide them, and do not procure any profit for their members."*[106] As shown in detail in Item 2 above, and also on other occasions above, the National Reservation Basis *inter alia* accepts that "ideal" providers earn profits from reserved public contracts, profits which they even can allocate freely to other commercial business activities which the "ideal" player is involved in, like *e.g.* real estate investments. The references to *Spezzino* and *CASTA* in this and the preceding paragraph, do not only further substantiate the disproportionality of the National Reservation Basis, but also show that National Reservation Basis has a substantive scope and content which is much wider and more lenient than the strict conditions and narrow scope of the case-specific preferential treatment accepted by *Spezzino* and *CASTA.*

[105] C-113/13, *Spezzino,* para 60; C-50/14, *CASTA*, para 63. While the Court in *Spezzino* left that question for the referring Court, AG Wahl gave further guidance in his opinion, concluding that it was "*inconceivable, in [his] view, that such a restriction can be deemed to be justified and proportionate where it is based on an a priori and general derogation from Articles 49 and 56 TFEU*" [the plaintiff's emphasis], see his opinion in C-113/13 *Spezzino*, EU:C:2014:291, para 61.

[106] C-113/13, *Spezzino,* para 61; C-50/14, *CASTA*, para 64.

5.2.6.4 Disproportionality underlined by lack of link between "ideal" requirement and subject-matter of contract

132. As an even further substantiation of the National Reservation Basis' disproportionality, reference is made to case C-513/99 *Concordia*, where it is held that *"[s]ince a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria which may be applied in accordance with that provision must themselves also be linked to the subject-matter of the contract"*[107] [the plaintiffs' emphasis]. Clearly, that principle must extend also to a selection criterion deciding that a certain category of economic operators are excluded from participation in a public procurement. Therefore, the plaintiffs submit that requiring a service provider to be an "ideal organisation", as a precondition for participation in public procurements of health and social services, is a (selection) criterion which is not properly linked to the subject-matter of the contract. Naturally, there is no necessary link between the legal status as "ideal organisation" and that category of economic operators' actual and concrete ability to provide relevant services of a given quality. Although the lack of such a link to the subject-matter of the contract could have qualified as an independent legal ground for contesting the EEA law compatibility of the National Reservation Basis,[108] the plaintiffs submits that this aspect also has relevance for this proportionality assessment based on the following reasoning: To apply a selection criterion with a non-existing link to the subject-matter of the contract is clearly disproportionate when, instead, the underlying invoked qualitative legitimate objectives could be better attained via the design and application of targeted qualitative award criteria in line with the wording and spirit of Article 76(2) of the Directive.

5.2.6.5 Disproportionality further underlined as the "ideal" requirement artificially narrows competition

133. In addition, Article 18(1) of the Directive confirms that an integrated part of the equal treatment principle is that *"[t]he design of the procurement shall not be made with the intention […] of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."* The combination of the latter rule being an integrated part of the equal treatment principle, and the opportunity contracting authorities have to design and put decisive emphasis on qualitative contract

[107] *Concordia Bus Finland v Helsingin kaupunki and HKL-Bussiliikenne*, C-513/99, EU:C:2002:495, para 59.

[108] In this context, when it is invoked to contest a discriminatory selection criterion, the requirement of having sufficient link to the subject-matter of the contract, can be considered as an integrated part of the equal treatment principle referred to by Article 71(1) of the Directive.

award criteria in line with Article 76(2) of the Directive, is yet another aspect underpinning the disproportionality of the National Reservation Basis. Again, when the underlying invoked qualitative legitimate objectives could be better attained via the design and application of targeted qualitative award criteria in line with the wording and spirit of Article 76(2) of the Directive, it must be held that the exclusion of non-ideal providers, as facilitated by the National Reservation Basis, must be seen as artificially narrowing competition and is thus disproportionate.

5.2.6.6 The proportionality review does not conflict with EEA States' discretion to decide qualitative protection level

134. Finally, in paragraph 56 of *Spezzino* and paragraph 60 of *CASTA*, the ECJ states that: *"[I]n the exercise of [the power to organise their public health and social security systems] Member States may not introduce or maintain unjustified restrictions of the exercise of fundamental freedoms in the area of health care. However, in the assessment of compliance with that prohibition, account must be taken of the fact that the health and life of humans rank foremost among the assets or interests protected by the Treaty and it is for the Member States, which have a discretion in the matter, to decide on the degree of protection which they wish to afford to public health and on the way in which that degree of protection is to be achieved."* [the plaintiffs' emphasis]. Again, the plaintiffs will point out that the judgments of *Spezzino* and *CASTA* were based on the state of EU/EEA law prior to the entry into force of Directive 2014/24. Thus, the backdrop for the citation above is the EU/EEA primary law-based assessment undertaken by *Spezzino* and *CASTA*. As substantiated above, the entry into force of Directive 2014/24 with Articles 74 to 77 in general and Articles 76(1) and (2) in particular, has changed the state of law. Article 76(2) confirms and facilitates that EEA States and their contracting authorities may put decisive or even sole emphasis on socially motivated qualitative criteria when designing a procurement and when subsequently awarding the contract. Hence, Article 76(2) expressly facilitates that in terms of quality and protection of public health and social aspects, EEA States can set and pursue the very highest degree of quality and protection without discriminating between different categories of economic operators. In other words, Articles 76(2) facilitates that the EEA States can reach any degree of public health protection inside the system of the Directive and Article 76(2). Hence, it is unnecessary and thus disproportionate to adopt a solution outside the scheme foreseen by the Directive, when that alternative scheme – *i.e.* the National Reservation Basis – implies a need for objectively justifying difference in

treatment between economic operators. It is implicit in that argument, that the EEA States' *"discretion [...] to decide [...] on the way in which that degree of protection is to be achieved"* cannot be unlimited. Even *Spezzino* and *CASTA* recognises that unjustified restrictions cannot be accepted, which effectively means that the proportionality review of restrictions and differences in treatment must be genuine and of sufficient intensity. Above, the plaintiffs have submitted that the proportionality review should be even more intense and stricter after the entry into force of Directive 2014/24 than it was before.[109]

5.2.6.7 Concluding remark: The National Reservation Basis is disproportionate and thus constitutes an unjustified infringement of the equal treatment principle of Article 76(1) of the Directive

135. Against the background of all the preceding paragraphs, the plaintiffs thus submit that the National Reservation Basis is disproportionate. Consequently, the *prima facie* unequal treatment of economic operators which the National Reservation Basis implies is not objectively justified. Accordingly, the plaintiffs suggest that the final question put forward by the Request shall be answered in the affirmative, meaning that the plaintiffs consider that Article 76[110] of the Directive 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 the national legislative provision in question".*

Med vennlig hilsen

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[109] In addition to the option Article 76(2) gives EEA States in terms of achieving any qualitative standards it may desire, reference is again made to recital 114 of the Directive, which recalls the available alternatives EEA States have instead of organising it as public service contracts subject to public procurement rules, e.g. in-house production or the mere financing of services supplied in accordance with regulatory requirements.

[110] For the sake of completeness, the plaintiffs specify that it does not consider it necessary to specifically address the hypothetical situation where Articles 31 and 36 EEA apply directly to the Procurement, as the estimated contract value of that procurement is considerably higher than the threshold referred to by Article 74 of the Directive, meaning that Articles 75 and 76 of the Directive come into play. By this, the plaintiffs also take the view that when Articles 74 to 76 of the Directive is applicable to a public contract, there is no room left for direct application of EEA primary law on that contract.