EFTA SURVEILLANCE AUTHORITY

Case No: 66111 and 66744
Event No: 551991
Dec. No.: 248/10/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of

21 June 2010

to close two cases against Norway commenced following a receipt of a complaint against that State in the field of public procurement

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement on the European Economic Area, in particular Article 31, 36, 65 and 109 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 23 and 31 thereof,

Having regard to the Act referred to at point 2 of Annex XVI to the EEA Agreement,

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 (hereafter referred to as "the Act")

as adapted to the EEA Agreement by Protocol 1 thereto.

Whereas:

On 3 February 2009, EFTA Surveillance Authority (hereafter referred to as "the Authority") received a complaint against Norway which alleged that, by allowing the exclusion of commercial operators from the award procedure for the procurement of child care and welfare services by the Norwegian Directorate for Children, Youth and Family Affairs (*Barne-, ungdoms- og Familiedirektoratet, hereafter "Bufdir")*, Norway had failed to fulfil its obligations arising from Article 2 of the Act and Article 31 and 36 of the EEA Agreement.

On 15 June 2009, the Authority received a second complaint against Norway, filed by the same complainant and concerning the same issue as referred to above, *i.e.* the award of a public contract concerning the procurement of child care and welfare services, this time related to a contract awarded by the Municipality of Oslo. Since both complaints essentially concern the same issue, they have been assessed jointly by the Authority.

The Authority requested the Norwegian Government to provide information on the content of the national rules and practice by letters of 23 February 2009 (Event No. 509088), 8 September 2009 (Event No. 529654) and 2 October 2009 (Event No. 532166). The Norwegian Government provided the requested information by letters of 4 May 2009, 28 September 2009 and 20 October 2009 (Ref. 200900447-/CPM). The issue has further been discussed at the Package Meeting in Norway on 11 and 12 November 2009.

Section 2-1(3) of the Norwegian Regulation No. 402 of 7 April 2006 on public procurement (*Forskrift No. 402 om offentlige anskaffelser*) provides that for contracts concerning the performance of health and social services with a non-profit organisation, a contracting authority is, in principle, not obliged to follow the procedural rules for public tendering laid down in part II and part III of the Regulation. This provision is interpreted and applied in such manner that contracting authorities in Norway are allowed to *a priori* exclude commercial operators from participating in award procedures for public contracts for child care and welfare services.

Both Bufdir and the Municipality of Oslo must be regarded as contracting authorities within the meaning of Article 1(9) of the Act and the contracts subject to the present decision must be considered as public service contracts within the meaning of Article 1(2)(d) of the Act having a total value exceeding the threshold value referred to in Article 7(b), as amended.[1] Therefore, the Act must be considered as in principle applicable to the award procedures subject to the present letter.

However, the services covered by the present contracts must be considered as non-priority services under Annex II.B of the Act, in particular as health and social services under Category 25. It follows from Article 21 of the Act that contracts which have as their object services listed in Annex II.B shall, apart from the general provisions of the Act as laid down in Title I and Title II, Chapter I and II, be subject solely to Article 23 and Article 35(4) of the Act, *i.e.* the provisions on technical specifications and the publication of a contract award notice. Moreover, it follows from the case law of the Court of Justice of the European Union (hereafter "the Court') that non-priority services are also subject to the fundamental principles of EEA law, and in particular the principles on the freedom of establishment and the freedom to provide services, in the event that such contracts appear to be of cross-border interest (Case C-324/98 *Telaustria* and *Case-507*/03, *Commission v. Ireland*). Taking into account the high value of the contracts concerned, their duration and the fact that foreign undertakings have expressed interest in the contract, the contracts appear to be of cross-border interest and, therefore, have to be assessed in light of the fundamental principles of EEA law.

It follows from the nature of the services concerned, *i.e.* the placement and care for children and youngsters in foster homes, that the operation thereof requires from the service provider a stable and continuous presence on Norwegian territory. It follows from the Court's case law that, under these circumstances, the situation has to be assessed in light of the freedom of establishment and not in light of the freedom to provide services (Case C-2/74 *Reyners v Belgium,* paragraph 21 and Case C-55/94 *Gebhard*, paragraph 25). As regards the question whether the national measure allowing contracting authorities to reserve public contracts for child care and welfare services to non-profit operators

[1] The threshold values were last amended by the Act referred to in point 2, 9th indent of Annex XVI to the EEA Agreement (Commission Regulation (EC) No 1422/2007 of 4 December 2007) and the value referred to in Article 1(2)(d) was set at NOK 1.654.298. The total value of the present contracts amounts to respectively NOK 2.29 billion for the contract(s) awarded by Bufdir and NOK 230 million for the contracts awarded by the Municipality of Oslo.

amounts to a restriction on the freedom of establishment, the Court has ruled that a Member State may, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system necessarily implies, with a view to attaining 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. The Court considered further that, under these circumstances, the national measure is not of such a nature as to place profit-making companies from other Member States in a less favourable factual or legal situation than profit-making companies from the Member State in which they are established and, therefore, concluded that the non-profit condition cannot be regarded as contrary to the Treaty provisions on the freedom of establishment (Case C-70/95 *Sodemare*).

Based on the above, and taking into account that, with regard to the present award procedures, profit-making companies from other Member States do not seem to be in a less favourable factual or legal situation than Norwegian profit-making companies, the Authority concludes that Section 2-1(3) of the Norwegian Regulation No. 402, and the way it is interpreted and applied by the Norwegian Government, does not amount to a restriction on the freedom of establishment or the freedom to provide services under EEA law.

As regards the non-discrimination obligation laid down in Article 2 of the Act, the Authority takes the view that this provision must be interpreted in the way that equal treatment must be provided to all undertakings that are normally allowed to provide the services concerned on the market. However, it follows from the above that under the rules on the freedom of establishment EEA States are allowed to exclude commercial operators from the market for public social services and *a fortiori* for child care and welfare services. Therefore, the Authority concludes that, in such cases, commercial operators cannot rely on the non-discrimination obligation of Article 2 of the Act to claim the same treatment as non-profit operators. Moreover, the difference in treatment is based on objective criteria.

By letter of 11 February 2010 (Event No. 546005), the complainant was informed by the Internal Market Affairs Directorate of the Authority that the latter had the intention to propose to the Authority to close the case.

By letter of 15 March 2010, the complainant replied to the aforementioned letter of 11 February 2010 in which it reiterated the view that the national measure in question amounts to a restriction on the freedom of establishment and the freedom to provide services under Article 31 and 36 of the EEA Agreement and amounts to a breach of the non-discrimination principle laid down in Article 2 of the Act. However, the Authority concludes that there were no elements in that letter which could alter its views on the matter.

There are, therefore, no grounds to pursue the cases further.

EFTA SURVEILLANCE AUTHORITY

HAS ADOPTED THIS DECISION:

The cases arising from two complaints against Norway concerning an alleged breach by that State of the Articles 31 and 36 of the EEA Agreement and Article 2 of the Act is hereby closed.

Done at Brussels, 21 June

For the EFTA Surveillance Authority

Per Sanderud
President

Sverrir Haukur Gunnlaugsson
College Member