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ORIGINAL

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Reykjavik, 29 June 2022

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

submitted in accordance with Article 20 of the Statute and Article 90(1) of the Rules of Procedure of the EFTA Court by

THE GOVERNMENT OF ICELAND

represented by Anna Jóhannsdóttir, Director General, Ministry for Foreign Affairs, Inga Þórey Óskarsdóttir, Legal Adviser, Ministry for Foreign Affairs and Hrafn Hlynsson, Specialist, Ministry of Finance and Economic Affairs.

Pursuant to Oslo District Court (Oslo tingrett) requests for an Advisory Opinion from the EFTA Court in:

Case E-4/22

please find below the Observation of the Icelandic Government.

Questions of interpretation referred to the EFTA Court

1. ***The first question reads as follows:***

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

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

Based on the below, the Icelandic Government submits that the question should be answered negatively. The activities provided by the non-profit organizations in providing nursing home services are of non-economic nature and therefore fall outside the scope of the Directive.

The Icelandic Government agrees with the Oslo municipality that the procurement of the nursing home services must be considered procurement of "non-economic services of general interest" and thus falling outside the scope of the EEA Agreement and the Public Procurement Directive, as stated in recitals 6 and 7 of the Directive, activities which constitute non-economic services of general interest fall outside the scope of the Directive.

The Icelandic Government submits that if the health and social services at issue are non-economic services of general interest, the Directive does not apply. A health and social service is non-economic if it forms part of a public health system, and it is financed entirely or mainly by public funds[1]. This is not altered by an EEA State's use of a third party to provide the service on behalf of the State.

Such non-economic health and social services constitute neither an (economic) service provided against "remuneration" within the meaning of Article 37 EEA, in the context of the freedom to provide services, nor does the operator providing such non-economic health and social service constitute an "undertaking" within the meaning of Article 61 EEA, in the context of EEA State aid law. There is no lex specialis definition of non-economic services of general interest or "service" in the Directive, nor in any other relevant secondary law instruments. In the view of the Icelandic Government, by reason of logic and legal hierarchy, the Directive does not apply to such non-economic services either.

The Icelandic Government points out that the Court of Justice of the European Union drew out general conclusion in the Dôvera case, from previous case law, and said that when examining the context of whether a social security scheme is non-economic in nature, it makes an overall assessment of the scheme at issue and, to that end, takes the following into consideration: (1) the pursuit, by the scheme, of a social objective, (2) its application of the principle of solidarity, (3) whether the activity carried out is non-profit-making, and (4) State supervision of that activity.[2]

The Icelandic Government, referring to recital 6 of the Directive, and footnote 1 to Annex XIV to the Directive, argues that if an EEA State makes use of the freedom to organise its health and social system

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[1] Judgement of 27 September 1988, *Belgian state* v *Humbel and Edel*, 263/86, ECLI:EU:C:1988:451, paragraphs 17&18.

[2] Judgement of 11 June 2020, *Dôvera*, C-262/18P og 271/18 P, ECLI:EU:C:2020:450, paragraphs 30.

as a non-economic service of general interest, the provision of services forming part of that system falls outside the scope of the Directive.

The Icelandic Government observes that it already follows from Article 1(2) of the Directive that the scope of the Directive is limited to economic services. In the absence of a lex specialis definition of the notion of a "service" in the Directive, the Icelandic Government submits that this must coincide with how the term service has been interpreted in case law on Article 37 EEA.

The Icelandic Government emphasises that the main purpose of the Directive is to set out provisions to coordinate national procurement procedures in order to ensure that the freedom to provide services is given practical effect. By reason of logic and legal hierarchy, the Directive could not apply to such non-economic services, as that would entail an expansion of the reach of the general definition of services in Article 37 EEA, which is hardly conceivable.[3]

The operation of the nursing home services in the case do not constitute economic activities.

Recital 6 of the Directive reads:

„It is also appropriate to recall that this Directive should not affect the social security legislation of the Member States. Nor should it deal with the liberalisation of services of general economic interest, reserved to public or private entities, or with the privatisation of public entities providing services.
It should equally be recalled that Member States are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive"[emphasis added].

Recital 7 of the Directive reads:

„It should finally be recalled that this Directive is without prejudice to the freedom of national, regional and local authorities to define, in conformity with Union law, services of general economic interest, their scope and the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue their public policy objectives ... "[emphasis added].

It follows that any assessment in the present case must consider the broader judicial interpretation of services of general economic interest and non-economic services of general interest which may be pursued outside of the scope of the Directive. Albeit this determination is always on case-by-case basis, helpful guidance can be sought from case law and other material, not least from the area of EEA rules

[3] Jugdement of 27 September 1988, *Commission* v *Germany*, C-160/08, EU:C:2010:230, paragraphs 73&74.

of state-aid, in particular the definition of an "undertaking" within those rules. It appears that the interpretation of Recitals 6-7 – and thus the scope of the Directive – must be conducted on the same principles.

The term 'economic activity' has been defined by the European Court of Justice as "*any activity consisting in offering goods and services on a given market.*" Hence, a proper market need is a prerequisite for any economic activity and economic interest. In the present case, no market exists, and the nursing home services pursue no economic interests within the meaning given to those terms in applicable rules and case law.

Moreover, in the area of nursing homes, crucial weight has been given to whether a recipient of the public funding is predominantly financed by user fees or public funds. If the recipient falls under the latter class its activities will normally be considered as non-economic in the sense of state aid rules.

The Icelandic Government also agrees with the Oslo municipality that the criteria set out by the EFTA Court in the judgment in Case E-13/19 *Hraðbraut* paragraphs 90 – 93 can be applied to establish that in the present case there are also no contracts pertaining to (economic) "services" for the purposes of the Public Procurement Directive, see point (9) of Article 2(1) of the Public Procurement Directive, as stated in chapter 5.2.1 in their Request.

The Icelandic Government emphasizes that following from the *Hraðbraut* Judgment; "The pecuniary nature of a public contract means that there is a quid pro quo, that is, the public authority receives a service (or good) in exchange for a consideration (reference is made to the judgments in Helmut Müller, cited above, paragraph 48, and IBA Molecular, C-606/17, EU:C:2018:843, paragraph 28). It follows that both sides of the equation have to be sufficiently certain and defined so that the contract can be performed according to the agreed specifications. The Commission submits that the contracts at issue are not based on a quid pro quo." [4]

The user fees for the nursing homes in the present case are all very small and a trivial part of their funding. They cover only a "fraction of true costs" which, according to case law, bars the application of rules relating to undertakings within the State aid framework – and consequently the public procurement rules.

The Icelandic Government considers that in circumstances such as those of the main proceedings, it is evident that the State, in establishing and maintaining such a system of national social system, is not

[4] Judgement of 10 December 2020, *Hraðbraut*, E-13/19, paragraph 76.

seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural, and educational fields (compare the judgment in Congregación de Escuelas Pías Provincia Betania, cited above, paragraph 50 and Hraðbraut, cited above, paragraph 95).

The Icelandic Government submits that, when viewed as a whole, the operations of the nursing homes in the present case, their organisation, the legal framework and overall social purpose, clearly demonstrates the lack of economic interest in the meaning of the relevant legislation and case-law.

2. ***The second question reads as follows:***

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

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

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

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

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

The Icelandic Government agrees with the Oslo municipality that the exception in Article 32 EEA, read in conjunction with Article 39, for "activities which in that Contracting Party are connected, even occasionally, with the exercise of official authority" applies to the contracts relating to nursing home services in the main proceedings. Hence the contracts are not reviewable in the light of the provisions of the EEA Agreement on freedom of establishment and freedom to provide services, as stated in chapter 5.2.2 in their Request.

Furthermore, the Icelandic Government emphasizes that one tender or tender method does not affect the next tender, so neither the actions from public contracting authority's prior tender methods (a) nor future tender methods (b) affect this case.

Regarding decisions to administer coercive health care, the Icelandic Government considers that issue to have no effect on this case.

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

The Icelandic Government concurs with Oslo municipality that the wording "even occasionally" is "from time to time" or "now and then".

3. <u>The third question reads as follows:</u>

On the reservation for non-profit organisations:

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

The Icelandic Government confirms that its Public Procurement Act (PPA) does not have the same Article as in the Norwegian Public Procurement Act/Regulation (Section 30-2a of the Norwegian Public Procurement Regulation) that reserves the right to participate in tendering procedures relating to health and social services for "non-profit organisations". The Icelandic PPA does though have an article that is identical to Article 77 of the Directive 2014/24/EU.

Nonetheless, the Icelandic Government does not think that Articles 31 and 36 of the EEA Agreement and Articles 74 – 77 of Directive 2014/24/EU preclude public contracting authorities to have an article in their legislation that only allows "non-profit organisations" to participate in certain tendering procedures relating to health and social services. In accordance with Recital 6 of Directive 2014/24/EU, Member States are free to organise the provision of certain services of general economic interest or as non-economic services of general interest and should therefore be able to reserve the right to provide such services to non-profit organisations.

Respectfully

for the Government of Iceland

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