ROYAL NORWEGIAN MINISTRY OF
TRADE, INDUSTRY AND FISHERIES

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Answers to the Authority's questions regarding the possible breach of EEA rules on public procurement in connection with the award of public contracts for the construction and operation of nursing homes

The Ministry of Trade, Industry and Fisheries (the Ministry) makes reference to the EFTA Surveillance Authority's (the Authority) letter of 18 June 2018. Please find the Ministry's answers to the Authority's questions below. The Authority's fifth and sixth question will be answered first. Subsequently the Ministry will answer the first, second, third and fourth question from the Authority.

1. The Authority's fifth question

By its fifth question the Authority asks the Norwegian Government of details of any actions taken or planned in relation to provisions akin to former Section 2-1(3)(a) of Regulation No. 402 of 7. April 2006. .

With regards to this question the Authority makes reference to point 5 of the letter from the Ministry dated 8 May 2017. In this letter the Ministry stated that with "*regard to the replacement of the provision formerly found in Section 2-1(3) lit. a, this exemption is not continued in the new regulation on public procurement*". The Ministry also informed that it had received an external report[1] from lawyer Karin Fløistad which assessed whether contracts on health and social services could be reserved for non-profit organisations in accordance with EEA law. The Ministry informed that according to the report there was a possibility, although limited, for introducing such reservations and that the Ministry currently was assessing how to follow up the conclusions in the report.

[1] Utredning av handlingsrommet for bruk av ideelle leverandører av helse- og sosialtjenester, 8 Mars 2017, Karin Fløistad, Advokatfirmaet Simonsen Vogt Wiig AS.

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The Ministry has now assessed the conclusions in the report. On the basis of the report, the case law of the Court of Justice of the European Union (the CJEU), an interpretation of Directive 2014/24/EU[2] (the Directive) and the Authority's Decision No. 154/177/COL[3] the Ministry is of the view that EEA law allows for the reservation of contracts on health and social services for non-profit organisations, where the conditions outlined in the case law of the CJEU is fulfilled. A proposal for a provision akin to the formerly found Section 2-1(3) lit. a. will consequently be sent on a public consultation shortly.

The Ministry will in the following explain the legal basis for our view that EEA law allows for the reservation of contracts on health and social services for non-profit organisations. The Ministry will first outline the legal situation before the introduction of the Directive in point 1.1 and subsequently provide our view as to whether the introduction of the Directive changed this legal situation in point 1.2. The Ministry will also provide information on the provision that will be sent on a public consultation in point 1.3.

1.1.The legal situation before the introduction of Directive 2014/24/EU
Any derogation from the fundamental principles of transparency and non-discrimination in EEA law requires an objective justification, such as the need to protect human health and life.

In cases where the CJEU has assessed the legality of derogations from the fundamental principles in cases concerning the health and social sector, it has repeatedly emphasized that EU law does not detract from the power of the Member States to organise their public health and social security systems[4]. Furthermore the CJEU has ruled that it is for the Member States, in this case the EEA States, to decide on which degree of protection which they wish to afford to public health and on the way that degree of protection is to be achieved.[5]

In *Sodemare*[6] the question was whether Italian legislation, in which the possibility of entering into contracts regarding health and social services was limited to non-profit organisations, was compatible with EU law. In its assessment the CJEU emphasised that the Italian welfare system was based on a principle of solidarity which sought to promote and protect the health of the population.[7]

The CJEU concluded that;

> *"(...) as Community law stands at present, a Member State may, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system of the kind at issue in this case necessarily implies, with a view to attainting its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit making".*[8]

[2] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, OJ L 94, 28.3.2014, p. 65–242
[3] EFTA Surveillance Authority - Decision No 154/177COL of 20 September 2017 in Case No. 77606
[4] Case C-70/95 Sodemare, para 27.
[5] Case C-113/12 Spezzino, para. 56 and Case C-50/14 CASTA para 60.
[6] Case C-70/95 Sodemare.
[7] Case C-70/95 Sodemare, para 28-29.
[8] Case C-70/95 Sodemare, para 32.

The Ministry deduced from this that EEA law did not preclude national legislation which allowed public authorities to reserve contracts for health and social services to non-profit organisations, in Norway entitled *"ideal* organisations".[9] The Norwegian government used this flexibility to enhance the Norwegian welfare system, by providing a provision in Section 2-1(3) of Regulation no. 402 of 7 April 2006 on public procurement which allowed for the possibility of reserving contracts of health and social services for non-profit organisations.

Subsequently, the CJEU has interpreted Directive 2004/18/EC[10] (the former Directive) in Case C-113/13, Spezzino[11] and Case C-50/14, CASTA[12]. The two judgements accepted national legislation that awarded certain contracts on health and social services directly, and on a preferential basis, on the condition that the award contributed to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency. Furthermore, according to this case-law, voluntary associations had to qualify as such in order to benefit from the exception recognised in case-law.[13]

In their Decision No. 154/177/COL[14] the Authority assessed the legality of Section 2-1(3) of Regulation no. 402 of 7 April 2006 seen against the conditions stemming from the case-law of the CJEU.

The Authority made reference to the fact that the former Section 2-1(3) of the Norwegian Regulation aimed to ensure that non-profit organisations can continue to provide health and social services. The Authority furthermore made reference to the Norwegian Government's explanation that non-profit organisations are an important alternative to common service providers. A combination of public, commercial, and non-profit providers of health and social services shall ensure a diversified offer, designed to fulfil the different needs of the population. The Authority inferred from this explanation*;*

> *"that the legislative objective pursued by the national provision in question is to safeguard public health and social welfare, both being legitimate grounds, which justify a derogation from the principles of transparency and non-discrimination in EEA public procurement law, as established in the Court of Justice's case-law"[15].*

Furthermore the Authority stated that while the*;*

> *"national provision in question seems to be based on policy considerations, namely to create conditions for involving non-profit organisations in the*

[9] There is currently no legal definition in national legislation of this type of organisation, but as the Norwegian government has previously informed the Authority this concept is generally understood by the Norwegian Government and contracting authorities as synonymous for "non-profit organisation in pursuance of a social aim". See Decision No: 154/17/COL page 10. The proposed provision, similar to former Section 2-1 (3) will provide a definition of what is considered an ideal organisation in public procurement law.

[10] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114–240

[11] Case C-113/13, Spezzino

[12] Case C-50/14, CASTA

[13] See summary made by EFTA Surveillance Authority - Decision of 20 September 2017, in Case No. 77606 page 8 which makes reference to Case C-113/13 Spezzino and Case C-50/14 CASTA.

[14] EFTA Surveillance Authority - Decision No 154/177COL of 20 September 2017 in Case No. 77606.

[15] EFTA Surveillance Authority - Decision No. 154/17/COL of 20. September 2017 in Case No. 77606 page 9.

> *provision of health and social services, the Authority does not see any inconsistency with the general objective of protecting public health and social welfare in Norway. As the Court of Justice has repeatedly emphasized, EEA law does not detract from the power of the EEA States to organise their public health and social security systems. Consequently, the said national policy consisting in favouring non-profit organisations with the aim of increasing their degree of involvement in the national health and social system must be regarded as one of the many considerations the EEA States may take into account when exercising their discretion as regards the manner how they wish to organise their public health and security systems".*[16]

With regards to the requirement that the award contributes to the social purpose and to the objectives of the good of the community and budgetary efficiency the Authority stated that;

> *"the Norwegian Government has stressed the importance of non-profit organisations and the role they play in the pursuit of social objectives".*[17]

Furthermore the Authority stated that;

> "*the national legal provision does not call into question the necessity to carry out a tender procedure that attaches importance to cost-efficiency. From that perspective, contracting authorities still remain obliged under the EEA rules on public procurement to use suitable award criteria that guarantee supply of the best value for money. In any case, the Authority has not found any indication that tender procedures carried out under this legal regime might not be driven by budgetary efficiency concerns".*[18]

As regards the requirement to qualify as a voluntary association, the Authority stated that they noted that;

> "*the concept of "ideelle organisasjon" referred to in Section 2-1(3) of the Norwegian Regulation is generally understood by the Norwegian Government and contracting authorities as synonymous for "non-profit organisation in pursuance of a social aim". Due to the absence of any legal definition in national legislation and/or any national registry of recognised entities, the classification as non-profit must be carried out ad hoc by every contracting authority for every award procedure. In order to ensure a consistent administrative practice, the classification is based on guidelines developed by the Norwegian Government, which specify the criteria that must be met. According to these guidelines "either the business pursued shall not have any profit objective or the profit gained must be used exclusively to operate humanist and social services in the interest of the general public or that of particular groups". In addition, "the entire organisation, without any economic incentive, must work to alleviate social needs of the community or specific vulnerable groups". Both*

[16] EFTA Surveillance Authority - Decision No. 154/17/COL of 20. September 2017 in Case No. 77606 page 10.
[17] EFTA Surveillance Authority - Decision No. 154/17/COL of 20. September 2017 in Case No. 77606 page 10.
[18] EFTA Surveillance Authority - Decision No. 154/17/COL of 20. September 2017 in Case No. 77606 page 10.

> *the entity's organisational structure and any tax privileges are taken into account as relevant factors in the overall assessment".*[19]

The Authority concluded that in their view the guidelines;

> *"accurately reflect the main essence of a voluntary organisation, as described in case-law. Against this backdrop, the Authority sees no objective reason liable to preclude an entity, which meets this criteria, from availing itself of the exception developed by the Court of Justice".*[20]

Against this background the Authority concluded that Section 2-1(3) of the Norwegian Regulation No. 402 of 7. April 2006 on public procurement, as well as the individual awards examined in the decision, fulfilled the legal requirements laid down in case-law.

The former provision in Section 2-1(3) was therefore in accordance with Norway's obligations under EEA law when the former Directive was in force.

1.2. Is the legal situation changed by the introduction of Directive 2014/24/EU?
The former Directive had a different regulation of health and social services. The former Directive distinguished Annex II A services, from Annex II B Services. For annex II B services a more lenient set of rules applied than for the ones listed in Annex II A. The reasoning behind this distinction was that the Annex II A services were seen to have cross-border interest, while it was assumed a lack of cross-border interest for the Annex II B services. The distinction between Annex A and Annex B services was lifted when the new Directive was introduced. At the same time the new Directive introduced a so-called "light touch-regime" for health and social services.

The light touch regime allows the Member States to procure health and social services in a more flexible manner than the ordinary rules governing the procurement of services. Article 77 of the new Directive also regulates the possibility of reserving procedures for contracts on certain health and social services for organisations fulfilling certain conditions. The introduction of the new Directive and the light regime therefore represented a change in the rules for procurement of health and social services.

However, in the view of the Ministry the relevant question is not whether the introduction of the light touch-regime in the new Directive represents a change to the procurement rules governing the procurement of such services. The relevant question is rather whether the introduction of the new Directive changed the understanding of the fundamental principles of equal treatment and competition in a manner which meant that there is no longer a possibility of procuring health and social services beyond the provisions of the new Directive.

The regulation of health and social services in a specific chapter in isolation can indicate that the possibility of reserving contracts follows the rules of that Chapter, and in particular the provision in Article 77.

[19] EFTA Surveillance Authority - Decision No. 154/17/COL of 20. September 2017 in Case No. 77606 page 10.
[20] EFTA Surveillance Authority - Decision No. 154/17/COL of 20. September 2017 in Case No. 77606 page 11.

At the same time Article 77 represents a narrower possibility of reserving contracts than the one that existed before the new Directive. This means that if a reservation of contracts beyond the provisions in the light touch regime was no longer possible, it would mean that the EU-legislator has limited the freedom given to the EU Member States by primary law in the area of health and social services. If it was the intention of the legislator to introduce such a far-reaching restriction, it would be natural that it was clearly stated or followed clearly the wording of the Directive.

There are no indications in the wording of the new Directive that the principles of equal treatment and competition was intended to change the legal situation.

On the contrary preamble 4 to the Directive states the following;

> *"The increasing diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC".*

Furthermore the preamble to the Directive indicates that the new Directive is not intended to implement a full harmonisation. On the contrary it seems to be the intention of the legislator that the Member States can depart from the provisions of the Directive to the extent that this is in accordance with the TFEU. Preamble 41 of the Directive states that;

> *"Nothing in this Directive should prevent the imposition of enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that those measures are in conformity with the TFEU".*

In the view of the Ministry this entails that the fact that health and social services are now within the scope of the Directive, does not preclude measures falling outside the scope of the Directive as long as they are in line with EEA primary law. The Ministry would like to emphasise that the purpose of safeguarding public health allowed for a direct award to non-profit organisations when assessing deviations from the principles of equal treatment and competition under the previous Directive.

Discussions from the Council in the preparatory work of the Directive illustrates the importance of societal goals and social purposes, and is furthermore an argument for the view that the introduction of the Directive did not intend to restrict the freedom of the Member States with regards to the organisations of these types of services. The Council stated that;

> *"Social services of general economic interest have a fundamental role in the EU citizen's life quality. The European public procurement rules respect the competence of Member States in this field as they do not in any way oblige Member States to externalise the execution of such services. If contracting authorities decide to externalise such services, they have to comply with EU rules.*

The objective is now to give more flexibility to Member States to organise the tender procedure for such services".[21]

In addition, the circumstances related to the introduction of Article 77 in the Directive are of relevance when assessing the legislators intention. Legal theory[22] makes reference to the fact that the provision was introduced to the Directive at a late stage, and that this was a done as a result of the lobbying from Great Britain. The lobbying was linked to their need of having a public service delivered by certain newly established companies by persons previously employed in the public sector. These circumstances indicate that the Article does not represent an intention from the legislator to exhaustively regulate the possibility of reserving contracts on health and social services, and that it needs to be given a narrow interpretation.

In the view of the Ministry Article 77 must be seen as a provision regulating a situation where the Member States can be certain that the conditions of reservation is present. In these instances the Member States can reserve the contracts without carrying out the more detailed assessment of whether a limitation of the fundamental freedoms is lawful in accordance with conditions established by EEA primary law. The articles cannot, however, be seen to limit the possibility that contracting authorities have to reserve contracts to non-profit organisations as long as such a reservation is in accordance with EEA primary law.

In conclusion, the Ministry is of the opinion that the new Directive did not change the principles of equal treatment and competition and that contracts on health and social services can still be reserved for non-profit organisations as long as the conditions for such a reservation are fulfilled.

1.3.The public consultation

The Ministry will shortly send a provision similar to the one in Section 2-1(3) of the Norwegian Regulation No. 402 of 7 April 2006 on public procurement, on a public consultation.

The proposed provision will include conditions which must be fulfilled in order for a contracting authority to reserve competitions on health and social services to non-profit organisations (ideal organisations). It will also be stated in the public consultation that the content of these conditions are to be understood in accordance with the above-mentioned statements in the case-law of the CJEU. Furthermore it is stated that because deviations from EEA law must be necessary and proportionate, the contracting authorities must make an assessment of the legality of reserving contracts ahead of each award procedure. The proposed provision will also provide a definition of what is considered an ideal organisation in public procurement law.

Although the case-law allows for the direct award of contracts on health-and social services, the proposed Norwegian provision will follow the rules in Article 74-77, meaning for example that it requires competition and EEA wide publication. The public consultation will be found on the Ministry's webpage. [23]

[21] Council of the European Union 5369/12 page 36.
[22] S. Smith (2014) Articles 74 to 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 on page 167.
[23] https://www.regjeringen.no/no/tema/naringsliv/konkurransepolitikk/id1363/

2. The Authority's sixth question

By its sixth question the Authority asks the Norwegian government of details of any current official interpretations, guidance or similar regarding reservation of contracts to ideal/non-profit organisations, whether pursuant to Section 2-4(h) of Regulation No. 974, principles akin to former Section 2-1(3) (a) of Regulation No. 402, or otherwise.

On 20 December 2017 the Ministry published guidelines entitled "*Guidelines on how contracting authorities can assess whether is allowed to reserve competitions regarding health and social services to ideal organisations".*[24]

The introduction to the guidelines refers to the rules governing the procurement of health and social services.

The guidelines outline the history and tradition of ideal organisations providing health and social services in Norway. They make reference to statements in the preparatory work of the new public procurement rules[25], where the Norwegian parliament emphasised the importance of these organisations in the Norwegian welfare system and clearly stated that contracts on such services should be allowed to be reserved to non-profit organisations to the extent that this in accordance with EEA law.

The guidelines also look at the history of the question of the possibility to reserve contracts of health and social services to non-profit organisations and refer to the external report by Karin Fløistad which considers these questions.[26] The guidelines look at the judgement in Sodemare and the assessment made by the CJEU in this decision, referred to in point 1.

The guidelines subsequently look closer at the CJEU's judgements in Spezzino and CASTA and point to the fact that a contracting authority, in every award procedure, must assess whether a reservation actually *contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency*. It is stated that this assessment may have different outcomes within different categories of health and social services. As a condition for considering this, the guidelines state that it must be a health and social service which is based on the principle of solidarity.

The guidelines look at which conditions must be fulfilled in order for an organisation to qualify as an ideal organisation, the main essence being that these are entities with a mission of performing tasks for the public good, which do not operate with a view of making a profit and which reinvest any profits in order to realise the mission of the organisation.

The guidelines furthermore look at certain elements which may be taken into account when assessing whether a reservation actually contributes to the social purpose and the pursuit of the objectives of the good of the community.

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[24] https://www.regjeringen.no/no/dokumenter/veiledning-om-hvordan-oppdragsgiver-kan-vurdere-om-det-er-adgang-til-a-reservere-konkurranser-om-anskaffelser-av-helse--og-sosialtjenester-for-ideelle-leverandorer/id2582864/

[25] Innst. 358 L (2015–2016) Point 2.2.5 - https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2015-2016/inns-201516-358/?lvl=0

[26] Utredning av handlingsrommet for bruk av ideelle leverandører av helse- og sosialtjenester, 8 Mars 2017, Karin Fløistad, Advokatfirmaet Simonsen Vogt Wiig AS.

The guidelines refer to the argument accepted by the Authority in Decision No. 154/17/COL[27], namely the aim of creating a combination of public, commercial, and non-profit providers of health and social services.

The guidelines also make reference to other characteristics of ideal organisations, which contribute to social purposes and the good of the community and state that these may be taken into account in the assessment, as long as they apply in the specific instance.

For example these organisations may lead to the user-groups they care for being heard in the society. With regards to services provided to and needed by these groups this may lead to welfare services that to a larger extent is customized to these groups, for example by the creation of new services or the adjustment of existing services. The guidelines also make reference to the fact that since these organisations do not exist in order to generate profits, they have a tradition of creating services which are highly beneficial for the user groups that they work for, without knowing whether this will be profitable.

Another characteristic that is mentioned is that these organisations sometimes carry out follow-up work to the provision of the service which is procured by the contracting authority and that this prevents the need for the public purse paying for the same service again, for instance in the event of follow-up activities for drug abusers that have previously been admitted to an institution for treatment. This is linked also to the tradition that these enterprises have with the use of volunteers. The use of volunteers and follow-up activities lead to a save of cost for the society as a whole and is therefore also of relevance for the assessment of whether the reservation contributes to budgetary efficiency.

When the contracting authorities are to assess budgetary efficiency, the guidelines state that most likely there is a presumption for such efficiency as long as the organisations do not generate or take out profits. The guidelines state that the use of volunteers will strengthen this presumption. The guidelines also make reference to the element highlighted by the Authority in Decision No. 154/177/COL [28], namely the need to carry out a tender procedure.

In the final point the guidelines also state that if the contracting authorities consider that a reservation is in accordance with current EEA law in the specific instance, the contracting authority need to publish the contract EEA wide, following the procedures in the Norwegian regulation Chapter 30.[29] The guidelines also state that the assessment naturally needs to be made before the contracting authorities decide to reserve the contract, that the principle of transparency requires the contracting authorities to ensure documentation with regards to their decisions and assessments. Furthermore the guidelines state hat the follow-up of the contract needs to attach importance to controlling that the chosen service-provider does act in accordance with the requirements of being an "ideal organisation.

There are also "*Guidelines for procurement of services in the health and social sector*"[30], published by the Agency for Public Management and eGovernment[31]. The Ministry has made

[27] EFTA Surveillance Authority - Decision No. 154/17/COL of 20. September 2017 in Case No. 77606
[28] EFTA Surveillance Authority - Decision No. 154/17/COL of 20. September 2017 in Case No. 77606
[29] Chapter 30 is an implementation of Articles 74-77 of the Directive.
[30] Veileder for anskaffelser av helse- og sosialtjenester, which can be found at https://www.anskaffelser.no/verktoy/veileder-kjop-av-helse-og-sosialtjenester
[31] Direktoratet for forvaltning og IKT (Difi).

reference to a former version of these guidelines in previous correspondence with the Authority. The guidelines were recently, in May 2018, updated to reflect the guidelines published by the Ministry in December 2017.

3. The Authority's first and second question

By its first and second question the Authority asks, in essence, about the current status of the procedure launched by the Municipality of Oslo on 19 December 2016 and the procedure launched by the Municipality of Oslo on 27 March 2018. The Ministry will also inform about the procedure launched by the Municipality of Bergen on 24 January 2018.

The procedure announced by the Municipality of Oslo on 27 March 2018 is not a replacement for the procedure launched on 19 December.

3.1.The procedure launched on 19 December 2016 by the Municipality of Oslo

On 19 December 2016 the Procurement Regulation No. 407 of April 2006 was still in force, and the procedure was therefore launched in accordance with this Regulation.

The Municipality of Oslo has informed that four tenderers replied to the call for tender within the deadline. Three of the tenderers were prequalified.

One of the tenderers, *"PRK Helse AS"*, was excluded from the tender procedure. This tenderer did not, in the view of the Municipality of Oslo, fulfil the requirements of an ideal organisation and was excluded from the procedure.

As regards this decision *"PRK Helse AS"* originally took the Municipality of Oslo to Court in order to be allowed to take part in the competition. The company also asked Oslo County Court[32] to grant an interim injunction in the procedure.[33] Considering that the conditions for an interim injunction were met the Oslo County Court originally prohibited the Municipality of Oslo to continue the competition, and to provide the procurement documents to the tenderer, until the Oslo District Court[34] had decided on the matter or until "PRK Helse AS" had been prequalified following a new assessment from the Municipality of Oslo.

The decision to allow a temporary injunction was appealed to the Borgarting Court of Appeal. Borgarting Court of Appeal approved the appeal and rejected the decision of a temporary injunction on the grounds that "PRK Helse AS" had not managed to prove that they have a claim, seeing that they could not be seen as an ideal organisation. The dispute has subsequently been settled out of court.

The dispute has led to the procurement procedure taking longer than initially planned. At this point, subsequent to the settlement, the Municipality of Oslo has informed that the procurement documents was sent out on 19 July 2017. The deadline for submitting the final tenders is 17 December 2017 and the planned date for choosing a tender is 8 March 2019. The Municipality

[32] Oslo byfogembete.

[33] To apply for a temporary injunction, you have to prove that you have a claim. You must also have grounds for provisional security. Grounds for provisional security can be the conduct of an individual giving reason to believe that enforcement of a claim will be wasted or made unreasonably difficult.See information about the concept op temporary injunctions here: https://www.domstol.no/en/Enkelt-domstol/Oslo-County-Court/enforced-execution-and-provisional-security/concerning-provisional-security/temporary-injunction/

[34] Oslo tingrett

has informed that they plan to enter into a contract by 2020, and that the operation of the nursing homes are planned to begin by 2024.

3.2. The procedure launched on 27 March 2018 by the Municipality of Oslo
On 27 March 2017 the Procurement Regulation No. 974 of 12 August 2016 had entered into force, and the procedure was therefore launched in accordance with this regulation. The procedure is a competitive procedure with negotiation. The deadline for submission of tenders in the competition expired on 16 May 2018.

The procedure is related to the award of public contracts for the operation of nursing homes solely, and does not involve any construction. It was a precondition in the procedure that the chosen provider(s) should have access to nursing home building(s) of a certain quality.

The Municipality has informed that four tenderers replied to the call for tender. No tenderers were excluded, and the Municipality negotiated with all four tenderers during the month of June. The Municipality has informed that they will enter into contracts with all four tenderers[35] on 7 September 2018. The contracts will be operative from 1 January 2019.

3.3. The procedure launched on 24 January 2018 by the Municipality of Bergen
The procedure was launched 24 January 2017, in accordance with the Procurement Regulation No. 974 of 12 August 2016. The deadline for submitting a tender in the competition was 12 March 2018.

The procedure is related to the award of public contracts for the operation of a nursing home. The Municipality of Bergen has informed that there has been a separate award procedure for the construction of this nursing home, which will be owned by the Municipality of Bergen.[36]

The Municipality of Bergen has informed that three tenderers replied to the call for tender. One tender[37] was chosen and the contract was entered into on 14 May 2018. The Municipality has furthermore informed that the provision of services, meaning the operation of nursing homes, is planned to begin in April 2019.

4. The Authority's third question

By its third question the Authority asks the Norwegian government to provide a clarification of the basis on which the procedures referred to above are reserved for ideal/non-profit organisations.

Regarding the procedure launched on 19 December 2016 by the Municipality of Oslo, this procedure is reserved for ideal organisations on the basis of sections 1-3 (2) lit. k and 2-1(3) lit. a. of Regulation No. 407 of April 2006. In this regard the Ministry makes reference to the letter sent to the Authority on 8 May 2015 and subsequent correspondence in that case.

[35] "Nordberghjemmet As, Diakonhjemmet Omsorg", "Sagenehjemmet AS, Diakonhjemmet Omsoorg", "Stiftelsen Diakonissehuset Lovisenberg (Cathinka Guldbergsentere Lovisenberg)" and "Stiftelsen Grefsenhjemmet"
[36] https://www.doffin.no/Notice/Details/2016-440117
[37] "Haraldsplass diakonale stiftelse".

The procurements launched by the Municipality of Oslo and the Municipality of Bergen after the entry into force of Regulation No. 974 of 12. August 2016 were reserved on the following legal basis

- the exemption for exercise of official authority cf. Section 2-4(h) of Regulation No 974 of 12. August 2016.
- the non-statutory exemption for ideal/non-profit organisations which follows from the case law of the Court of Justice of the European Union (the CJEU) cf. for example case C-113/13 (Spezzino) and case C-50/14 (CASTA).

4.1. The exemption for official authority

The exemption in the Norwegian Procurement Regulation No. 974 of 12 August 2016 Section 2-4(h) is legally based in Article 39, cf. Article 32 of the EEA Agreement. According to these provisions the EEA Agreement shall not apply to activities, which *"are connected, even occasionally, with the exercise of official authority"*. Contracts consisting in the exercise of official authority therefore do not fall within the scope of the EEA Agreement.

The procurements in question concern health and care services for patients in long-term beds in nursing homes. Long-term beds in nursing homes is part of the public health and care services that municipalities are obliged to offer to the citizens pursuant to §§ 3-1 and 3-2 of the Health and Care Services Act.

It follows from the case law of the CJEU that the use of coercive measures against citizens is considered to constitute exercise of official authority, cf. Cases C-160/08, C-47/08 and C-54/08.

The Ministry has previously provided an extensive explanation of health and care services in nursing homes in Norway[38], the legal basis for the use of coercive measures on residents in nursing homes[39] and the scope of the use of the coercive measures in nursing homes in the Municipality of Oslo[40] in correspondence with the Authority in their letter of 1 march 2017 in case 77606.

The Ministry informed the Authority that it is the health personnel responsible for the patient's care who makes the formal decision of applying coercive measures and therefore considers whether the conditions for applying coercive measures are met cf. § 4A-5 of the Patient's and Users Rights Act. As previously informed the decision can be made for maximum 1 year at a time. The decision should be justified in writing and may be appealed to the County Governor by the patient or the patient's next of kin. The Ministry would also like to inform the Authority that the County Governor can overrule the decision to apply coercive measures on its own initiative. Furthermore, where a decision on use of coercive measures have not been appealed and the use of coercive measures persists for more than three months, the County Governor shall on its own initiative consider whether the coercive measures are still necessary cf. § 4A-8 of the Patient's and Users Rights Act.

[38] See letter from the Ministry to the Authority of 1 March 2017 in case 77606 point 1
[39] See letter from the Ministry to the Authority of 1 March 2017 in case 77606 point 2
[40] See letter from the Ministry to the Authority of 1 March 2017 in case 77606 point 3

In the previous correspondence with the Authority the Ministry informed that we are of the opinion that the range of coercive measures that may be used against residents in nursing homes in Norway, amongst other medication without consent and retaining the patient in the nursing home against his/her will, include measures that constitute use of official authority within the meaning of Article 32 of the EEA Agreement.[41] The Ministry elaborated on this view in our letter of 8 May 2017 in case 77606.[42]

The Municipality of Oslo has informed that the reservation of the procurement has been done on the basis of considerations of the information provided in these letters. The Municipality of Bergen has emphasised that the explanations of the situation provided by the Municipality of Oslo applies equally to them and that their reservation is done on the basis of the same considerations.

4.2. The non-statutory exemption for ideal/non-profit organisations which follows from the case law of the Court of Justice of the European Union (the CJEU) cf. for example case C-113/13 (Spezzino) and case C-50/14 (CASTA).

As outlined in point 1 the Ministry is of the view that EEA law allows for the reservation of contracts on health and social services to non-profit organisations where conditions outlined in the case-law of the CJEU is fulfilled. As stated in point 2 the Ministry has published guidelines on how contracting authorities should assess whether a reservation is allowed in their award procedures.

Both the Municipality of Oslo and the Municipality of Bergen have stated that they have based their reservation on the non-statutory exemption, after assessing the applicability of this exemption on their award procedure.

4.2.1. The assessment by the Municipality of Oslo

The Municipality of Oslo has informed the Ministry of the fact that ideal organisations traditionally have played an important role in establishing nursing homes in Oslo. For a long time these organisations have provided a certain share of these services to the population in Oslo.

The Municipality of Oslo has stated that there is a political goal that ideal organisations provide approximately 25% of institutional beds being by 2025. The procurement in question is a replacement of existing nursing homes, that are today delivered by ideal organisations and the reservation seeks to maintain the goal percentage.

The Municipality of Oslo has highlighted that the service in question, the nursing home service, is a health and social service based on the principle of solidarity. They have stated that they share the political view of the Norwegian Parliament, namely that ideal organisations in this service sector represent an important alternative to common service providers and that the safeguarding of their existence in the provision of the services in question is necessary to safeguard public health and social welfare. The Municipality have stated that ideal organisations represent a supplement to the competences found in public and private commercial enterprises and as such contribute to diversity in the provision of various welfare

[41] See letter from the Ministry to the Authority of 1 March 2017 in case 77606 point 4
[42] See letter from the Ministry to the Authority of 8 May 2017 in case 77606 point 2.

services. It is highly important for the Oslo Municipality Nursing Administration that the nursing home services delivered are adjusted to the users in a manner which ensures a high quality and effective service for each individual. The Municipality finds a reservation of the competition on the award in question for ideal organisations to be necessary in order to maintain the mix of service providers which ensures such a high quality and effective service for each individual.

The Municipality has also highlighted the role that these organisations play in identifying social needs and creating offers for various users groups of health and social services. These organisations have a tradition of providing offers to the poor, people suffering from addiction problems, people with mental illnesses, physically disabled and elderly people. The Municipality considers that this tradition gives reason to believe that these organisations will play a role in the development and adaption of health and social services also in the future. They subsequently find that ideal organisations uncover social needs and contributes to the further development of the Norwegian welfare system.

The Municipality has also pointed to the fact that the profit generated from the provision of these services are spent on developing welfare services corresponding to the social purpose of the organisations. The Municipality has also stated that their impression is that the ideal organisations have access to a larger amount of volunteers.

The Municipality therefore considers that the competition on this award of nursing home services can be reserved for ideal organisations.

4.2.2. The assessment by the Municipality of Bergen

The Municipality of Bergen has informed that ideal organisations have long traditions of working for persons in need of care services and elderly persons, and that these organisations still play an important part in the testing and development of various services.

The Municipality of Bergen has highlighted that the service in question, the nursing home service, is a health and social service based on the principle of solidarity. They have stated that by reserving the competition of the award of the contract in question to ideal organisations they ensure that the public funds which are assigned to the provision these services, is actually used on the social purpose that the services seek to maintain. The reason for this is that potential profits are not given to the owners of the enterprise, but reinvested.

The Municipality of Bergen has also stated that ideal organisations have illustrated a great ability to develop various services of a high quality for the individuals receiving the services. In this regard the Municipality finds that ideal organisations contribute to the mix of service providers, considered necessary to safeguard public health and social welfare.

The Municipality has also informed that in their experience many ideal organisations have access to resources that they choose to put at the disposal of the nursing homes in a manner which is beneficial to the users of the service. This can for instance be access to volunteers or economical resources, for example that profits made are used to pay employees with a specific responsibility of organizing activities for the nursing home inhabitants.

In consequence the Municipality of Bergen states that although they may pay the same price for services from ideal organisations as they do for services from private commercial operators, they receive larger value for money and therefore find that the public funds reach further.

The Municipality of Bergen also states that the contract specifically demands documentation intended to prove that the organisation does in fact qualify as an ideal organisation, and that this has been assessed in accordance with the Ministry's guidelines.

5. The Authority's fourth question

By its fourth question the Authority seeks information of what assessment the two Municipalities have undertaken in relation to the applicability of Section 2-4 (h) of Regulation no. 974 of 12 August 2016, providing an exemption for services connected with the exercise of official authority. The Norwegian government is also invited to include details as to how the Authority's Decision No. 154/17/COL[43] has been taken into account in these assessments, especially provided that ancillary activities such as works and/or the provision of catering, laundry, transport and similar services remain subject to the EEA rules on public procurement. The Norwegian government is also invited to explain whether any alternative provisions are relied upon in order to limit the procedures to ideal/non-profit organisations.

5.1.Services included in the procedure launched on 27 March 2018 by the Municipality of Oslo

The Municipality of Oslo has informed that the nursing home services will be provided from already existing buildings, which will be rented by the Municipality. It was a prerequisite in the procurement that the chosen suppliers should have access to buildings of a certain standard that the Municipality could rent. As landlords, the suppliers will be responsible for the management, maintenance and structural operation of the buildings.

Cleaning services, laundry services and catering services will be part of the operation of the nursing homes and thus the responsibility of the chosen suppliers.

5.2.Services included in the procedure launched on 24 January 2018 by the Municipality of Bergen

The Municipality of Bergen has informed that the nursing home in question, Siljuslåtten, is currently under construction.[44] There has been a separate award procedure for the construction of this nursing home, which will be owned by the Municipality of Bergen.[45]

The municipal nursing homes have an external service provider of catering services following a procurement from 2016.That award procedure also included Råstølen nursing home, which has now been given the name Siljuslåtten sykehjem.[46]

With regards to laundry services, the Municipality of Bergen has informed that for economic reasons the normal procedure is to rent this equipment from a laundry service. It is the chosen service provider that is responsible for ensuring this, meaning that the laundry services are also included in the procurement of the nursing home services. Cleaning services are also a part of the responsibility of the chosen supplier.

[43] EFTA Surveillance Authority - Decision No 154/177COL of 20 September 2017 in Case No. 77606
[44] https://www.bergen.kommune.no/omkommunen/avdelinger/etat-for-utbygging/9694/article-109551
[45] https://www.doffin.no/Notice/Details/2016-440117
[46] https://www.doffin.no/Notice/Details/2016-585818

5.3.*Which services does the exemption for official authority cover?*
In the Authority's Decision No. 154/17/COL[47] the Authority made reference to the fact that the CJEU has ruled that, as derogations from the fundamental rules of freedom of establishment and freedom to provide services, the rules on exercise of official authority must be interpreted in a manner which limits their scope to what is strictly necessary in order to safeguard the interest which they allow the EEA States to protect.[48]

The Authority has also pointed to the fact that the CJEU has stated that according to settled case-law, the derogation provided under those articles must be restricted to activities which, in themselves, are directly and specifically connected with the exercise of official authority. This excludes from being regarded as connected with the exercise of official authority functions that are merely auxiliary and preparatory.

The services referred to above form an inherent part of the nursing home service and should therefore not be seen as "auxiliary" or "preparatory". To demand that these services were tendered out separately would in many instances render the exemption for the exercise of official authority without effect. This because it in practice is often necessary to provide the service as a whole, and consequently it is necessary to apply the exemption to the service as a whole, in order to safeguard the interest which the exemption allows the EEA States to protect.

With regards to the need of procuring the services as a whole, the Municipality of Oslo has emphasised that nursing home services are services which are essential in the welfare state and to the inhabitants in Norway. When procuring these services, the Municipality as a contracting authority needs to be able to organise the procurement in the manner which leads to the best possible provision of nursing home services. Sometimes this requires that the services are procured from a supplier which is responsible for providing the nursing home service as a whole. This is the case for the procurement at issue, where the chosen suppliers shall operate nursing homes in buildings owned by (or otherwise disposed of) the suppliers. If, in this case, the nursing home operation is split into different parts and made subject to separate contracts there is a risk of a situation where the total nursing home service is not functioning. When a procurement is split into separate parts, the supplier responsible for running the main service - the nursing homes service - is not in a position to control and guarantee the other services, which are essential to ensure the proper functioning of the main service. The Municipality of Oslo has also underlined that it is unfavourable both in terms of quality control and economic efficiency if the Municipality enters into contracts regarding parts of the operation of nursing homes that are not owned and operated by the Municipality itself.

The Municipality of Bergen also states that the services included in their procurement of nursing home services are procured as an inherent part of that service.

5.4 Mixed contracts
In the event that the Authority does not share the opinion that the nursing home services as a whole can be seen as covered by the exemption for official authority, the Ministry has

[47] EFTA Surveillance Authority - Decision No 154/177COL of 20 September 2017 in Case No. 77606
[48] See Case 147/86, Commission v. Greece, para. 7.

previously explained our view that these types of contracts can be seen as a mixed contract, considering that various types of services are part of the procurement.[49]

Article 3 of the Directive governs mixed procurement. According to Article 3(6), *"where different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject-matter of that contract".*

The Municipality of Oslo has informed that, in essence, they do not see the statements in the Authority's Decision No.154/17/COL as referring to anything else than the assessment necessary according to the rules on mixed procurement. As already stated above in point 5.3 the Municipality of Oslo views these services as one inherent service which cannot be separated.

The Municipality of Oslo has informed that with regards to what is the main-subject matter of the contract in question this is clearly the procurement of the nursing home services. Obtaining these services is the purpose of the contract. The Municipality of Oslo has also pointed to the fact that the nursing home services clearly constitute the largest economic value of the contract.

The Municipality of Bergen has equally informed that they share this view and that the nursing home services are clearly the main subject-matter of their procurement.

Yours sincerely

Monica Elisabeth Auberg
Deputy Director General

Elin Engelsen Geitle
Adviser

This document is signed electronically and has therefore no handwritten signature

Attachements: Utredning av handlingsrommet for bruk av ideelle leverandører av helse- og sosialtjenester, 8 Mars 2017, Karin Fløistad, Advokatfirmaet Simonsen Vogt Wiig AS.

[49] See the Ministry's letter to the Authority of 1 March 2017