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Judgment in Case E-4/22 *Stendi AS and Norlandia Care Norge AS v Oslo kommune*

RESERVATION OF PUBLIC CONTRACTS FOR THE OPERATION OF NURSING HOMES PERMISSIBLE UNDER CERTAIN CONDITIONS

In a judgment delivered today, the Court answered questions referred by Oslo District Court (*Oslo tingrett*) concerning the interpretation of Articles 31, 32, 36 and 39 of the Agreement on the European Economic Area (“EEA”) and Directive 2014/24/EU on public procurement (“the Directive”).

The main proceedings concern the procurement by Oslo municipality of services relating to the operation of nursing home places. Participation in that procurement procedure is reserved for a form of organisations, which in Norway is referred to as “*ideelle organisasjoner*”. Stendi AS and Norlandia Care Norge AS, as profit-making operators, are thus prevented from participating.

By its first question, the referring court asked whether contracts such as those at issue in the main proceedings were to be regarded as contracts relating to the provision of “services”, thus falling within the scope of the Directive. The Court held that medical services provided for consideration fall within the scope of the provisions on the freedom to provide services in Article 36 EEA. A medical service does not cease to be a service within the meaning of Article 37 EEA because it is paid for by a national health service or a system providing benefits in kind. Accordingly, the Court found that a public contract for pecuniary interest providing for the provision of long-term places in nursing homes, in circumstances such as those of the main proceedings, constitutes a contract for the provision of services within the meaning of point (9) of Article 2(1) of the Directive.

By its second question, the referring court essentially asked whether activities involving coercive health care, such as those at issue in the main proceedings, come within the scope of the exception regarding the exercise of official authority in Article 39 EEA, read in conjunction with Article 32 EEA. Under Norwegian law, health personnel are directly authorised to provide coercive health care. The Court held that the activity of operating nursing homes, in circumstances such as those of the main proceedings, cannot be regarded as being directly and specifically connected with the exercise of official authority, even where coercive health care may be provided.

By its third question, the referring court asked whether Articles 31 and 36 EEA and Articles 74 to 77 of the Directive preclude national legislation allowing contracting authorities to reserve the right to participate in tendering procedures relating to health and social services for “*ideelle organisasjoner*”. The Court found that Articles 74 to 77 of the Directive must be interpreted as not precluding national legislation which reserves for “*ideelle organisasjoner*” the right to participate in a procedure, involving a competitive bidding process, for the award of public contracts for the provision of social or other specific services listed in Annex XIV to the Directive, provided that two conditions are fulfilled. First, the legal and contractual framework within which the activity of those organisations is carried out must actually be grounded in the principles of universality and solidarity, which are inherent to a social welfare system, as well as in reasons of economic efficiency and suitability, and contribute effectively

to the social purpose and objectives of solidarity and budgetary efficiency on which that system is based. Second, that the principle of transparency, as specified in Articles 75 and 76 of the Directive, is respected.

The full text of the judgment may be found on the Court's website: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.