

Case No:77606  
Document No: 858393  
Decision No: 154/17/COL

EFTA SURVEILLANCE  
AUTHORITY

## EFTA SURVEILLANCE AUTHORITY DECISION

of 20 September 2017

closing a complaint case arising from an alleged unlawful discrimination of private enterprises and breach of the EEA rules on public procurement

### THE EFTA SURVEILLANCE AUTHORITY

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

Whereas:

#### **1 Introduction**

On 6 July 2015 (Doc. No. 763710), the EFTA Surveillance Authority (“the Authority”) received a complaint lodged by NHO Service against the Norwegian Government alleging a breach of the EEA rules on public procurement resulting from an unlawful discrimination of private enterprises in the award of public contracts. More concretely, the complainant argues that the EEA public procurement directives have not been correctly implemented into the Norwegian legal order, as national rules appear to allow public entities to award contracts in the area of health and social services exclusively to non-profit organisations (“*ideelle organisasjoner*”, according to the terminology used in Norwegian legislation), to the detriment of other economic operators. In the complainant’s view, this leads to a discriminatory practice, which hinders effective competition as well as the effort to guarantee best quality and value of services in public procurement.

The complaint refers in this context to two different legal provisions in Norwegian legislation authorising such administrative practice among contracting entities, which, in the complainant’s opinion, is not in line with the EEA rules on public procurement: Section 2-1 (3) and Section 1-3(2) lit. k of the Norwegian Regulation No. 402 of 7 April 2006 on public procurement (*Forskrift No. 402 om offentlige anskaffelser*). While the first legal basis contains a general authorisation to privilege non-profit organisations in award procedures, the second legal basis relies on a presumed exercise of official authority required to provide the services in question. The complainant further claims that the concept of “*ideelle organisasjoner*” is not defined under Norwegian law, thus undermining legal certainty as a fundamental principle of EEA law.

After examining the complaint, the Authority takes the view that none of the alleged issues raised in the complaint indicates an incorrect implementation of the EEA rules on public procurement into Norwegian law. The present decision contains an account of the investigation carried out by the Internal Market Affairs Directorate (“the Directorate”) as well as the main reasons for this conclusion.

## 2 Correspondence

By letter of 8 July 2015 (Doc. No. 763990), the Authority informed the Norwegian Government of the receipt of the complaint.

By letter of 27 October 2015 (Doc. No. 777667), the Authority sent a request for information to Norway, to which the Norwegian Government replied by letter of 23 November 2015 (Doc. No. 781610).

The matter was discussed with the Norwegian Government at the package meeting in Oslo on 12-13 November 2015.

On 2 March 2016 (Doc. No. 795534), the Authority sent a request of information to Norway, to which the Norwegian Government replied by letter dated 30 March 2016 (Doc. No. 798646).

On 10 May 2016 (Doc. No. 803840), the Authority sent a request of information to Norway, to which the Norwegian Government replied by letter dated 21 June 2016 (Doc. No. 809313).

On 7 July 2016, a meeting between the Authority and the complainant took place at the Authority’s premises, during which the complainant provided a presentation explaining its views on the legal issues of the case (Doc. No. 811915).

By e-mail of 16 August 2016 (Doc. No. 814840), the complainant informed the Authority that it had instituted proceedings against the award of a public contract. The complainant also announced to provide the Authority with the information it had requested at the meeting of 7 July 2016.

On 8 September 2016 (Doc. No. 77606), the Authority sent a request for information to Norway, to which the Norwegian Government replied by letter dated 10 October 2016 (Doc. No. 821847).

The matter was further discussed by the Authority and the Norwegian Government at the package meeting, which took place in Oslo on 27-28 October 2016.

On 18 November 2016, the complainant received a letter from the complainant containing written observations (Doc. No. 827231).

By letter dated 12 December 2016 (Doc. No. 831079), the Norwegian Government replied to the Authority’s follow-up letters.

By letter dated 10 January 2017 (Doc. No. 834495), the Authority sent a request for information to Norway, to which the Norwegian Government replied by letter dated 1 March 2017 (Doc. No. 844373).

By letter dated 9 March 2017 (Doc. No. 836862), the Directorate informed the complainant of its intention to propose to the Authority that the case be closed. The complainant was invited to submit any observations on the Directorate's assessment of the complaint or present any new information.

By letter dated 24 May 2017 (Doc. No. 857730), the complainant submitted written observations in reply to the Authority's letter of 9 March 2017.

The case has been discussed informally on several occasions with the complainant and the Norwegian Government.

### **3 Legislative framework**

#### **3.1 EEA law**

##### **3.1.1 EEA Agreement**

Article 31(1) EEA, in Part III, Free Movement of Persons, Services and Capital, Chapter 2, Right of Establishment, reads:

*“Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*

*Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.”*

Article 32 EEA provides the following:

*“The provisions of this Chapter 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.”*

Article 36(1) EEA, in Chapter 3, Services, reads:

*“Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.”*

Article 39 EEA reads:

*“The provisions of Articles 30 and 32 to 34 shall apply to the matters covered by this Chapter.”*

Article 65(1) EEA, in Part IV, Competition and other common rules, Chapter 3, Other common rules, reads:

*“Annex XVI contains specific provisions and arrangements concerning procurement which, unless otherwise specified, shall apply to all products and to services as specified.”*

### **3.1.2 Directive 2004/18**

*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*<sup>1</sup> (“Directive 2004/18”) was incorporated into the EEA Agreement by Joint Committee Decision No 68/2006 and entered into force on 18 April 2007.

In the meantime, Directive 2004/18 has been replaced by *Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18* (“Directive 2014/24”), following its incorporation into the EEA Agreement by Joint Committee Decision No 97/2016, which has entered into force on 1 January 2017. Directive 2004/18 remains nonetheless the solely relevant EEA Act for the purposes of an assessment of compatibility with EEA rules on public procurement in the present case, given that it was in force at the time when the Norwegian legislation, challenged in the complaint, was in place. The same goes for the award practice based thereon, as reflected in the tender procedures launched by the Municipality of Oslo in June 2015, thus prior to the entry into force of the new rules. The applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract.<sup>2</sup> Accordingly, the Authority’s assessment set out in this letter does not extend to aspects related to the compatibility of current Norwegian legislation with Directive 2014/24.

Directive 2004/18 contains the following definitions in Article 1(2):

*“(a) ‘Public contracts’ are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.*

...

*(d) ‘Public service contracts’ are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.*

<sup>1</sup> Act referred to at point 2 of Annex XVI to the EEA Agreement (OJ L 245, 7.9.2006, p. 22 and EEA Supplement No 44, 7.9.2006, p. 18).

<sup>2</sup> Case C-337/98, *Commission v France*, EU:C:2000:543, paras. 36 and 37; Case C-576/10, *Commission v Netherlands*, EU:C:2013:510, para. 52.

...”

The applicability of Directive 2004/18 to the award of public service contracts is subject to various conditions, in particular as regards the value of those contracts and the kind of services concerned.

Thus, first, in accordance with the first and third indents of Article 7(b), Directive 2004/18 applies, *inter alia*, to public service contracts with the value exclusive of value-added tax specified therein, which have as their object the services listed in Annex II A to that directive awarded by contracting authorities other than the central government authorities listed in Annex IV of that directive or which have as their object the services listed in Annex II B thereto.

Secondly, under Articles 20 and 21 of Directive 2004/18, contracts which have as their object services listed in Annex II A of that directive are to be awarded in accordance with Articles 23 to 55 thereof, whereas contracts which have as their object services listed in Annex II B of that directive are to be awarded in accordance with Articles 23 and 35(4) only thereof, which concern, respectively, the technical specifications and the notice of the results of the procurement procedure. In accordance with Article 22 of Directive 2004/18, contracts which have as their object services listed both in Annex II A and in Annex II B of that directive are to be awarded in accordance with Articles 23 to 55 thereof where the value of the services listed in Annex II A is greater than the value of the services listed in Annex II B, or, in other cases, in accordance only with Articles 23 and 35(4) of that directive.

Category 25 in Annex II B to Directive 2004/18 concerns health and social services.

### 3.2 National law

Regulation No. 402 of 7 April 2006 on public procurement (*Forskrift No. 402 om offentlige anskaffelser*; “the Norwegian Regulation”)<sup>3</sup> implemented the EEA rules on public procurement, including those laid down in Directive 2004/18, into Norwegian law, prior to the implementation of Directive 2014/24.

Section 2-1(3) of the Norwegian Regulation reads<sup>4</sup>:

*“(3) For the following contracts regarding the execution of health and social services, the contracting authority is not required to oblige with the rules in the Regulation Part II or III:*

- a) Contracts concluded with an ideal organisation,*
- b) Contracts regarding the execution of training and rehabilitation services provided outside of hospitals and covered by the Regional Health Authorities’ responsibility for specialist health services as described in law 2 July 1996 No. 61 on specialist health services etc. Section 2-1a, and*
- c) Contracts regarding services to specific users, under the condition that*
  - 1. it is not possible to carry out a proper tender competition without disclosing confidential information about the user, and*

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<sup>3</sup> LOV-1999-07-16-69-§11

<sup>4</sup> Unofficial translation by the Authority

2. *the user does not consent to disclosing such information, or only consent to providing such information to one or more specific service providers.*

*If the contract value exceeds the thresholds in Section 2-2 (limit values), Section 17-3 (performance requirements and technical specifications) and Section 18-4 (publishing of the results of the competition) shall apply.*<sup>5</sup>

Section 1-3(2) lit. k provides the following<sup>6</sup>:

*“(2) The Regulation does not apply to:*

*...*

*k) contracts involving the exercise of official authority which can be exempted in line with the EEA Agreement Article 39, cf. Article 32.”*

## 4 Assessment

As indicated at the outset, the complaint raises the question of compatibility of two legal provisions in Norwegian legislation with EEA law. Whilst both provisions share a certain similarity as to their legal consequences, in so far as they allow contracting authorities to reserve certain public contracts having as their subject matter health and social services to non-profit organisations, they show clear differences, resulting from the fact that they can only be invoked upon fulfilment of their respective, very distinct, legal requirements. It is due to these important differences that the Authority has assessed the compatibility of these legal provisions separately.

The Authority has relied on information provided in the complaint and by the Norwegian Government in the course of its investigation in order to gain a better understanding of the legislative purpose and the effects of the legal provisions in question. The Authority has further examined the current award practice in Norway, as it reflects their application.

### 4.1 Compatibility of Section 2-1(3) of the Norwegian Regulation with EEA law

#### 4.1.1 Applicable set of rules under EEA law

In order to assess the question of compatibility, it is necessary to establish first the relevant legal benchmark under EEA law. As the Norwegian Government has explained,<sup>7</sup> the legal basis in EEA law for the adoption of the legal provision laid down in Section 2-1(3) of the Norwegian Regulation is the set of rules applicable to the award of contracts having as their subject matter services in the health and social sector. This type of services is listed as category 25 in Annex II B to Directive 2004/18, for which a more lenient set of rules applies than for the one listed in Annex II A due to its presumed lack of cross-border relevance.<sup>8</sup>

<sup>5</sup> Section 2-1(3) of the Norwegian Regulation was repealed as of 1 January 2017, when Regulation No. 974 of 12 August 2016 on public procurement implementing Directive 2014/24 entered into force.

<sup>6</sup> Unofficial translation by the Authority

<sup>7</sup> See the Norwegian Government's letter of 23 November 2015, p. 2-3.

<sup>8</sup> Case C-507/03, *Commission v Ireland*, EU:C:2007:676, para. 24; Case C-226/09, *Commission v Ireland*, para. 27; Case C-95/10, *Strong-Segurança*, EU:C:2011:161, para. 30.

The Court of Justice of the European Union (“the Court of Justice”) has interpreted this set of rules, in particular in the recently delivered judgments in Case C-113/13, *Spezzino*,<sup>9</sup> and in Case C-50/14, *CASTA*,<sup>10</sup> providing valuable guidance on the powers of contracting authorities wishing to award public service contracts in the health and social sector as well as on the legal requirements for the exercise of these powers. The principles established in these judgments, characterised by their clarity and effort to take into account the specificities of public procurement in the said sector, reflect the important evolution the Court of Justice’s case-law has undergone since the judgment in Case C-70/95, *Sodemare*,<sup>11</sup> on which the Authority mainly based its Decision 248/10/COL of 21 June 2010 in Case Nos. 66111 and 66744.<sup>12</sup>

For the sake of clarity, the Authority will summarize in what follows the main principles derived from the Court of Justice’s latest case-law before explaining how it has applied them in its assessment of the legislative and administrative implementation of EEA rules on public procurement in Norway.

#### ***4.1.2 EEA law does not categorically prohibit the privileged treatment of non-profit organisations in award procedures***

One of the conclusions the Authority draws from the Court of Justice’s case-law referred to above is that EEA law does not, in principle, preclude national legislation, which allows public authorities to entrust the provision of services listed in Annex II B by direct award, without any form of advertising, to voluntary organisations.<sup>13</sup> An analysis of the case-law indicates that a public authority is not even required, under EEA law, to compare the proposals of various associations beforehand where such national legislation is in place.<sup>14</sup> The Authority concludes from the above that it is under certain conditions lawful to privilege non-profit organisations in award procedures.

#### ***4.1.3 Legal requirements laid down in the Court of Justice’s case-law for a privileged treatment of non-profit organisation in award procedures***

The Authority notes that the Court of Justice’s case-law also provides an answer to the question as to what precisely are the conditions to be met for such a direct award to voluntary organisations to be considered in line with EEA law.

It follows from the case-law that one of these conditions is that the service concerned must be an exclusively, or in any case, predominantly non-priority service covered by Annex II B. In case of so-called mixed procurement, the more lenient set of rules applies provided that the relevant financial threshold for the applicability of Directive 2004/18 has been exceeded.<sup>15</sup>

Furthermore, the Authority deduces from the case-law that the service in question must have some cross-border relevance in order to trigger the applicability of the general

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<sup>9</sup> Case C-113/13, *Spezzino*, EU:C:2014:2440.

<sup>10</sup> Case C-50/14, *CASTA*, EU:C:2016:56.

<sup>11</sup> Case C-70/95, *Sodemare*, EU:C:1997:301.

<sup>12</sup> EFTA Surveillance Authority Decision 248/10/COL of 21 June 2010 in Case Nos. 66111 and 66744 to close two cases against Norway commenced following a receipt of a complaint against that State in the field of public procurement (Doc. No. 551991).

<sup>13</sup> Case C-113/13, *Spezzino*, cited above, para. 65; Case C-50/14, *CASTA*, cited above, para. 69.

<sup>14</sup> Case C-50/14, *CASTA*, cited above, para. 72.

<sup>15</sup> Case C-113/13, *Spezzino*, cited above, paras. 40-45; Case C-50/14, *CASTA*, cited above, para. 37.

principles of public procurement law.<sup>16</sup> On the other hand, in the Authority's understanding of the EEA rules on public procurement, this criterion might be redundant from a legal point of view in certain circumstances, as EEA law does not prevent any EEA State from adopting specific rules on procurement in areas below the applicable financial thresholds as it sees fit. These areas fall within the national legislator's own competence. Accordingly, an EEA State could, in principle, adopt a less strict set of rules than those foreseen in Directive 2004/18, allowing a preferential treatment of voluntary organisations, provided that there is no discrimination based on nationality.

Another criterion is that there has to be an objective justification for deviating from the principles of transparency and non-discrimination in EEA public procurement law, consisting in an interest to protect human health and life. It is worth recalling in this context that the Court of Justice has ruled that it is for the EEA States, which have a discretion in the matter, to decide on the degree of protection which they wish to afford to public health and on the way in which that degree of protection is to be achieved.<sup>17</sup>

It further follows from the case-law that the award must contribute to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency.<sup>18</sup> The fulfilment of these conditions must be subject to a case-by-case assessment.

Voluntary associations must qualify as such in order to benefit from the exception recognised in the Court of Justice's case-law. In particular, they are not allowed to pursue objectives other than those mentioned above, to make any profit as a result of their services apart from reimbursement of the variable, fixed and on-going expenditure to provide them, or to procure any profit for their members.<sup>19</sup>

Lastly, the Court of Justice stresses that the resort to this exception from the general rules on public procurement finds its limits in the prohibition of abuse of rights. The application of national legislation allowing direct awards cannot be extended to cover the wrongful practices of voluntary associations or their members. Thus, the activities of voluntary associations may be carried out by the workforce only within the limits necessary for their proper functioning. As regards the reimbursement of costs, it must be ensured that profit making, even indirect, cannot be pursued under the cover of a voluntary activity and that volunteers may be reimbursed only for expenditure actually incurred for the activity performed, within the limits laid down in advance by the associations themselves.<sup>20</sup>

#### ***4.1.4 Application of the legal requirements laid down in the Court of Justice's case-law to the award practice in Norway***

After listing the conditions laid down in the Court of Justice's case-law, authorising a direct award of public service contracts to non-profit organisations, the Authority will explain the reasons why it sees these conditions met by the award practice in Norway, as foreseen in national legislation.

In the complaint,<sup>21</sup> it is argued that the national contracting authorities in Norway apply Section 2-1(3) of the Norwegian Regulation to tender procedures having as their object the

<sup>16</sup> Case C-113/13, *Spezzino*, cited above, para. 46; Case C-50/14, *CASTA*, cited above, para. 42.

<sup>17</sup> Case C-113/13, *Spezzino*, cited above, para. 56; Case C-50/14, *CASTA*, cited above, para. 60.

<sup>18</sup> Case C-113/13, *Spezzino*, cited above, para. 60; Case C-50/14, *CASTA*, cited above, para. 63.

<sup>19</sup> Case C-113/13, *Spezzino*, cited above, para. 61; Case C-50/14, *CASTA*, cited above, para. 64.

<sup>20</sup> Case C-113/13, *Spezzino*, cited above, para. 62; Case C-50/14, *CASTA*, cited above, para. 65.

<sup>21</sup> See letter of complaint of 30 June 2015, p. 1



award of service contracts in the health and social sector. The examples mentioned, such as childcare services, management of nursing homes, hospitals, medical and other types of rehab, psychotherapy, professional addiction treatment, etc qualify as health and social services covered by category 25 in Annex II B to Directive 2004/18. Consequently, this type of contracts, in principle, falls within the scope *ratione materiae* of the exception recognised in the Court of Justice's case-law.

In so far as Section 2-1(3) of the Norwegian Regulation foresees a derogation from the general, stricter rules on public procurement, allowing national contracting authorities to directly award public contracts to voluntary organisations, this legal consequence is authorised by EEA law, as interpreted by the Court of Justice. From that perspective, it is in line with the case-law, provided that the requirements set out above are met.

As regards the requirement referred to above that the exception be applied on the basis of a case-by-case assessment of the subject matter of the public contract to be awarded, the Authority sees this condition met in the case at hand. As the Norwegian Government has explained,<sup>22</sup> Section 2-1(3) of the Norwegian Regulation is flexible enough as to provide for a diversified handling of procurement, for example, in the case of mixed procurement, depending on which type of service is predominant in an individual case. According to the information provided, Norwegian contracting authorities are under an obligation to carry out an individual assessment of the types of services to be procured and to establish their relative value. This is precisely what national contracting authorities are required to do according to the Court of Justice's case-law.

Section 2-1(3) of the Norwegian Regulation does not appear to oblige contracting authorities to establish the potential or actual cross-border interest in a specific public contract. However, as the Norwegian Government has explained, economic operators from other EEA States are welcome to submit tenders in the area of health and social services provided that they are registered as non-profit organisations in their respective States of origin. In the Authority's view, this indicates that contracting authorities implicitly assess any potential or actual cross-border interest on the basis of the criteria developed for that purpose in the Court of Justice's case-law.<sup>23</sup> Irrespective thereof, as the Authority has explained above, even in the absence of such cross-border interest, EEA law would not categorically preclude contracting authorities from directly awarding contracts in the area of health and social services if this were foreseen in national legislation.

As the Norwegian Government has explained,<sup>24</sup> Section 2-1(3) of the Norwegian Regulation aims to ensure that non-profit organisations can continue to provide health and social services. In its view, 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 infers 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.

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<sup>22</sup> See the Norwegian Government's letter of 30 March 2016, p. 2.

<sup>23</sup> See Case C-231/03, *Coname*, EU:C:2005:487, paras. 19 ff; see joined Cases C-147/06 and C-148/06, *SECAP*, EU:C:2008:277, paras. 24 and 31.

<sup>24</sup> See the Norwegian Government's letter of 23 November 2015, p. 2.

While the national provision in question seems to be based on policy considerations, namely to create conditions for involving non-profit organisations in the 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.<sup>25</sup> 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 social security systems.

A further requirement established by the case-law of the Court of Justice is that the award contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency. As already mentioned, the Norwegian Government has stressed the importance of non-profit organisations and the role they play in the pursuit of social objectives. The first and second requirements must therefore be regarded as being, in principle, fulfilled, where Section 2-1(3) of the Norwegian Regulation is invoked by a contracting authority in order to enable the provision of services in the health and social sector. This conclusion is valid for the child welfare sector as well as for the specific examples referred to in the complaint. As for the requirement to contribute to budgetary efficiency, the Authority notes that, regardless of the policy-inspired involvement of non-profit organisations, this 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.

As regards the requirement to qualify as a voluntary association, the Authority notes 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.<sup>26</sup> 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*”.<sup>27</sup> In addition, “*the entire organisation, without any economic incentive, must work to alleviate social needs of the community or specific vulnerable groups*”. Both the entity’s organisational structure and any tax privileges are taken into account as relevant factors in the overall assessment. According to the information provided,<sup>28</sup> contracting authorities have nonetheless established a

<sup>25</sup> Case C-70/95, *Sodemare*, para. 27; Case C-571/07, *Blanco Pérez and Chao Gómez*, EU:C:2010:300, para. 43; Case C-113/13, *Spezzino*, cited above, para. 55.

<sup>26</sup> See the Norwegian Government’s letters of 23 November 2015, p. 3, and of 30 March 2016, p. 2.

<sup>27</sup> *Guidelines for procurement of services in the health and social sector* (“Veileder for anskaffelser av helse- og sosialtjenester”).

<sup>28</sup> See the Norwegian Government’s letter of 30 March 2016, p. 2.

practice with regard to which providers are considered to be non-profit. As a result, unless their status changes, no documentation will be required from them in order to prove their status a non-profit organisation. In the Authority's view, the criteria laid down in these 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 these criteria, from availing itself of the exception developed by the Court of Justice.

In view of the fact that there are no indications in support of the assumption that the national legislation in question might give rise to any abuse of rights either by contracting authorities or non-profit organisations, a further requirement is fulfilled.

#### ***4.1.5 Preliminary conclusions on Section 2-1(3) of the Norwegian Regulation***

In light of the foregoing considerations, the Authority takes the view that the legal basis laid down in Section 2-1(3) of the Norwegian Regulation, authorising direct awards of service contracts to non-profit organisations in the health and social sector fulfils the legal requirements established in the Court of Justice's case-law. Consequently, the national provision in question as well as the administrative practice based thereon are in line with the EEA rules on public procurement.

It is worth stressing that, given the limited scope of the Authority's assessment, this preliminary conclusion does not extend to the question of a possible compatibility of currently applicable Norwegian law with Article 77 of Directive 2014/24.

## **4.2 Compatibility of Section 1-3(2) lit. k of the Norwegian Regulation with EEA law**

### ***4.2.1 Applicable set of rules under EEA law***

As explained above, an assessment of compatibility of a national legal provision with EEA law makes it necessary to establish the relevant legal benchmark. For that purpose, both the legislative purpose and the effect of that provision must be established.

It follows from the wording of Section 1-3(2) lit. k of the Norwegian Regulation and the explanations given by the Norwegian Government hereto<sup>29</sup> that this national legal provision is intended to implement Articles 32 EEA and 39 EEA into the Norwegian legal order in the area of public procurement. More specifically, it constitutes a legal basis allowing contracting authorities to derogate from the general national rules on procurement, where the provision of public services in the health and social sector requires the exercise of official authority. In accordance with the national policy referred to above, in support of an increased involvement of voluntary organisations, this legal provision is applied as a legal basis for excluding economic operators other than non-profit organisations from tender procedures if contracting authorities wish so.

The Authority notes at the outset that Article 65(1) EEA refers to Annex XVI to the EEA Agreement, which contains specific provisions and arrangements concerning procurement, including those laid down in Directive 2004/18.<sup>30</sup> The Authority further observes that Directive 2004/18 is designed to implement the fundamental freedoms guaranteed by the

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<sup>29</sup> See the Norwegian Government's letters of 21 June 2016, p. 3 and 5, and of 10 October 2016, p. 1.

<sup>30</sup> Case E-24/13 *Casino Admiral* [2014] EFTA Ct. Rep. 732, para. 3.

EEA Agreement, namely the right of establishment and the freedom to provide services.<sup>31</sup> Consequently, in so far as Articles 32 EEA and 39 EEA recognise the right of the EEA States to derogate from the said fundamental freedoms as a whole in certain areas of activity characterised by an exercise of official authority, the application of these exceptions must have the same legal effect as regards the provisions of Directive 2004/18.<sup>32</sup>

The Authority has assessed, in a subsequent step, whether Section 1-3(2) lit. k of the Norwegian Regulation complies with the legal requirements to fulfil in order to invoke the derogations laid down in Articles 32 EEA and 39 EEA. In line with the above understanding of the legal nature of the derogations, the fulfilment of these legal requirements would have as a consequence the inapplicability of the provisions of Directive 2004/18.

#### **4.2.2 Legal requirements laid down in the Court of Justice's case-law for the exercise of official authority**

The Authority notes that the contracts subject to tender, indicated in the complaint and cited as an example of the practical application of Section 1-3(2) lit. k of the Norwegian Regulation, concern the operation of child welfare institutions, which implies the provision of social services, an activity listed as category 25 in Annex II B to Directive 2004/18. As a consequence, this type of service must, in principle, be seen as covered by the scope *ratione materiae* of this directive. This finding allows an examination of compatibility with EEA law in light of Articles 32 EEA and 39 EEA.

The Court of Justice has interpreted these provisions on several occasions, shedding light on the requirements their application is subject to. It has ruled that, as derogations from the fundamental rules of freedom of establishment and freedom to provide services, they must be interpreted in a manner which limits their scope to what is strictly necessary in order to safeguard the interests which they allow the EEA States to protect. Furthermore, the Court of Justice has ruled that derogations provided for under those articles must be restricted to activities which, in themselves, are directly and specifically connected with the exercise of official authority. Such a connection requires a sufficiently qualified exercise of prerogatives outside the general law, privileges of official power or powers of coercion.<sup>33</sup> This applies, in particular, to activities entailing the exercise of powers of constraint.<sup>34</sup> Accordingly, the exceptions in question do not extend to activities that are

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<sup>31</sup> See Recitals 2 and 6 of Directive 2004/18; See Case C-160/08, *Commission v Germany*, EU:C:2010:230, para. 74.

<sup>32</sup> See Case C-160/08, *Commission v Germany*, cited above, para. 74. See Case C-3/88, *Commission v Italy*, EU:C:2011:334, and Case C-272/91, *Commission v Italy*, EU:C:1994:167, in which the Court of Justice first examined whether the activity in question qualified as “exercise of official authority” within the meaning of the exception to the right of establishment and the freedom to provide services under the Treaty, and, after concluding that this was not the case, proceeded to examine whether there had been a breach of secondary EU legislation. See also Recital 25 to the Preamble of Directive 2014/24, from which follows that the European legislator introduced an exception from the EEA rules on public procurement for legal activities connected with the exercise of official authority. This supports the view that the exception in question has the effect to restrict the scope of application of the public procurement directives as well. See further, in the context of *Directive 2006/123/EC on services in the internal market*, the exception set out in Article 2(2)(i), which orders the inapplicability of the directive to activities connected with the “exercise of official authority” and has been interpreted by the Court of Justice in Case C-293/14, *Hiebler*, EU:C:2015:843.

<sup>33</sup> Legal Opinion of Advocate General Mayras in Case 2/74, *Reyners*, ECR 1974, 631, p. 664; Case C-160/08, *Commission v Germany*, cited above, para. 82.

<sup>34</sup> Case C-114/97, *Commission v Spain*, EU:C:1998:519, para. 37; Case C-293/14, *Hiebler*, cited above, para. 37.

merely auxiliary or preparatory to the exercise of official authority, or to certain activities whose exercise, although involving contacts, even regular and organic, with the administrative or judicial authorities, or indeed cooperation, even compulsory, in their functioning, leaves their discretionary and decision-making powers intact, or to certain activities which do not involve the exercise of decision-making powers, powers of constraint or powers of coercion.<sup>35</sup>

#### ***4.2.3 Application of the legal requirements laid down in the Court of Justice's case-law to the award practice in Norway***

As regards the two tender procedures, which are at the core of the complaint, more concretely, those launched by the Norwegian Government's Directorate of Children, Youth and Family as contracting authority, the Authority notes that their object is the award of public contracts concerning the operation of child welfare institutions. The Authority has examined both the purpose and the nature of the services economic operators must provide in the fulfilment of the tasks assigned, taking into account the information submitted by the complainant and the Norwegian Government.

As the Authority has been able to establish in the course of its investigation, these services have as their objective the wellbeing of minors, who, due to the special protection they require, are placed under the care and the surveillance of the State. The conditions for their – voluntary or compulsory – internment in the institutions in question are regulated in detail in national legislation. The same applies to the conditions for the adoption of a number of measures, aimed at ensuring the fulfilment of the tasks, such as body searches, search of rooms and personal belongings, confiscation and destruction of dangerous objects and drugs, control of mail as well as the recovery of minors who have escaped from the institutions.<sup>36</sup> These measures have been subject to a closer scrutiny by the Authority with a view to establishing whether they qualify as exercise of official authority. In what follows, the Authority will present a concise overview of the considerations taken into account in its assessment of this question.

The Authority deems it important to stress at the outset that child welfare constitutes an essential concern of society, for which every family, and complementarily, the State bears responsibility. It is therefore consequent to regard it as a legitimate policy objective that EEA States may pursue when establishing their respective national systems of health and social security, for which they are, as mentioned above, afforded discretion as regards the organisation and the level of protection guaranteed. While the Authority acknowledges that, according to the settled case-law of the Court of Justice, a contribution to the protection of public health, which any individual may be called upon to make, in particular by assisting a person whose life or health are in danger, is not sufficient for there to be a connection with the exercise of official authority,<sup>37</sup> it cannot ignore the fact that the measures listed above are characterised for entailing significant restrictions of fundamental rights. In fact, they restrict *inter alia* the right to liberty, the right for respect of a person's family, home and correspondence as well as the right to property – all of them fundamental rights whose protection is enshrined in the *European Convention of*

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<sup>35</sup> Case C-47/08, *Commission v United Kingdom*, EU:C:2011:334, para. 86.

<sup>36</sup> See the Norwegian Government's letter of 21 June 2016, p.3-5.

<sup>37</sup> Case C-160/08, *Commission v Germany*, cited above, para. 80; Case C-465/05, *Commission v Italy*, EU:C:2007:781, para. 38; Case C-114/97, *Commission v Spain*, cited above, para. 37.

*Human Rights (ECHR)*<sup>38</sup>. The Authority recalls in this context that, according to the EFTA Court's established case-law, the provisions of the EEA Agreement – including Articles 32 EEA and 39 EEA – are to be interpreted in the light of fundamental rights, the provisions of the ECHR and the judgments of the European Court of Human Rights being important sources for determining the scope of these fundamental rights.<sup>39</sup>

The implications of the said restrictions and the ensuing need to guarantee the safeguard of fundamental rights of minors appear to be the reason why the Norwegian legislator has provided for specific legal bases in domestic law, authorising the executive bodies of the State and those operators acting on its behalf to carry out these measures. This indicates, in the Authority's understanding of the applicable national legal framework, that private individuals other than those expressly authorised by the State are meant to be precluded from exercising these or similar competences. Furthermore, as the Norwegian Government has explained, staff members of the respective child welfare institutions are authorised to adopt these measures without any further involvement and/or authorisation of State bodies typically entrusted with the exercise of official authority, in particular the use of force, such as police, public prosecutor or the judiciary, thus confirming the Authority's view that certain staff members in child welfare institutions in charge are conferred autonomous decisional powers as to how to deal with minors in critical circumstances. The fact that the use of these measures by the child welfare institutions themselves is subject to legal review before national courts is a further indication of both a decisional autonomy and a close connection with the exercise of State prerogatives.

The Authority sees significant differences compared to other cases examined in the Court of Justice's case-law. Whilst in Case C-283/99, *Commission v Italy*,<sup>40</sup> the provision of private security services was deemed not to qualify as exercise of official authority, the Authority takes the view that the powers certain staff members of the respective child welfare institutions are vested with go beyond the ones vested in private security firms. These powers are farther-reaching in terms of their intrusiveness on the fundamental rights of the individual concerned than the competences of surveillance assessed by the Court of Justice in Case C-343/95, *Calì & Figli v Servizi Ecologici Porto di Genova*,<sup>41</sup> and, accordingly, considered not to qualify as exercise of official authority. Rather than to merely contribute to the maintenance of public security, which any individual may be called upon to do, thus, an activity considered by the Court of Justice in Case C-114/97, *Commission v Spain*,<sup>42</sup> not to meet this qualification either, the measures described above appear to serve a very specific purpose. They aim at influencing the conduct of minors with behavioural problems in a positive way. How these measures are applied in practice is determined beforehand by a specific policy, which, in the Authority's view, falls within the field of education. At the same time, the activities performed in child welfare institutions differ considerably from those examined by the Court of Justice in Case 147/86, *Commission v Greece*,<sup>43</sup> which concerned teaching provided by private schools or given at home. Contrary to mere teaching activities, child welfare institutions deal with the core social competences of minors, with the aim to form them into full members of

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<sup>38</sup> The fundamental rights referred to above are enshrined in Article 5 ECHR (Right to liberty and security), Article 8 ECHR (Right for a private and family life, home and correspondence) and Article 1 of Protocol No. 1 to the ECHR (Protection of property).

<sup>39</sup> See Case E-2/03, *Ásgeirsson* [2003] EFTA Ct. Rep. 185, para. 23; Case E-4/11, *Clauder* [2011] EFTA Ct. Rep. 216, para. 49; Case E-15/10, *Posten Norge* [2012] EFTA Ct. Rep. 246, para. 85.

<sup>40</sup> Case C-283/99, *Commission v Italy*, EU:C:2001:307.

<sup>41</sup> Case C-343/95, *Calì & Figli v Servizi Ecologici Porto di Genova*, EU:C:1997:160.

<sup>42</sup> Case C-114/97, *Commission v Spain*, cited above, para. 37.

<sup>43</sup> Case 147/86, *Commission v Greece*, EU:C:1988:150.

society. The responsibilities entrusted to these institutions are therefore of sensitive national interest, as they concern the functionality of society as a whole.

In light of the above considerations, it is evident to the Authority that child welfare institutions in Norway exercise coercive powers within the meaning of Articles 32 EEA and 39 EEA, as interpreted in the case-law of the Court of Justice, when adopting the said measures on minors in the accomplishment of the tasks assigned. This occurs in an official function, as it is expressly authorised by the national legislator on the basis of a specific legal base in domestic law and does not require further involvement and/or authorisation of State bodies typically entrusted with the exercise of official authority, in particular the use of force. Furthermore, the use of coercive measures occurs in fulfilment of tasks concerning essential interests of society. The consequence of this conclusion is that activities requiring the use of these coercive measures are not covered by the fundamental rules of the right of establishment and the freedom to provide services. As a result, the EEA rules on public procurement do not apply to this specific area of social and health services. From this point of view, these rules do not preclude a national provision such as Section 1-3(2) lit. k of the Norwegian Regulation, which allows the exclusion of economic operators other than non-profit organisations from tender procedures if contracting authorities wish so.

#### ***4.2.4 Limited possibility to verify the consistent application of the exception***

The Authority has further examined the claim according to which Norway allegedly breaches EEA law due to its inconsistent application of the exception laid down in Articles 32 EEA and 39 EEA. This claim has been raised in connection with the two tender procedures launched by the Norwegian Government's Directorate of Children, Youth and Family, which stand as an example of how Section 1-3(2) lit. k of the Norwegian Regulation is applied in practice. Although both tender procedures concern the award of contracts having the same subject matter – namely the operation of child welfare institutions –,<sup>44</sup> one of them has been reserved to non-profit organisations, whereas the other one has admitted the participation of other economic operators. This fact has raised questions as to how the national legal provision referred to above exactly operates and whether any limits set by EEA law might have been overstepped as a result of this different treatment in the area of procurement.

The Authority notes at the outset that, as the Norwegian Government has explained,<sup>45</sup> Section 1-3(2) lit. k of the Norwegian Regulation has been invoked by the contracting authority in both tender procedures, in line with national legislation. This means that Norway appears to construe the exception in Articles 32 EEA and 39 EEA as an authorisation under EEA law to decide at its own discretion how to treat economic operators, for example by making a distinction between the rights of non-profit organisations and those of other economic operators when it comes to participating in tender procedures.

The Authority is of the opinion that a verification of the consistent application of the exception in Articles 32 EEA and 39 EEA is only to a very limited extent legally possible. One of the reasons resides in the legal nature of this exception as a rule on its own right, which has the effect of delimiting the scope of the respective fundamental freedoms,<sup>46</sup>

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<sup>44</sup> See the Norwegian Government's letter of 21 June 2016, p.1-2.

<sup>45</sup> See the Norwegian Government's letter of 10 October 2016, p. 1.

<sup>46</sup> See Legal Opinion of Advocate General Cruz Villalón in Cases C-47/08, *Commission v Belgium*, C-50/08, *Commission v France*, C-51/08, *Commission v Luxembourg*, C-53/08, and C-54/08, *Commission v Austria*,

ultimately authorising EEA States to remove therefrom certain activities intrinsically connected with the exercise of official authority. Whilst the exercise of “official authority” remains an autonomous concept of EEA law subject to the interpretation of the European courts in their respective areas of judicial competence, activities qualifying as such in accordance with the criteria listed above may not be subject to a control of compliance in the light of the right of establishment and the freedom to provide service as a result of their non-applicability.

In so far as the complainant refers to the judgment delivered by the Court of Justice in Case 152/73, *Sotgiu*,<sup>47</sup> in support of an assessment of consistency of Norway’s understanding and practical application of the exception in Articles 32 EEA and 39 EEA as described above, the Authority fails to see its relevance to the issue at stake. In the *Sotgiu* case, the Court of Justice dealt with the compatibility with the rules on free movement of workers of a German regulation regarding conditions of employment and work at the *Deutsche Bundespost* (German Federal Mail Office), which allowed a less favourable treatment of employees with families in other EU Member States. This regulation was examined from the viewpoint of a possible discrimination based on nationality, prohibited under EU law, given that the applicant in the case, an Italian national, was adversely affected by the said regulation. After noting that the said prohibition did not apply to employment in the public service, the Court of Justice noted in paragraph 4 of the judgment that this exception could not apply against workers once they had been admitted to the public service.<sup>48</sup> Ever since, the Court of Justice has reiterated this rule in similar cases concerning employment in the public service subject to regulations entailing discrimination on the basis of nationality.<sup>49</sup>

The relevance of these findings in the present case must be challenged, as they concern an instance of discrimination based on nationality, which is not the issue in the circumstances giving rise to the complaint. As has been mentioned above, Section 1-3(2) lit. k of the Norwegian Regulation does not discriminate against service providers from other EEA States, as long as they qualify as non-profit organisations. The criterion for establishing a distinction in treatment is not nationality but rather a business model. In so far as the complainant’s submissions appear to plead in favour of a broader interpretation of the consistency argument used by the Court of Justice in that judgment as to encompass other criteria of differentiation such as business models, the Authority notes that this interpretation lacks any foundation in case-law. The Authority must therefore dismiss the arguments brought forward in the complaint.

#### ***4.2.5 Limitation of the exception to activities strictly requiring the adoption of coercive measures***

The Authority’s assessment leads to the conclusion that Section 1-3(2) lit. k of the Norwegian Regulation must be regarded as being in line with EEA law in so far as it is applied to contracts having as their subject matter services in the social and health sector strictly requiring the adoption of the coercive measures listed above.

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C-54/08, *Commission v Germany*, and C-61/08, *Commission v Greece*, EU:C:2010:513, para. 78, in which the exception related to the “exercise of official authority” is defined as the “negative scope of the freedom of establishment”.

<sup>47</sup> Case 152/73, *Sotgiu*, EU:C:1974:13.

<sup>48</sup> Case 152/73, *Sotgiu*, cited above, para. 4.

<sup>49</sup> Case 225/85, *Commission v Italy*, EU:C:1987:284, para. 11; Case C-195/98, *Commission v Austria*, EU:C:2000:655, para. 37.



The obligation to subject exceptions to the fundamental freedoms to a narrow interpretation, thus limiting them to activities connected directly and specifically with the exercise of official authority in order to ensure the functioning of the internal market, makes it nonetheless necessary to distinguish them from other activities possibly falling within the definition of “works” and/or “services” within the meaning of Article 1 of Directive 2004/18. Activities such as the construction of infrastructure needed for the operation of child welfare institutions and/or the provision of catering, laundry and transport services do not appear, in the Authority’s view, to be connected directly and specifically with the exercise of official authority, and could be equally performed by economic operators specialised in the respective area. Performance of these tasks would merely require supervision by the institution’s management bodies, but not necessarily the adoption of measures falling under the State’s prerogatives.<sup>50</sup>

Consequently, in order not to deprive the rules on the right of establishment and the freedom to provide services, Directive 2004/18 intends to implement, of all practical effectiveness, it is upon the contracting authority to carry out a case-by-case assessment of the applicability of Section 1-3(2) lit. k of the Norwegian Regulation to every public contract to be tendered out, taking into account the purpose of Articles 32 EEA and 39 EEA, as interpreted in the case-law referred to above. The contracting authority must thereby assess whether other merely ancillary activities, not strictly requiring the exercise of official authority in order to safeguard legitimate State interests,<sup>51</sup> would be eligible for being subject to a separate tender procedure foreseeing the participation of both non-profit organisations and other economic operators alike. In its assessment, the contracting authority must take due account of the objective underlying the EEA rules on public procurement, consisting in ensuring the development of effective competition in the field of public contracts,<sup>52</sup> while the principles of transparency, non-discrimination and equal treatment<sup>53</sup> are upheld.

#### **4.2.6 Preliminary conclusions on Section 1-3(2) lit. k of the Norwegian Regulation**

The assessment carried out by the Authority, based on the information submitted in the complaint and by the Norwegian Government, has not raised any aspects indicating an extensive application of the legal basis in Section 1-3(2) lit. k of the Norwegian Regulation, possibly overstepping the boundaries set by EEA law indicated above. From that viewpoint, this national legal provision and its application to the award of contracts having as their subject matter the operation of child welfare institutions must be seen in compliance with Articles 32 EEA and 39 EEA.

Irrespective of this preliminary conclusion, the Authority reserves itself the right to investigate possible breaches derived from an application of that legal basis to contracts covering activities not linked to the exercise of official authority, such as those referred above, including, but not limited to, contracts expected to be awarded in tender procedures concerning the construction and operation of nursing homes.<sup>54</sup>

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<sup>50</sup> See Case C-438/08, *Commission v Portugal*, EU:C:2009:651, para. 37.

<sup>51</sup> See Case 147/86, *Commission v Greece*, EU:C:1988:150, para. 7.

<sup>52</sup> See Recitals 2, 36, 46 of Directive 2004/18.

<sup>53</sup> See Recital 2 and Article 2 of Directive 2004/18.

<sup>54</sup> Notified to the Authority in the complainant’s letter of 18 November 2016 (“New information on ongoing and coming tender competitions”), p. 43.

## 5 Conclusions

The Authority has come to the conclusion that none of the issues raised in the complaint indicates a breach of the EEA rules on public procurement by either Norwegian legislation or administrative practice.

More concretely, the Authority has established the following:

- 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 this letter fulfil the legal requirements laid down in case-law exceptionally allowing national contracting authorities to directly award public contracts having as their subject matter services in the social and health sector to non-profit organisations;
- Section 1-3(2) lit. k of the Norwegian Regulation No. 402 of 7 April 2006 on public procurement is in line with Articles 32 EEA and 39 EEA in so far as it is applied to activities connected directly and specifically with the exercise of official authority, in particular those necessary to operate child welfare institutions and requiring the adoption of coercive measures, as specified in Norwegian legislation. 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 above findings are based on an assessment of compatibility with the EEA rules on public procurement of legislation and administrative practice in Norway prior to the entry into force of Directive 2014/24 on 1 January 2017.

## 6 Assessment of the supplementary remarks made by the complainant

By letter of 9 March 2017 (Doc. No. 836862), the complainant was informed by the Authority of its intention to close the complaint case and was invited to submit written observations.

The complainant replied by letter dated 25 May 2017 (Doc. No. 857730), essentially raising no new points beyond what has already been dealt with by the Authority in its letter of 9 March 2017. In particular, the complainant does not substantiate, neither does it provide evidence in support of its claim that the provision in Section 2-1(3) of the Norwegian Regulation fails to fulfil the legal requirements laid down in the Court of Justice's case-law for a privileged treatment of non-profit organisation in award procedures. Furthermore, the complainant does not challenge the Authority's detailed assessment indicating that certain activities related to the operation of child welfare institutions, which strictly require the adoption of coercive measures may qualify as exercise of official authority within the meaning of Articles 32 EEA and 39 EEA. The Authority must therefore conclude that the complainant does not challenge the assessment that the provisions in question constitute the legal basis in EEA law for Section 1-3(2) lit. k of the Norwegian Regulation and other national measures adopted thereupon. Against this backdrop, the supplementary remarks presented by the complainant do not alter the Authority's assessment.

The analysis of this case has shown that there has not been any breach of EEA law which would justify the launch of infringement proceedings against Norway.



## **7 The Authority's Decision**

There are, therefore, no grounds for pursuing this case further.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged unlawful discrimination of private enterprises and breach of the EEA rules on public procurement is hereby closed.

For the EFTA Surveillance Authority

Sven Erik Svedman  
President

Helga Jónsdóttir  
College Member

*This document has been electronically signed by Sven Erik Svedman, Helga Jonsdottir.*