WRITTEN OBSERVATIONS

BY

OSLO MUNICIPALITY

Represented by Ms. Ane Grimelid, advocate at the Oslo Municipal Attorney's office, submitted pursuant to Article 20 of the Statute and Article 90 (1) of the Rules of Procedure of the EFTA Court, in

Case E-4/22 – Stendi AS and Norlandia Care Norge AS v Oslo kommune

in which the Oslo District Court (Oslo tingrett) has requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on the interpretation of Articles 31, 32, 36 and 39 of the EEA Agreement and Articles 2(1) point (9) and 74 – 77 of Directive 2014/24/EU, in respect of reservation of the right to participate in tender procedures for non-profit organisations.

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1 Introduction

(1) The referring court's questions have arisen in proceedings between Stendi AS and Norlandia Care Norge AS and Oslo municipality regarding the compatibility with EEA law of the latter's procurement of up to 800 long-term places in nursing homes. The municipality has reserved the provision of these long-term places (the "nursing home services") for non-profit organisations. Stendi AS and Norlandia Care Norge AS, being

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for-profit entities, do therefore not qualify to participate in the tender proceedings concerning those contracts.

(2) The referring court has submitted the following questions to the EFTA Court (as translated by the EFTA Court):

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

1. *Is a contract for pecuniary interest providing for the provision of long-term places in nursing homes, the procurement of which is 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?*

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 place directly with the contracting public authority's contractor, but rather with the health personnel working for the contractor?*

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

On the reservation for non-profit organisations:

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

(3) Oslo municipality will submit observations on all three questions.

2 Observations on question 1

2.1 Introductory remarks

(4) By question 1, the national court seeks clarification from the EFTA Court on whether contracts with characteristics such as those in the main proceedings, concerning the provision of long-term places in nursing homes, are to be classified as contracts relating to the provision of "services" according to point (9) of Article 2(1) of Directive 2014/24/EU (the Procurement Directive).

(5) In short, Oslo municipality submits that the provision of long-term places in nursing homes, subject to the contracts at issue in the main proceedings, are services of a non-economic character. Such services fall outside the scope of both the EEA Agreement's provisions on the right of establishment and freedom to provide services and the Procurement Directive. Thus, there is not an obligation for the municipality to follow the procedures of the Procurement Directive when entering into the contracts.

2.2 Non-economic services

(6) A "public service contract" is defined in point (9) of Article 2(1) of the Procurement Directive as a public contract having as its object the

provision of "services" other than those referred to in point (6) of Article 2(1). It must be borne in mind that the Procurement Directive is designed to implement the provisions of the EEA Agreement relating to the freedom of establishment and the freedom to provide services.[1] Therefore, the notion of "services" in the Procurement Directive cannot have a different meaning or a wider scope than under the EEA Agreement.

(7) According to the first paragraph of Article 37 EEA, only services "*normally provided for remuneration*" are to be considered services within the meaning of the EEA Agreement. The essential characteristic of remuneration lies in the fact "*that it constitutes consideration for the service in question and is normally agreed upon between the provider and the recipient of the service*".[2] Thus, in order to be a service under that provision and the Directive, the activity at issue must have an economic dimension primarily attested by the existence of remuneration.

(8) Activities without the element of remuneration lack that economic dimension and do not qualify as services under the EEA Agreement or the Procurement Directive. In the context of the Procurement Directive, the EU legislator has explicitly clarified in recital (6) that "*non-economic services of general interest should not fall within the scope of this Directive*". The same recital recognises that EEA States are "*free to organise the provision of compulsory social services or other services (...) either as services of general economic interest or as non-economic services of general interest or as a mixture thereof*".

(9) If a service is considered "non-economic" in the context of the Procurement Directive, this must necessarily entail that the service is not provided in exchange for remuneration, and thus also falls outside the legal notion of "services" in the same Directive and in Article 37 EEA. In Oslo municipality's view, this must also imply that a contract having

[1] Case C-160/08 *Commission v Germany*, para. 73-74 and case E-13/19 *Hraðbraut* para. 90
[2] See for instance case C-236/86 *Humbel*, para. 17, case E-5/07 *Private Barnehagers Landsforbund*, para. 81 and case E-13/19 *Hraðbraut*, para. 91

such a "non-economic" (or "non-service") as its object cannot be regarded as a "public contract" in the meaning of point (5) of Article 2(1) of the Directive, as it is, logically, not a contract for "pecuniary interest". According to case law, the pecuniary nature of a contract means that the contracting authority receives a service pursuant to the contract "in return for remuneration".[3]

(10) Accordingly, if an EEA State applies its freedom to organise certain activities as non-economic services of general interest (or non-services under the EEA Agreement)[4], those services fall outside the scope of the Procurement Directive as well as the EEA Agreement.

(11) Neither the Directive nor the provisions on services in the EEA Agreement contain any definition of what constitutes such non-economic services (or, in other words, services that are not provided in return for remuneration). The case law of the EFTA Court and the CJEU indicates however that the organisation and financing of the services within the EEA State is essential in this regard. That institutional framework surrounding a given service may obviously differ from State to State. This important aspect is emphasized in recital (114) of the preamble to the Procurement Directive, which states that such activities that are known as "*services to the person*", such as certain social, health and educational services, "*are provided within a particular context that varies widely amongst Member States, due to different cultural traditions*".

(12) In a string of cases concerning educational activities provided within a national educational system, the EFTA Court and the CJEU have held that the essential characteristic of remuneration (the "economic" element of the activity) is absent where the following two conditions are satisfied. First, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields, and second, the system in question is mainly funded from the public

[3] Case C-451/08 *Helmut Müller*, para. 48-49.
[4] Cf. recital (6) of the preamble to the Procurement Directive.

purse and not by students or their parents.[5] The nature of the activity is not affected by the fact that the users must sometimes pay fees in order to make a certain contribution to the operating expenses of the system.[6] Under such circumstances, the State financing of the activities in question is aimed at achieving broader social policy objectives in that particular field, rather than to engage in economic and gainful activities.

(13) If, to the contrary, the activity in question is mainly financed by private funds, the characteristic of remuneration is fulfilled and the activity thus constitutes an (economic) service.[7] According to the case law of the CJEU, it is not necessary for that *private* financing to be provided mainly by the users in order for the activity to be regarded as a service, as TFEU Article 57 does not require that the service is paid for by those for whom it is performed.[8]

(14) Applying these principles from free movement cases, the CJEU in case C-74/16 *Congregación* clarified that educational courses provided by third party establishments that are integrated into a system of public education and financed, entirely or mainly, by public funds, do not constitute economic activities in the meaning of Article 107(1) TFEU.[9]

(15) In case E-13/19 *Hraðbraut*, the EFTA Court confirmed that the line of reasoning from the case law referred to in above as regards the assessment of the economic or non-economic character of a service, and the principles from *Congregación* with regard to the integration of third party providers into such a system, may be applied also within the context of the Procurement Directive. In that case, the EFTA Court assessed whether a set of contracts between the national educations authorities in Iceland and three private colleges that provided upper secondary educational activities, constituted service contracts under the Directive. Applying the conditions set out in inter alia case C-263/86 *Humbel*, and referring to para. 50 of the CJEUs judgement in *Congregación*, the EFTA Court noted that the activities under the

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[5] See cases C-263/86 *Humbel*, para. 17-18, C-109/92 *Wirth*, para. 15-16, C-76/05 *Schwarz*, para. 39, C-74/16 *Congregación*, para. 50 and E-13/19 *Hraðbraut*, para. 92

[6] See for instance cases C-263/86 *Humbel*, para. 19, E-5/07 *Private Barnehagers Landsforbund*, para. 83 and E-13/19 *Hraðbraut*, para. 93.

[7] Case C-109/92 *Wirth*, para. 17.

[8] Case C-76/05 *Schwarz*, para. 41.

[9] See para. 50. The provider of the educational activities was a non-public entity (a church).

contracts concerned educational activities that was part of a national system with the characteristics described above. The EFTA Court concluded that the contracts did not have as their object the provision of (economic) "services" within the meaning of the Directive, and, consequently, did not constitute "public service contracts" pursuant to point (9) of Article 2(1) of the Directive.

(16) In Oslo municipality's view, the judgement in *Hraðbraut* thus indicates that the fact that public authorities in an EEA State has decided to make use of private operators to provide the services within a system with the characteristics described above, by way of entering into contracts, does not render an otherwise non-economic service to suddenly be of an economic character.[10] In its assessment of whether the services in question were of an economic or non-economic character, the EFTA Court did not place any emphasis on the fact that the Icelandic State had entered into contracts with the private colleges concerning their provision of educational services within the national system of education. What mattered was only the institutional framework surrounding the services.

(17) Further, it follows from the CJEU's judgement in joined cases C-262/18 P and C-271/18 P *Dovera* that the presence of competitive elements in a social welfare system that is predominantly financed by the public purse, does not change the non-economic nature of the scheme where competitive elements are secondary to the scheme's social, solidarity and regulatory aspects.[11] In Oslo municipality's opinion, that judgement gives support to a view that the mere recourse to competition as a means to choose the private provider that shall be integrated in a system with the characteristics described, is not capable of changing the non-economic character of the services in question.

(18) In light of the above, Oslo municipality submits that the analysis of the economic or non-economic character of certain services should not differ between a contract-based model that introduces market mechanisms, and a grant-based model. Irrespective of the general relationship between the concept of "services" under the EEA free movement rules and the concept of "undertaking"/"economic activity"

[10] Cf. case C-74/16 *Congregación*, para. 42.

[11] See para. 34, 41-50 and 61

under the rules on competition and state aid, it follows from the case law described above that the *Humbel* doctrine is applied in both free movement and state aid cases. Further, it should be noted that both contract-based and grant-based models may include elements of competition, in the latter case for instance by way of the granting authority's selection of which applicants should receive a grant (based on quality of the services or the amount of aid applied for), or by way of user selection.

(19) In Oslo municipality's view, other EEA case law does not affect the interpretation of the notion of "services" in point (9) of Article 2(1) of the Procurement Directive advocated above. Inter alia, the municipality observes that the CJEU's judgement in case C-281/06 *Jundt*, where the CJEU put its foot down for a national tax rule that discriminated based on nationality, did not preclude the CJEU and the EFTA Court from reaching its rulings in *Congregación* and *Hraðbraut* respectively.

(20) Although *Hraðbraut* and the other case law referred to above primarily concern educational activities, Oslo municipality submits that the legal principles relied upon must apply equally to other activities with the same characteristics. The line of reasoning in the relevant judgements from the EFTA Court and the CJEU is not linked to any specific traits that are exclusive for educational activities. On the contrary, the reasoning is rooted in the institutional and financial framework surrounding the services. Indeed, the case law explicitly refers to the fulfilment of the national authorities' duties towards the population *"in the social, cultural **and** educational fields"*, and must therefore, in Oslo municipality's view, be equally valid for other services that the State is responsible for providing to its citizens in these particular areas.

(21) In the public procurement context, this is supported by the fact that the Procurement Directive places health and social services on the same footing as educational services as "services to the person", which are provided within a particular context that varies widely amongst EEA States due to different cultural traditions, cf. recital (114) of the preamble to the Directive. Further, it is not necessarily so that educational services are the most sensitive for the EEA States. Thus, the Procurement Directive does not lend support to a view that educational activities for some reason differs from health and social services with

regard to the applicability of the legal principles set out in inter alia *Humbel* and *Hraðbraut*.

(22) For these reasons, it is the view of Oslo municipality that the line of reasoning in *Hraðbraut* and the other case law referred to above should apply equally to health and social services. If the conditions set out in the case law are fulfilled, the services should be considered "non-economic" services (of general interest) or non-services falling outside the scope of the Procurement Directive and the EEA Agreement's provisions on services.

(23) Turning to the case at hand, the contracts concerning the provision of long-term places in nursing homes possess the exact characteristics described above. The activities provided for (the "nursing home services") are services in the social field that Oslo municipality has a statutory duty to offer to its inhabitants.[12] It is evident that the municipality, in establishing and maintaining this system of nursing home places, is not seeking to engage in gainful activity but is fulfilling its social duties towards its population. Further, the nursing home places are predominantly financed from the public purse (about 80 percent).[13] By entering into the agreements under which they provide long-term nursing home places on behalf of Oslo municipality, the private (non-profit) providers are integrated into this system as described in the request for an advisory opinion.[14]

(24) Against this background, Oslo municipality submits that the contracts between the municipality and the private (non-profit) providers concerning long-term places in nursing homes cannot be regarded as having as their object the provision of "services" within the meaning of Article 37 EEA or the Procurement Directive. Accordingly, the contracts do not constitute "public service contracts" within the meaning of point (9) of Article 2(1) of the Directive. It follows that the contracts fall outside the scope of both the Procurement Directive and the free movement rules.

[12] Cf. point 3.3.1 in the request for an advisory opinion
[13] Ibid.
[14] See, inter alia, point 4.2 and 4.3.1

(25) For the reasons set out above, Oslo municipality respectfully proposes that the answer to question 1 should be as follows:

"Contracts providing for the provision of long-term places in nursing homes with characteristics such as those described in the request, do not have as their object the provision of "services" within the meaning of Directive 2014/24/EU and thus do not constitute public service contracts according to point (9) of Article 2(1) of that Directive."

3 Observations on question 2

3.1 Introductory remarks

(26) In submitting its observations on question 2, Oslo municipality will assume that the contracts in the case at hand, providing for the provision of long-term places in nursing homes, are deemed to have as their object the provision of (economic) "services" and thus constitute public service contracts pursuant to point (9) of Article 2(1) of the Procurement Directive. With this assumption, the contracts will fall under the scope of the Directive and the EEA Agreement's provisions on services unless an exemption applies.

(27) By question 2(1), the national court seeks clarification from the EFTA Court on whether a public contracting authority's legal ability to rely on the exception in Articles 32 and 39 EEA for activities that are connected with the exercise of official authority is affected by certain circumstances. Further, by question 2(2), the EFTA Court is asked to clarify how the term "even occasionally" in Articles 32 and 39 EEA should be interpreted, relating to any quantitative requirements that must be satisfied for the exemption to apply.

(28) In short, Oslo municipality submits that the exception in Articles 32 and 39 EEA applies to the activity of providing long-term places in nursing homes, which are subject to the contracts between the municipality and non-profit organisations in the case at hand. As the exception in those Articles is a rule on its own right, having the effect of delimiting the scope of the rules on right of establishment and freedom to provide services, Oslo municipality's choices with regard to the

reliance on that exception cannot be subject to any control of compliance in the light of those fundamental freedoms.

(29) It should be noted that the possible application of Articles 32 and 39 EEA to the activities in question to an extensive degree relies on the facts of the case. Oslo municipality respectfully proposes that the EFTA Court provides the referring court with guidance on the interpretation of EEA law with regard to the questions raised, while leaving it to the national courts to make a final determination based on the evidence presented in the national proceedings.

3.2 The exception in Articles 32 and 39 EEA for activities that are connected with the exercise of official authority

(30) According to Article 32 EEA, the provisions of the EEA Agreement's chapter 2 on the right of establishment "shall not apply, so far as any given Contracting Party is concerned, to activities which in that Contracting Party are connected, even occasionally, with the exercise of official authority". Pursuant to Article 39 EEA, the provision of Article 32 shall equally apply to the matters governed by chapter 3 on services.

(31) The exception in Articles 32 and 39 EEA is a rule on its own right that delimits the scope of the respective fundamental freedoms, and, consequently, the Procurement Directive,[15] ultimately authorising EEA States to remove therefrom activities connected with the exercise of official authority. It follows that activities qualifying as "official authority" in accordance with the case law of the European courts, cannot be subject to a control of compliance in the light of the right of establishment and the freedom to provide services as a result of their non-applicability.[16] Consequently, in Oslo municipality's view, a contracting authority's choice with regard to, first, whether or not to

[15] As the Procurement Directive is designed to implement the fundamental freedoms guaranteed by the EEA Agreement, the right to derogate from these freedoms pursuant to Articles 32 and 39 EEA must apply equally as regards the provisions of the Directive.

[16] This line of reasoning was applied by the EFTA Surveillance Authority in its Decision No. 154/17 /COL regarding two tender procedures launched by the Norwegian Government's Directorate of Children, Youth and Family, concerning the operation of child welfare institutions. In that case, the Authority accepted that Articles 32 and 39 EEA could be invoked as a basis for reserving the contracts in question for non-profit organisations.

invoke the exception in Articles 32 and 39 EEA, and second, how to organise a tender procedure where the exception is invoked – for instance, reserving the tender procedure for non-profit providers – cannot be subject to a verification of "consistency".

(32) It should be underlined that the effect of the "consistency check" advocated by the plaintiffs would be that national contracting authorities are deprived from their choice of invoking Articles 32 and 39 EEA as part of a reorganisation of their social services away from contracts with for-profit service providers, as long as contracts with such providers have been entered into at some earlier point in time. In Oslo municipality's view, this would clearly interfere with the wide discretion given to Member States to organise the providers of social services in the way they consider most appropriate, emphasized in recital (114) of the preamble to the Procurement Directive. In addition, Oslo municipality fails to see how such a check should be practically possible.

(33) Further, Oslo municipality fails to see the relevance of the CJEU's judgement in case C-152/73 *Sotgiu* to the case at hand. The *Sotgiu* case concerned the compatibility with the rules on free movement of workers of a German regulation regarding conditions of employment and work at the German Federal Mail Office. As the regulation allowed for a less favourable treatment of employees with families in other EU Member States, the case was examined from the viewpoint of a possible discrimination based on nationality, prohibited under EU law. After noting that, according to (the then) Article 48(4) of the Treaty, this prohibition did not apply to employment in the public service, the Court stated that the exception could not apply against workers once they had been admitted to the public service.[17] The CJEU has since reiterated this rule in similar cases concerning employment in the public service subject to regulations entailing discrimination based on nationality[18]. In the present case, nationality-based discrimination is not an issue. In Oslo municipality's view, any submission from the plaintiffs in favour of a broader interpretation of the CJEU's ruling in *Sotgiu* as to encompass other situations than discrimination, lacks foundation in case law.

[17] Case C-152/73 *Sotgiu*, para. 4

[18] Case C-225/85 *Commission v Italy*, para. 11, case C-195/98 *Commission v Austria*, para. 37

(34) Oslo municipality submits that the activities involved in providing long-term places in nursing homes fall within the exception in Articles 32 and 39 EEA, as they are *"directly and specifically connected"* with a *"sufficiently qualified"* exercise of official authority in the form of coercive powers (coercive health care).[19] The power to adopt coercive measures lies in the very heart of the exercise of official authority. In fact, they may entail significant restrictions of fundamental rights whose protection is enshrined in the European Convention of Human Rights (ECHR), such as the right to liberty.

(35) Subject to detailed statutory requirements, certain health personnel in nursing homes are authorised to adopt coercive measures in the form of coercive health care without any authorisation of State bodies, thus being conferred autonomous decisional powers as to how to deal with patients who resist receiving necessary health care. Any coercion must have the purpose of avoiding serious harm to the patients' health. Inter alia, coercive health care measures may include forced detention in the nursing home (by way of locked doors etc.) if this is necessary in order to secure the patient's health, compulsive medication and measures restraining the patient's movement. It is important to note that the residents of long-term places in Oslo municipality's nursing homes consist of only the most seriously ill elderly persons, of which about 85 percent are suffering from cognitive impairment or varying degrees of dementia.[20] The adoption and implementation of coercive health care measures is part of the nursing home health personnel's duty to secure that patients receive the necessary health care, and thus forms an integral part of the provision of nursing home places.

(36) When entering into contracts with Oslo municipality concerning the provision of long-term places in nursing homes, the private (non-profit) providers deliver these services on behalf of the municipality, thus contributing to the fulfilment of the municipality's statutory duty to offer nursing home places to its inhabitants. According to national legislation, the services may be provided by the municipality itself or through an agreement concluded between the municipality and other

[19] See, inter alia, case C-160/08 *Commission v Germany*, para. 37 and case C-114/97 *Commission v Spain*, para. 35

[20] See sections 3.3.2 and 4.3.2 of the request for an advisory opinion

public or private service providers.[21] Through the provisions of and the monitoring of the contracts, Oslo municipality secures that the private providers satisfy all requirements that follow from national laws and regulations in the field, as well as Oslo municipality's own adopted standards applying to nursing home services. These include requirements with regard to the routines for the adoption and implementation of coercive measures in the form of coercive health care. Thus, the coercive health care measures is an integral part of the subject-matter of the contracts and cannot be considered separable from the private providers' contractual services and obligations towards the municipality, see by way of comparison the CJEU's judgement in case C-2/74 *Reyners*.[22]

(37) As regards the quantitative standard for the application of Articles 32 and 39 EEA, Oslo municipality submits that the interpretation must be based on a natural reading of the wording "even occasionally". This indicates that it is sufficient for the exception to apply that the activity involves the exercise of official authority "from time to time" or "now and then". The clear wording, explicitly containing a quantitative requirement, contradicts an understanding that the view taken by the CJEU in case C-47/02 *Anker* regarding the exception from the provisions on freedom of movement for workers for employment in the public sector (Article 28(4) EEA) is transferrable to Articles 32 and 39 EEA.[23] As opposed to Articles 32 and 39, the wording of Article 28(4) does not contain any quantitative requirement for its application. Further, the fact that the exception in Articles 32 and 39 according to case law involve a qualitative requirement of "sufficiently serious" exercise of official authority, while Article 28(4), it seems, does not, may call for a different interpretation also with regard to any quantitative delimitation. Finally, no case law from the European courts support an assertion that the more stringent quantitative requirement set out in *Anker* should apply equally to the exception in Articles 32 and 39 EEA.

[21] See section 3.3.1 of the request for an advisory opinion

[22] From para. 42

[23] In case C-47/02 *Anker* the CJEU stated that the rights justifying the derogation from the freedom of movement of workers must be exercised "*on a regular basis*" by the holders and must not represent "*a very minor part of their activities*", cf. para. 63

(38) For the sake of completeness, it should be noted that in Oslo municipality's view, the extent of coercive health care measures provided in long-term nursing homes is sufficient for Articles 32 and 39 EEA to apply, irrespective of which quantitative standard is required.[24] This is, however, for the national courts to assess.

(39) For the reasons set out above, Oslo municipality respectfully proposes that the answer to question 2 should be as follows:

Question 2(1):

"If the activities subject to a public service contract is sufficiently concerned with the exercise of official authority to fall within the exception in Articles 32 and 39 of the EEA Agreement, a public contracting authority's ability to rely on that exception is not subject to a control of the consistent application of that exception. Consequently, the contracting authority's choice with regard to, first, whether to invoke the exception in Articles 32 and 39 EEA, and second, how to organise a tender procedure where the exception is invoked, is not affected by, inter alia, whether the same or other contracting authority/authorities previously have chosen or still choose to invoke the exception for equivalent activities.

As long as the power to adopt coercive measures forms an integral part of the subject-matter of the contract and is not separable from the private provider's contractual obligations, a contracting authority's reliance on Articles 32 and 39 EEA is not affected by the fact that the power of coercion lies with the personnel who are employed by the provider."

Question 2(2):

"The term "even occasionally" in Articles 32 and 39 of the EEA Agreement shall be construed to mean that it is sufficient for the exception to apply that the activities in question involves the exercise of official authority "from time to time" or "now and then". The quantitative requirement set

[24] Cf. Section 4.4 of the request for an advisory opinion

out in case C-47/02 Anker (para. 63) with regard to Article 28(4) EEA do not apply to the exception in Articles 32 and 39 EEA."

3 Observations on question 3

3.1 Introductory remarks

(40) By question 3, the national court seeks clarification from the EFTA Court on whether Articles 31 and 36 of the EEA Agreement and Articles 74 – 77 of the Procurement Directive preclude national legislation which allows contracting authorities to reserve the right to participate in tendering procedures relating to health and social services for non-profit organisations on the terms laid down in the national legislative provision in question.

(41) At the outset, Oslo municipality notes that the question from the referring court is not limited to the reservation of contracts for the service in question, which is the provision of long-term places in nursing homes. Instead, it refers to the reservation of contracts for "*health and social services*" in general to non-profit organisations. In this respect, Oslo municipality notes that Article 34 of the SCA establishes a special means of judicial cooperation between the EFTA Court, on the one hand, and national courts on the other. The aim is to provide national courts with the necessary interpretation of elements of EEA law to decide the cases before them.[25] Conversely, where it is obvious that the interpretation of EEA law that is sought is unrelated to the facts of the main proceedings or its purpose, and where the problem is hypothetical, the EFTA Court is not obliged to give a an advisory opinion.[26] As the nature of the service may be relevant when assessing the compatibility with EEA law of the reservation of the contracts in hand, Oslo municipality will, where appropriate, focus its submissions on contracts for the provision of long-term places in nursing homes.

(42) In submitting its observations on this question, Oslo municipality will assume that the contracts for the provision of long-term places in nursing homes is deemed to be public service contracts of an economic

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

character within the meaning of point (9) of Article 2 (1) of the Procurement Directive and thus fall within the scope of the Directive. In this respect, the municipality refers to its submissions on question 1. Further, Oslo municipality will assume that the services are not covered by the exception in Articles 32 and 39 EEA for activities that are connected with the exercise of official authority, cf. the submissions on question 2.

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

(44) In short, Oslo municipality submits that the reservation of the right to participate in the tender procedure for the provision of long-term places in nursing homes to non-profit organisations is consistent with the discretion under EEA law deriving from the Articles 74 – 77 of the Procurement Directive ("the Light regime"), and Articles 31 and 36 of the EEA Agreement.

(45) Furthermore, the municipality submits that the national definition of "non-profit organisations" is in line with the substantive content given to the notion of "non-profit organisations" in the case-law of the CJEU[27], as are the stated requirements for reservations.

(46) In Oslo municipality's view, the national leeway to introduce a legal basis for reservation of tender procedures for non-profit organisations, cf. Section 30-2a of the Norwegian Public Procurement Regulation, must be assessed on the basis of the general parameters for EEA States' discretion in Article 76 of the Procurement Directive. Oslo municipality submits that the legal basis for reservations is in conformity with Article 76 of the Directive (at least) with regard to nursing home services, see the European Court of Justice's judgment in Case C-70/95 *Sodemare*.

[27] There are no indications that the national legislation in question might give rise to any abuse of rights. Rather, it follows from judgements from national courts, reviews of the Norwegian complaints board for public procurement, and examinations by public authorities, that any risks for the abuse of rights are supervised.

(47) Before setting out its submissions on the general parameters for EEA States' discretion in Article 76 of the Procurement Directive, Oslo Municipality will present its understanding of the harmonisation level of the Directive as a whole and the overall context of this legislation.

3.2 The Procurement Directive and the overall context

(48) In Oslo municipality's opinion, the Procurement Directive cannot generally be regarded as a "total harmonisation directive", but must rather be viewed as a "minimum harmonisation directive". It clearly follows both from the legal basis on which the Directive was adopted as well as from the preamble (cf. recital (1), last sentence) that the aim of the Directive is only to "*[coordinate] national procurement procedures*" and not to establish a fully harmonised system. Thus, the aim of the Directive was not to introduce a total harmonisation regime for public procurement where national rules no longer have a role to play.[28]

(49) This is confirmed by the lack of recitals in the preamble that emphasise or reflect the total harmonisation character of a directive. It should be recalled that such clauses are otherwise found in many directives.[29] Indeed, many recitals in the preamble to the Procurement Directive rather points in the direction of a level of discretion for the EEA States in the implementation of the Directive, cf. for example recital (6), recital (41) and recital (114).

(50) Further, it should be recalled that the EU legislative process is complex and that there might be a number of different reasons why the Directive and the Light Regime ended up with the current articles and structure. Thus, against this backdrop, no firm conclusions can be drawn from the fact that the provisions of the Public Procurement Directive neither explicitly forbids nor allows the introduction of national legislation that permits public contracting authorities to reserve the right to participate in tendering procedures relating to health and social services for non-profit organisations on certain conditions.

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[28] For a similar assessment by the CJEU, see joined cases C-285/99 and C-286/99 *Lombardini,* para. 33.

[29] See for example Directive 2011/83/EU Article 4 and Directive 2007/46/EC, recital (2) to the preamble

(51) This appraisal is not called into question by Article 77 of the Light regime. The wording of that provision and the context surrounding its adoption indicate that it was borne out of very specific circumstances, which cannot provide a sound basis for an antithetical interpretation that it exhaustively regulates the possibility of reserving contracts on social services for non-profit organisations. Article 77 was adopted at a very late stage of the legislative process under very specific circumstances to respond to a particular need of a single Member State.[30] It would be a clear paradox if this last minute acceptance of the lobbying of one Member State, which was meant to provide a further right for Member States to reserve certain contracts to particular entities (by way of the "safe harbour" technique[31]), should hinder the case-by-case assessment of national rules on reservation for non-profit organisations under Article 76.

(52) This is all the more true given that the preparatory work clearly points in the direction of a leeway for the EEA States[32] and that the case-law of both the EFTA Court and the CJEU points in the direction of a greater leeway for Member States in the field of Services of General Interest.[33]

(53) In addition, Oslo Municipality would like to draw the EFTA Court's attention to the current debate in Brussel of the need to reduce profit-seeking in social services, as commented on by both the Commissioner

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

[31] This legislative technique means that a provision of a statute or a regulation specifies that a certain conduct will be deemed *not* to violate a given rule.

[32] Cf the objective by the Council of the European Union to give more flexibility to Member States to organise tenders for social services (Council of the European Union 5369/12 s.36), the objective of that of the Commission to make better use of public procurement in support of societal goals (Explanatory Memorandum, COM/2011/1896 s.2), and the wish of the European Parliament to introduce reminders in the recitals of the Directive about the leeway of Member States granted by the *Sodemare* judgement (A7-007/2013.

[33] This is reflected in Court cases both on public procurement (cf. E-13/19, *Hraðbraut*, C-598/19, *Conacee*, para. 32, C-285/18, *Irgita*) and state aid (C-74/16 *Congregacion*, C-262/18 P *Dovera*, E- E-9/19 *Abelia* and WTW AS v EFTA Surveillance Authority)

Nicolas Schmit[34] and EPSU, the European federation of public service unions (EPSU) organising millions of workers in health and social care across Europe.[35]

3.3 Reservation of contracts concerning the provision of long-term places in nursing homes for non-profit organisations

3.3.1 The requirements of the Light regime

(54) Public contracts for health and social services that fall within the Light regime are subject to two requirements:

(55) First, Article 75 concern the publication of notices, and requires contracting authorities to make known their intention to award a contract by means of a contract notice or a prior information notice according to the rules set forth in that provision. The requirement is an expression of the principle of transparency, which is also laid down Article 76 (1) of the Directive.

(56) Second, Article 76(1) of the Procurement Directive provides that national provisions on the award of contracts for health and social services subject to "the Light regime" must be in compliance with the principles of equal treatment and transparency. Further, Article 76(2) underlines that Member States are free to determine the procedural rules applicable as long as such rules allow public contracting authorities to take into account the specificities of the relevant services, including such considerations and quality objectives as referred to in that provision.

(57) Oslo Municipality has complied with the principle of transparency in the case at hand, as the call for tenders was published on 25 November 2020 in TED, in accordance with Section 30-2a (3) of the Public Procurement Regulation, read in conjunction with Section 30-5.

3.3.2 The principle of equal treatment

(58) Oslo Municipality submits that the reservation of the right to participate in the tender procedure for the provision of long-term

[34] https://www.euractiv.com/section/economy-jobs/news/commissioner-schmit-you-cannot-make-money-on-social-services/

[35] https://www.epsu.org/article/orpea-s-financial-reports-confirm-union-concern;

places, based on Section 30-2a of the Public Procurement Regulation, are in compliance with the principle of equal treatment.

(59) In order to assess whether the reservation of the provision of long-term places in nursing homes, pursuant to Section 30-2a of the Public Procurement Regulation, are in compliance with the principle of equal treatment, it is necessary first to assess whether non-profit and for-profit providers are in a comparable situation.

(60) The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

(61) When assessing whether or not non-profit providers are in a comparable situation to non-profit providers with regard to the provision of long-term places nursing homes, due account must be taken to the objectives of the Light Regime.

(62) As set out in section 3.2 above, the objective of the Procurement Directive and in particular the Light Regime was not to establish a fully harmonised framework where national rules and social objectives for the organisation of the health- and social welfare systems has no role to play. The legal and factual context in which the Directive was enacted by the EU legislator does not indicate that the purpose was only to give full effect to the market-principles in EEA law.

(63) Rather, it follows clearly from the preamble to the Directive that Member States, given the importance of the cultural context and the sensitivity of services to the persons, should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. Further, due account should be taken to Article 14 TFEU and Protocol No 26, cf. recital (114) to the preamble.

(64) On this basis, Oslo Municipality submits that in the analysis of whether non-profit and for-profit providers of nursing home services are in a comparable situation, it is necessary to take into consideration the specific and highly sensitive nature of the provision of long-term places in nursing homes, where the aspect of care towards the patients is of utmost importance. The residents of long-term places in nursing homes in Oslo are the most ill elderly persons, where approximately 85 percent

suffer from varying degrees of cognitive impairments or dementia. Normally, the nursing home is their last home in life. Such aspects lies within the core of the reservation case-law of the CJEU with regard to non-profit providers (cf. the *Sodemare* judgement). In this regard, the intrinsic value-added benefits for the society that is connected with non-profit providers, which gives a spill-over for the benefit of the services provided, should be taken into account.

(65) In the experience of Oslo Municipality, non-profit providers are very suitable for the provision of these services. They have long experience and deliver very well in the soft quality dimensions related to the care of the elderly, and have a tradition of giving a voice to persons in the society that otherwise have difficulties to be heard. Non-profit providers also supply services of extra-value due to the use of voluntary resources. The inherent purpose of non-profit providers to pursue social aims as a priority, and the fact that any profits are reinvested in the organisation, thus maximising the social value of the services, entails that non-profit and for-profit providers are not in a comparable situation.

(66) In Oslo, the collaboration with the non-profit sector with regard to nursing homes goes back to the 1970s, and some of the non-profit organisations have an institutional continuity dating back to 1917. Non-profit organisations have thus played an important role as innovators, identifying needs of vulnerable groups, and having provided important services to the benefit of the residents of the municipality. In Oslo municipality's view, it is important for the population to secure the presence of these organisations.

(67) As the largest municipality of the country, Oslo municipality is aware of its potential to contribute to the national goal of the government to strenghten and maintain non-profit providers in the overall policy of health and social welfare. In this respect, Oslo municipality consider that it is making a valuable contribution to the national goal to increase the involvement of non-profit providers in the national health and social system through the reservation of the nursing home services that are the subject of dispute in the main proceedings.

(68) Oslo municipality accordingly submits that non-profit and for-profit providers are not in comparable situations with regard to the provision

of long-term places in nursing homes. Thus, the reservation of the right to participate in tender procedures concerning such services pursuant to Section 30-2a of the Norwegian Public Procurement Regulation are in compliance with the principle of equal treatment as expressed in Article 76 (1) of the Procurement Directive.

3.3.3 Objectively justified difference in treatment

(69) Should the reservation of the right to participate in tender procedures concerning long-term places in nursing homes pursuant to Section 30-2a of the Public Procurement Regulation not comply with the principle of equal treatment, Oslo Municipality submits that it must be considered objectively justified and proportionate for attaining the objectives of the Light regime.

(70) As set out in the consultation paper in respect of Section 30-2a, the social objective that the provision is aimed to achieve, is the greater breadth and variation of the overall provision of social and health care. In Oslo municipality's view, this objective is within the objective of the Light regime as it is an important quality aspect in order to fulfil the needs of the population. Section 30-2a was introduced as a tool to increase the degree of involvement of non-profit providers in the national health and social system, grounded on the desire to preserve the specific qualities and character of these organisations.

(71) Oslo municipality submits that the measure is necessary due to the difficulties the non-profit providers face in open tenders.

(72) One main difficulty is linked to the fact that non-profit providers to a large extent have different labour costs than other private (for-profit) providers. Within the nursing home area, for example, the vast majority of non-profit actors have salary-, working- and pension terms that are similar to that of public authorities. The reason is that non-profit providers over a long period of time and in mutual dependence with the public authorities have developed an employer practice that differs from the commercial providers and give them a higher cost level.

(73) In addition, as explained in the consultation paper to Section 30-2a of the Public Procurement Regulation, a challenge in open tenders is that it is difficult to concretise the "soft qualitative" advantages of the non-profit providers. Another challenge is related to the fact that non-profit

providers often provide qualitative and economic benefits to society that go beyond the benefits for the delivery of the specific service and thus is difficult to emphasise in traditional tenders. This is also the case for nursing home services. Oslo Municipality will expand further on this part of the observations in the national proceedings.

(74) Oslo municipality notes that it cannot see that there are alternative tools available.

(75) As regards the character of the measure, Oslo municipality would like to highlight the fact that both the *Sodemare*-judgement (reservation of the official financing of an entire service), and the *Spezzino* and *CASTA* judgements (direct awards), concerns more restrictive measures than a restriction of the participation of individual tenders. Furthermore, the measure does not imply an obligation, but a possibility to reserve individual tenders for non-profit providers. In addition, public authorities are encouraged to assess, even in the event that the conditions are fulfilled, whether or not is appropriate to reserve the individual tender in question.

3.3.4 The understanding of the notion of non-profit organisation

(76) Oslo Municipality submits that the national definition of "non-profit organisations" in Section 30-2a (2) is in line with the substantive content given to the notion of "non-profit organisations" in the CJEUs case-law.

(77) It follows from the judgement[36] and the opinion[37] by the CJCE in the *Sodemare*-case, and judgement by the CJEU in the *Falck* case[38], that the absence of profit-making and the reinvestment of any profits are the key component in a non-profit provider, not whether the organisations are voluntary organisations. The current definition of non-profit providers in Section 30-2a (2) builds on the previous understanding of the notion of "ideelle organisasjoner" in the old Public Procurement Regulation[39], but the national definition takes, as far as Oslo municipality understands it,

[36] Case C-70/95, Sodemare, para. 7.
[37] Opinion of the Advocate General in the case C-70/95, Sodemare, at point 6.
[38] Case C-465/17, Falck, para. 61.
[39] Preparatory work of the Ministry of Trade and Industry, section 5.2 at page. 8

into account updated case-law from the CJCE with regard to the notion of non-profit organisation in EEA law.

(78) Oslo municipality also notes that in a decision from 2017, the EFTA Surveillance Authority found that the notion of "ideelle organisasjoner" was in line with the requirements set out in the relevant case-law of the CJEU.

3.3.5 The understanding of the conditions for reservations

(79) In the view of Oslo municipality, the conditions for individual reservations in Section 30-2a of the Procurement Regulation is designed in line with the requirements for reservations in the CJEUs case law with regard to direct awards, cf. the judgements in the *Spezzino* and *CASTA* cases. Thus, it is in the view of Oslo municipality clear that the terms as such are lawful and consistent with EEA law.

(80) In the view of Oslo municipality, a strict interpretation of a condition of budgetary efficiency would exclude the ability for public authorities to take full account of the specificities of the services by choosing to conduct pure competitions based on quality parameters. This would be a considerable limitation of the discretion of public authorities and not in line with the objectives of the Light Regime. Therefore, it should, in the view of Oslo Municipality, be deemed in this regard that it is enough that the competition principle is upheld and that competition for tenders are published in accordance with the requirements for the principle of transparency.

3.4 Articles 31 and 36 of the EEA Agreement

(81) In question 3, the referring court also asks whether Articles 31 and 36 of the EEA Agreement precludes national legislation which allows contracting authorities to reserve the right to participate in tendering procedures relating to health and social services for "non-profit organisations". Assuming that those provisions apply, the national provision in Section 30-2A would be considered as consistent with the principles of equal treatment and transparency, cf above.

3.5 Closing remarks

(82) For the reasons set out above, the Municipality of Oslo respectfully proposes that the answer to question 1 should include that:

“ Articles 31 and 36 of the EEA Agreement and Articles 74 – 77 of Directive 2014/24/EU must be interpreted as not precluding a national legislation allowing public contracting authorities to reserve the right to participate in tendering procedures relating to nursing home services for “non-profit organisations”, provided that that the regulation complies with the principles of equal treatment and transparency as reflected in Articles 75 and 76 of the Public Procurement Directive”

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KOMMUNEADVOKATEN

Ane Grimelid
advokat