Brussels, 20 December 2019
Case No: 84338
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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by the

THE EFTA SURVEILLANCE AUTHORITY

represented by
Ewa Gromnicka, Erlend Møinichen Leonhardsen and Carsten Zatschler,
Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-8/19

Scanteam AS

v

The Norwegian Government

in which the Norwegian Complaints Board for Public Procurement requests an Advisory Opinion from the EFTA Court on the interpretation of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

ESA | EFTA Surveillance Authority

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1 INTRODUCTION

1. This case concerns the scope of application of Directive 2014/24/EU on public procurement (the "**Directive**").

2. This issue arises in the context of a complaint case pending before the Norwegian Complaints Board for Public Procurement (in Norwegian, "*Klagenemnda for offentlige anskaffelser*", further "**KOFA**"), which is called upon to determine whether the Norwegian embassy in Luanda (the "**Embassy**") was bound by those rules and therefore obliged to publish a particular procurement.[1]

3. As set out in detail in these written observations, the Directive applies *ratione personae* and a body such as the diplomatic mission of a State, which clearly constitutes a contracting authority for the purposes of Article 2(1)(1) of the Directive, will always be subject to those rules, irrespective of whether it is based inside or outside EEA territory, and irrespective of whether what it is procuring is to be performed or delivered inside or outside EEA territory.

4. As one of the parties to the dispute pending before KOFA has advanced the position that the scope of application of the Directive does depend on the place where the contracting authority is based, or where the services are to be performed (*quod non*), ESA will, by way of supererogatory amplification make submissions as to why a *ratione loci* approach to scope is misconceived. Further and in the alternative, ESA will submit that even if such an approach were to be followed, the Embassy would nonetheless be bound by the Directive.

2 FACTS OF THE CASE

5. On 27 March 2017, the Norwegian Embassy in Luanda published a voluntary notice on "Doffin 1" for the procurement of consulting services in connection with planning, management and implementation of a human rights project in Angola (Angola Human Rights Training Project 2017-2021).[2] In part II.2) of the notice, the value of the contract was estimated at 20 500 000 Norwegian Crowns

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[1] Pursuant to the specific procedure section 8-17(4) of the Public Procurement Regulation, which aims to transpose the Directive into Norwegian law.

[2] https://doffin.no/Notice/Details/2017-172441

(NOK). In part IV.2.4) of the notice, it was stated that the time-limit for submitting tenders was 25 April 2017. The notice was published with the CPV Code 75210000 - Foreign policy services and other services.

6. Part 2.1.1 of the tender specifications stated that the procurement procedure was divided into two phases. The first phase would include planning and preparation of a project document, including detailed objectives and relevant indicators for achievement of objectives, inputs and risk management. The second phase would consist in the execution of the project. Part 4.3 stated that the maximum budget was NOK 500 000 for phase 1 and NOK 20 000 000 for phase 2.

7. Three tenders were received by the time-limit, from Scanteam AS (the "**Complainant**"), KPMG AS / Bjørknes Høyskole AS and The Governance Group AS.

8. By letter of 23 May 2017, the Embassy announced that the contract had been awarded to The Governance Group AS (the "**successful tenderer**"). The award letter stated that the successful tenderer had obtained a total score of 9.91 points, as compared to 8.47 points awarded to KPMG and 7.60 points awarded to the Complainant. For the criteria *'proposed solution'* and *'competence and experience'*, the successful tenderer had obtained a full score (10 points), as compared to 7 and 8 points for the Complainant and KPMG, respectively. The Complainant offered the lowest hourly rate and thus obtained 10 points for the price criterion, as compared to 8.56 and 9.71 points awarded to KPMG and the successful tenderer, respectively.

9. By written correspondence of 2 and 15 June 2017, the Complainant lodged objections to the award decision. A reply to that complaint was given and the award decision was maintained by written correspondence of 3 July 2017. On 5 July 2017, the Complainant submitted a fresh complaint against the award decision. In that complaint it was claimed that the procurement procedure had not been carried out in accordance with the rules governing public procurement and that the tendering procedure therefore had to be cancelled. A reply was given to that complaint and the claim for cancellation was dismissed by written correspondence of 7 July 2017.

10. The complaint, including the claim of unlawful direct procurement procedure, was lodged with the Complaints Board for Public Procurement on 7 May 2018. The contract with the chosen tenderer was entered into on 14 July 2017.

3 EEA LAW

11. The Directive was incorporated into Annex XVI to the EEA Agreement at point 2 by Decision of the EEA Joint Committee 97/2016 of 29 April 2016[3] which entered into force on 1 January 2017. The Directive was published in Norwegian in the EEA Supplement to the Official Journal of the European Union on 13 December 2018.[4] Annexes I, III and XI to the Directive are supplemented by Appendices 1 to 3 to Annex XVI to the EEA Agreement.

12. Recital 10 of the Directive reads:

> *"The notion of 'contracting authorities' and in particular that of 'bodies governed by public law' have been examined repeatedly in the case-law of the Court of Justice of the European Union. To clarify that the scope of this Directive ratione personae should remain unaltered, it is appropriate to maintain the definitions on which the Court based itself and to incorporate a certain number of clarifications given by that case-law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concepts as elaborated by the case-law. For that purpose, it should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a 'body governed by public law' since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character.*
>
> *Similarly, the condition relating to the origin of the funding of the body considered, has also been examined in the case-law, which has clarified inter alia that being financed for 'the most part' means for more than half, and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law."*

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[3] Joint Committee Decision OJ L 300, 16.11.2017, p. 49, EEA Supplement No 73, 16.11.2017, p. 53
[4] OJ EEA Supplement No 84, 13.12.2018, p. 556-635.

13. Article 1 of the Directive reads:

"Subject-matter and scope:

1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.

3. The application of this Directive is subject to Article 346 TFEU.

4. This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.

5. This Directive does not affect the way in which the Member States organise their social security systems.

6. Agreements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities or groupings of contracting authorities and do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by this Directive."

14. Article 2 of the Directive reads:

"Definitions

1. For the purposes of this Directive, the following definitions apply:

(1) 'contracting authorities' means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;

(2) 'central government authorities' means the contracting authorities listed in Annex I and, in so far as corrections or amendments have been made at national level, their successor entities;

(3) 'sub-central contracting authorities' means all contracting authorities which are not central government authorities;

(4) 'bodies governed by public law' means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

(5) 'public contracts' means 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;"

15. Appendix 1 List of central government authorities for Norway referred to in the second subparagraph of Article 2(1) of Directive 2014/24/EU reads:

"Statsministerens kontor Office of the Prime Minister

Arbeids- og sosialdepartementet Ministry of Labour and Social Affairs

Barne-, likestillings- og inkluderingsdepartementet Ministry of Children, Equality and Social Inclusion

Finansdepartementet Ministry of Finance

Forsvarsdepartementet Ministry of Defence

Helse- og omsorgsdepartementet Ministry of Health and Care Services

Justis- og beredskapsdepartementet Ministry of Justice and Public Security

Klima- og miljødepartementet Ministry of Climate and Environment

Kommunal- og moderniseringsdepartementet Ministry of Local Government and Modernisation

Kulturdepartementet Ministry of Culture
Kunnskapsdepartementet Ministry of Education and Research
Landbruks- og matdepartementet Ministry of Agriculture and Food
Nærings- og fiskeridepartementet Ministry of Trade, Industry and Fisheries
Olje- og energidepartementet Ministry of Petroleum and Energy
Samferdselsdepartementet Ministry of Transport and Communication
Utenriksdepartementet Ministry of Foreign Affairs
Agencies and Institutions subordinate to these Ministries.*"*
[emphasis added]

16. Article 126 of the EEA Agreement reads:

"The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway."

4 NATIONAL LAW AND PRACTICE

17. According to the Norwegian Government, the procurement procedure in question is covered by the Public Procurement Act (*lov om offentlige anskaffelser*)[5] and Part I of the Public Procurement Regulation (*forskrift om offentlige anskaffelser*)[6], and was therefore announced by the voluntary publication of a notice on Doffin. There is no obligation to publish a notice in the TED database for procurement procedures under Part I of the Public Procurement Regulation.
18. Section 2 of the Public Procurement Act reads:

"The Act applies when contracting authorities as mentioned in the second paragraph enter into works, service or construction contracts, including concession contracts, or carry out planning and design contests, with an estimated value equal to or exceeding NOK 100,000 excl. VAT.

[5] https://lovdata.no/dokument/NL/lov/2016-06-17-73?q=lov%20om%20offentlige%20anskaffelser
[6] https://lovdata.no/dokument/SF/forskrift/2016-08-12-974?q=forskrift%20om%20offentlige%20anskaffelser

The law applies to the following contracting authorities:

a) state authorities,

b) county and municipal authorities,

c) public law bodies,

d) associations with one or more contracting authorities as mentioned in letters a to c,

e) public undertakings that carry out supply activities as defined in international agreements such as Norway are obliged by and

f) other undertakings that carry out supply activities on the basis of exclusive or special rights as defined in international agreements by which Norway is obliged.

The Act does not apply to procurements that can be exempted pursuant to Article 123 EEA.

The Ministry may in regulations stipulate further exemptions from the scope of the Act. The Ministry may, in regulations, stipulate that the Act shall apply to works contracts and associated service contracts that contracting authorities, as mentioned in the second paragraph, subparagraphs a to d, do not themselves enter into, but provide direct subsidy of more than 50 per cent.

The Ministry may, in regulations, stipulate that the law shall apply to Svalbard, and to lay down special rules for local conditions."

19. The Norwegian Ministry of Foreign Affairs has issued a comprehensive instruction on the application of procurement rules which introduces a distinction in the application of the Public Procurement Act and therefore the relevant procedures and conditions, depending on the localisation of the contracting authority:

"If the contracting authority (ministry) is located in Norway then Part I; Part II or III of the Public Procurement may also apply depending on the value and type of contract.

If the contracting authority is an embassy within the EEA then Part I; Part III may also apply depending on the value and type of contract.

If the contracting authority is an embassy outside the EEA only Part I of the Procurement Act will be applicable irrespective of the value and type of contract."[7]

5 THE QUESTION REFERRED

20. KOFA requests the EFTA Court to answer the following question:

"Is Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement applicable to procurement procedures undertaken by a foreign mission of an EFTA State in a third country (outside the EEA)?"

6 KOFA IS A "COURT OR TRIBUNAL" AND MAY REQUEST ADVISORY OPINIONS UNDER ARTICLE 34 SCA

21. According to the request, in the present case the Norwegian Government argues that KOFA does not constitute a court or tribunal within the meaning of Article 34 SCA and as such is not eligible to submit a reference to the EFTA Court, who should therefore dismiss the request.
22. In Case E-5/16 *Municipality of Oslo*, in paragraph 35 of the judgment, the Court referred to Cases E-1/94, E-8/94 and E-9/94, E-4/04, Case E-1/11, Case E-4/09, Joined Cases E-26/15 and E-27/15, and Joined Cases E3/13 and E-20/13, and observed that the Norwegian Government "in all of these cases, except with regard to the *Markedsrådet* (Norwegian Market Council) and the *Beschwerdekommission der Finanzmarktaufsicht* (Financial Market Authority)," had "argued that the bodies in question did not constitute a court or tribunal within the meaning of Article 34 SCA and that the Court should therefore dismiss the requests."[8]
23. While the Norwegian Government has the right to make this argument over and over again, it is, however, misconceived. Moreover, the Norwegian Government's position on the status of KOFA as a court or tribunal within the meaning of Article 34 SCA is disputed by the KOFA itself.

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[7] *Ibid.*
[8] Case E-5/16 *Municipality of Oslo*, [2017] EFTA Ct. Rep. 52, para 35.

24. The Authority submits that KOFA is a court or tribunal for the purposes of Article 34 SCA and the request is therefore admissible. This conclusion is supported both by the applicable law and by the interpretation given to the terms "court or tribunal" by the Court and the Court of Justice of the European Union ("**CJEU**").
25. It follows from the Court's own case law that "when assessing whether a body is to be qualified as a court or tribunal under Article 34 SCA the Court takes account of a number of factors".[9] In general, "[t]he rules relating to the referring body must be considered as a whole in order to determine if that body fulfils the necessary prerequisites to be considered independent."
26. The Court has in numerous cases held that requests from various appeals bodies are admissible because the requesting body must be considered to be "a court or tribunal"[10]. Such bodies include the Appeals Board of the Financial Markets Authority in Case E-9/17[11], the Appeals Committee at the Finnish Board of Customs in Case E-1/94[12], Norwegian Board of Appeal for Industrial Property Rights in Case E-5/16[13] and the Market Council in Norway in Case E-4/04[14]. Also, the CJEU has on numerous occasions considered requests from public procurement appeals bodies admissible.[15]
27. For instance, in Case E-5/16, which concerned the Norwegian Board of Appeal for Industrial Property Rights the Court concluded that the Board fulfilled "to a sufficient degree the factors established in the Court's case law."[16] This conclusion was based on the fact that the board was established by law, had a permanent existence, exercised binding jurisdiction and applied the rule of law.[17]

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[9] *Ibid*. para 38
[10] Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark*, [1994-1995] EFTA Ct.Rep. 15, paragraph 7.
[11] Case E-9/17 *Edmund Falkenhahn AG and the Financial Market Authority*, [2017] EFTA Ct. Rep.
[12] Case E-1/94 *Restamark*, cited above, paragraphs 7 – 31.
[13] Case E-5/16 *Municipality of Oslo*, [2017] EFTA Ct. Rep. 52.
[14] Joined Cases E-8/94 and E-9/94 *Forbrukerombudet v Mattel Scandinavia A/S and Lego Norge* A/S [1994/1995] EFTA Ct. Rep. 113, paragraph 15 and Case E-4/04 *Pedicel AS and Sosial og helsedirektoratet*, [2005] EFTA Ct.Rep. 1, paragraph 20- 21.
[15] Case C-546/16, *Montte SL v Musikene*, EU:C:2018:752, paragraphs 20 – 25; Case C-296/15 *Medisanus d.o.o. v Splosna Bolnisnica Murska Sobota*, EU:C:2017:431, paragraphs 32- 38; Case C-203/14 *Consorci Sanitari del Maresme v. Corporació de Salut del Maresme i la Selva*, EU:C:2015:664, paragraphs 17-31; Case C-465/11 *Forposta SA, ABC Direct Contact Sp. z o.o. v. Poczta Polska SA*, ECLI:EU:C:2012:801, paragraph 18, and Case C-396/14 MT Højgaard A/S and Züblin A/S v Banedanmark, ECLI:EU:C:2016:347, paragraphs 22 - 33.
[16] Case E-5/16, para 40.
[17] *Ibid*.

28. It is clear that these conditions are also fulfilled by KOFA, which is a body established by law. Section 11 of the Public Procurement Act provides for the establishment of the board for resolving disputes concerning rights and duties pursuant to the Public Procurement Act and regulations issued pursuant to the Act.
29. On the question of the independence, the Court in Case E-5/16 made three observations: First, "that the chair and the deputy chair qualify as judges and have permanent positions."[18] For KOFA, the chair and the deputy do not have to qualify as judges, but all members are appointed by the King in Council.[19]
30. Second, that "the rules of administrative and employment law against unlawful dismissal protect all of the members."[20] KOFA members are protected directly by Regulation on the Complaints Board for Public Procurement[21], whereby the appointees "cannot be dismissed or suspended throughout their nomination period except if a special reason is present."[22]
31. Finally, the Court emphasised "that in the assessment of complaints, the Board of Appeal cannot be given instructions."[23] KOFA's independence is ensured by Section 5 of the Regulation on the Complaints Board for Public Procurement. This provision states that neither KOFA nor its secretariat can be instructed by the Government whether concerning "legal interpretation, exercise of discretion, decisions in individual cases or the case handling". Section 15, second paragraph, contains additional independence safeguards for the individual members of KOFA, underlining, *inter alia*, that KOFA members cannot be instructed by the Ministry, the KOFA secretariat or any other KOFA member, including the head of KOFA.[24]
32. In line with Section 11 first paragraph of the Public Procurement Act and Section 2 of the Regulation on the Board of Appeal for Public Procurement, contracting

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[18] The chair and the deputy are appointed by the King in Council but other members are simply appointed by the Ministry.
[19] See Section 3 of the Regulation. Most recently, such KOFA member appointments were made by the King in Council on 21 June 2019. See https://www.regjeringen.no/no/aktuelt/nye-medlemmer-til-klagenemnda-for-offentlige-anskaffelser/id2661305/ (in Norwegian).
[20] Case E-5/16, para. 40.
[21] https://lovdata.no/dokument/SF/forskrift/2002-11-15-1288
[22] In Norwegian, this final sentence reads: *«Medlemmene kan ikke avsettes eller suspenderes i perioden med mindre det foreligger særlig grunn.».*
[23] Case E-5/16, para 40.
[24] In Norwegian: *«(…)Klagenemndas medlemmer fungerer uavhengig av sitt yrke, arbeidsgiver og sin øvrige stilling. De kan ikke instrueres faglig av departementet, sekretariatet eller de øvrige medlemmene, herunder klagenemndas leder.».*

authorities are obliged to participate in KOFA proceedings.[25] The Public Procurement Act empowers KOFA to adopt decisions on infringements of procurement rules. It can also issue administrative fines which cannot be appealed. Legal proceedings involving decisions of the KOFA must be instituted within two months from the parties received the decision. The ordinary courts of law may review all aspects of the case. State authorities and bodies also can bring legal proceedings.

33. ESA agrees with KOFA's assessment that the CJEU judgments referred to by the Norwegian authorities in point 24 of the request for advisory opinion cannot be relied on to deny KOFA the right to request advisory opinion as the case law cited there concerns an appeal board's status as a party in the dispute.[26]
34. In view of all the considerations above ESA submits that KOFA fulfils the criteria to be considered a "court or tribunal" for the purposes of Article 34 SCA.

7 LEGAL ANALYSIS OF THE QUESTION REFERRED

35. By its question, KOFA in essence seeks to ascertain whether the Directive is to be interpreted to the effect that EEA State bodies such as foreign missions are bound by the Directive notwithstanding the circumstance that they may be based outside EEA territory and/or that what they are procuring is to be performed or delivered outside EEA territory.
36. ESA submits that the Directive applies to all bodies falling within the scope of the notion of a contracting authority within the meaning of its Article 2(1)(1) regardless

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[25] In Norwegian, respectively:
«§ 11.Tvisteløsningsorgan
Kongen kan opprette et organ for løsning av tvister om rettigheter og plikter etter loven og forskrifter gitt i medhold av loven. Oppdragsgivere som er omfattet av loven, har plikt til å delta i prosessen for organet.
Departementet kan gi forskrift om saksbehandlingen i organet. (…)»
and:
«*§ 2.Oppdragsgivers plikt til å delta i klagebehandlingen*
Oppdragsgiver som er omfattet av anskaffelsesloven og forskrifter gitt med hjemmel i denne, plikter å delta i klagebehandlingen etter denne forskrift. Oppdragsgiver skal inngi tilsvar og for øvrig følge de instrukser som klagenemnda gir om saksbehandlingen.».

[26] See paragraph 29 of Case C-222/13 *TDC*, ECLI:EU:C:2014:2265: "the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision", and paragraph 37: "not acting as a third party in relation to the interests at stake".

of the place of the performance of the contract. According to the CJEU, once the value threshold under the Directive is met (which necessarily has to be the case for the Directive to become applicable to a particular procurement), there is a presumption that there is cross border interest.[27] ESA observes that the Directive itself is silent as to any limitations, or indeed relevance, of its territorial scope. ESA is also not aware of any case law from either the Court or the CJEU directly on this issue.

37. Considering the purpose and wording of the Directive, ESA submits that the question of its scope of application must be addressed from the perspective of *ratione personae* rather than from the perspective of *ratione loci*, which seems to have been the emphasis in the position of the Norwegian Government reflected in the request for an advisory opinion.

38. In the light of these considerations, ESA submits that the question referred by KOFA should be answered to the effect that EEA State bodies are bound by the Directive irrespective of whether they are based inside or outside EEA territory and irrespective of whether what they are procuring is to be performed or delivered inside or outside EEA territory.

7.1 The Directive applies to "contracting authorities" *ratione personae*

39. As Advocate General Jacobs put it in his opinion in *SIAC Construction*:

> *"The main purpose of regulating the award of public contracts in general is to ensure that public funds are spent honestly and efficiently, on the basis of a serious assessment and without any kind of favouritism or quid pro quo whether financial or political. The main purpose of Community harmonisation is to ensure in addition abolition of barriers and a level playing-field by, inter alia, requirements of transparency and objectivity."*[28]

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[27] Case C-115/14 *RegioPost GmbH & Co. KG* v *Stadt Landau in der Pfalz*, ECLI:EU:C:2015:760, paragraph 51: *"Thus, the value of the contract at issue in the main proceedings clearly exceeding the relevant threshold for the application of Directive 2004/18, that contract must be regarded as having a certain cross-border interest"* and Case C-213/07 *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, ECLI:EU:C:2008:731, paragraph 30.

[28] Case C-19/00 *Siac Construction*, ECLI:EU:C:2001:266, paragraph 33 of the Opinion.

40. In Case C-399/98 *La Scala,* the CJEU held that *"exposure to Community competition in accordance with the procedures provided for by the Directive ensures that the public authorities cannot indulge in favouritism".*[29]
41. The Directive applies to bodies which qualify as contracting authorities within the meaning of point (1) of Article 2(1) of the Directive: the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.
42. The CJEU has held that the aim of Directive is to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities.[30] This consideration guided the CJEU to interpret the notion of "contracting authority" widely, especially in view of diverse organisational forms used across the EEA States, and irrespective of whether they are part of the State administration in formal terms.[31]

7.2 The diplomatic missions of EEA States constitute "contracting authorities"

43. ESA submits that diplomatic missions forming part of a ministry of foreign affairs have to be considered as contracting authorities for the purposes of application of the Directive already as it is evident that they form an integral part of the State administration in formal terms, without even having to resort to the CJEU's wider interpretation of the notion of "contracting authority".
44. Further certainty to this effect is provided to some extent by Article 2(1)(2) of the Directive which provides that the "central government authorities" means the contracting authorities listed in Annex I and, in so far as corrections or amendments have been made at national level, their successor entities. A short comparison of listings in Annex I shows that there is no uniform approach as regards the level of detail that Member States decided to go into – it depends on the internal decision of the State which has been reflected in Annex I.
45. However, the Ministry of Foreign Affairs is one of the central government authorities listed by all the Member States. Moreover, Annex I has been incorporated into the EEA Agreement and the Norwegian Authorities listed the Ministry of Foreign Affairs

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[29] Case C-399/98 *La Scala*, ECLI:EU:C:2001:401, paragraph 75.
[30] Case C-44/96 *Mannesmann Anlagenbau Austria*, ECLI:EU:C:1998:4, paragraph 33.
[31] Case C-31/87 *Beentjes*, ECLI:EU:C:1988:422, paragraph 12.

among the central government authorities, as well as agencies and Institutions subordinate to these Ministries. It seems that there are only two States which refer to their diplomatic missions directly in Annex I, namely Sweden and the Netherlands.

46. In the case pending before KOFA, there can be no question that the diplomatic mission forms part of the State. As already mentioned, the Norwegian Ministry of Foreign Affairs and agencies and institutions subordinate to it are listed as "central government authorities" in Annex I of the Directive. Although Annex I only serves to determine application of a number of specific provisions of the Directive, it constitutes a subset of contracting authorities and therefore any entity listed therein must be considered to be a contracting authority.[32] At the same time, it is clear from the definitions in points (1), (2) and (3) of Article 2(1) of the Directive that Annex I is by no means exhaustive as regards the fundamental notion of "contracting authority", which goes well beyond the "central government authorities" expressly listed.

47. Furthermore, were there to be any doubt regarding the meaning of the "State" in this context, ESA notes that the notion has from the very beginning been understood by the CJEU broadly and interpreted functionally.[33] Therefore it does not matter whether the given body is formally part of administration or organisationally independent. To establish whether a body falls into the notion of the State it has to be assessed whether the body fulfils the task of public authority and what are its functioning rules – especially as regards its composition and financing.[34]

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[32] This conclusion is further supported by Instruction "Procurement by the Ministry of Foreign Affairs 1. Instructions 2. Routines, Ministry of Foreign Affairs, 14/6098-92 10 April 2018; https://www.norway.no/globalassets/2-world/kenya/appendix-9---procurement-by-the-ministry-of-foreign-affairs.pdf, which describes missions as contracting authorities and the findings of the Office of the Auditor General who found that "the Ministry of Foreign Affairs has decentralized the organization of the procurement area. A decentralized responsibility for procurement means that anyone who has been allocated budget allocation authority can complete procurement. There are about 200 cost centers in the foreign service that can make purchases. This includes the Ministry of Foreign Affairs with departments and subject sections and approx. 100 foreign service stations."; Audit report for 2018 on Ministry of Foreign Affairs compliance with procurement regulations.

[33] See to that effect Case C-31/87 *Beentjes*, para 12 and especially the Opinion of Advocate General Darmon, ECLI:EU:C:1988:226, at paras 10 et seq.

[34] Case C-31/87 *Beentjes*, cited above, paragraphs 11 and 12, and Advocate General Darmon at paras 10 and 12.

48. The CJEU in Case C-323/96 *Commission* v *Belgium* held that *"the definition of contracting authority, […] states that, for the purposes of each, 'contracting authorities' shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law […] The term 'the State' referred to by that provision [the definition of "contracting authority"] necessarily encompasses all the bodies which exercise legislative, executive and judicial powers."*[35]

49. In Case C-31/87 *Beentjes*[36] the CJEU went even further, holding that the term "the State" for the purposes of the procurement directive should be interpreted in functional terms considering the aims of the directive. Taking that into account, the CJEU held that even if a body is not formally part of the State administration, procurement rules will apply when a body was set up to carry out tasks entrusted to it by legislation. Any other interpretation would jeopardize *"the effective attainment of freedom of establishment and freedom to provide services in respect of public contracts"*.[37]

50. Diplomatic missions perform functions associated with the executive powers of a State. Furthermore, such missions generally operate under the control of a State's Ministry of Foreign Affairs and are funded through its budget. It is therefore clear that diplomatic missions have to be classified as contracting authorities for the purposes of the application of the procurement directives not only because, being subordinate to the Ministry of Foreign Affairs, they form an integral part of the State administration in formal terms, but also because they fall within the notion of the States in functional terms.

51. ESA therefore submits that the Directive is applicable *ratione personae* to diplomatic missions forming part of a ministry of foreign affairs of an EEA State, and in any event in the circumstances outlined in the Request from KOFA.

52. In the light of these considerations, ESA submits that the question referred by KOFA should be answered by holding that the Directive must be interpreted to the effect that EEA State bodies which qualify as contracting authorities within the meaning of its Article 2(1)(1) are bound by the Directive irrespective of whether they are

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[35] Case C-323/96 *Commission v. Belgium*, ECLI:EU:C:1998:411, paragraph 27.
[36] Case C-31/87 *Beentjes*, ECLI:EU:C:1988:422, paragraphs 11 to 13.
[37] *Ibid*, para 11.

based inside or outside EEA territory, and irrespective of whether what they are procuring is to be performed or delivered inside or outside EEA territory.

8 SUBMISSIONS ON THE REQUIRED LINK WITH EEA TERRITORY

53. As already set out by way of introduction, the Directive applies *ratione personae*, rendering considerations *ratione loci* otiose. Because the issue of territorial effect has been raised in front of KOFA by the Norwegian Government, and because the request for an advisory opinion appears to proceed on the basis that there is a relevant territorial aspect, ESA addresses *ratione loci* considerations in these written observations so as to enable the Court to render its judgment on the basis of the fullest possible information. This leads to the conclusion that even if such an approach were to be followed, the result would be the same: the Embassy would be bound by the Directive as there is a sufficiently close link with EEA territory.
54. The Norwegian Government's stance in front of KOFA appears to have been motivated at least in part on the instruction by its Ministry of Foreign Affairs cited at paragraph 19 above, which introduces a distinction between embassies depending on whether they are located inside or outside the EEA.
55. ESA in essence submits that the EEA Agreement's territorial scope as a matter of international law has no impact on the scope of application of the Directive, which applies to EEA State bodies in question *ratione loci* as well as *ratione personae.*

8.1 Article 126 EEA and the notion of "territory"

56. The starting point for determining the territorial scope of the EEA Agreement is Article 126 EEA. With respect to the EEA EFTA States, it states that "The Agreement shall apply […] to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway."
57. ESA in this regard agrees with the submissions of the Government of Norway in front of KOFA that the Embassy is, as a matter of international law, *not* located in the territory of Norway.
58. In short, the 1961 Vienna Convention on Diplomatic Relations ("VCDR") is the key international treaty governing diplomatic missions such as the Embassy.[38] The

[38] 500 *UNTS* p. 95.

International Law Commission ("ILC"), whose reports were instrumental for the codification of the VCDR, refers to "the 'exterritoriality' theory, according to which premises of the mission represent a sort of extension of the territory of the sending State" as one of the theories that have exercised an influence on the development of diplomatic privileges and immunities.[39] However, this particular theory does not, to any discernible degree, appear to have been guiding the ILC in its drafting. Indeed, even early writers such as Grotius recognized this approach as "Fiction".[40] Thus, there is little doubt that under the VCDR and under international law in general, the diplomatic mission of a sending State established in a receiving State is not part of the territory of the sending State.[41]

59. For the purposes of the present case, however, the mere conclusion that the Embassy is not located in Norway on its own is inconclusive because, according to well-established principles, the EEA Agreement, and Acts incorporated therein, apply outside the territory of an EEA State by virtue of another factor, namely that the issue at hand is sufficiently closely linked to the EEA.

8.2 Territoriality is established where there is a sufficiently close link to the EEA

60. The question is not whether an act *takes place* in EEA territory, but whether it *has effects* in EEA territory. This "functional" or "effects-based" approach will be examined in the following section. The Authority is not aware of any relevant case law on this issue from the Court but will set out in turn the relevant case law of the CJEU, its own practice, and that of the Joint Committee.

8.2.1 CJEU case law regarding the application of EU law to situations arising outside the territories of the EU Member States

61. As regards territorial scope in the EU, Article 52 TEU states that the Treaties shall apply to all the Member States and the territorial scope of the Treaties is specified in Article 355 TFEU. The CJEU has in numerous judgments held that the treaties

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[39] Report of the International Law Commission covering the work of its Tenth Session, 28 April - 4 July 1958, Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859), Yearbook of the International Law Commission, 1958 ,vol. II, p. 94-95.

[40] Hugo Grotius, *The Rights of War and Peace* (2005 ed. (Richard Tuck transl.)) vol. 2 (Book II), Chapter XVIII. IV. 5.

[41] See e.g. Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford University Press 2016), p. 11, noting that "Exterritoriality continues, however, to enjoy an astonishing afterlife in popular consciousness.").

and secondary legislation of the EU may apply, within the limits of international law, outside the territories of the Member States. Three of the most salient examples are presented below.

62. First, Case C-214/94 *Boukhalfa*, which concerned a local employee of Belgian nationality at the German Embassy in Algiers, who asked to receive the same treatment as local staff of German nationality. The CJEU held that while the geographical application of the Treaty was defined in Article 227 (now Article 52 TEU), "[t]hat article does not, however, preclude Community rules from having effects outside the territory of the Community."[42] The CJEU recalled that "provisions of Community law may apply to professional activities pursued outside Community territory as long as the employment relationship retains a sufficiently close link with the Community" (emphasis added).[43] It then went on to examine whether there was "a sufficiently close link between the employment relationship, on the one hand, and the law of a Member State and thus the relevant rules of Community law, on the other."[44] It concluded that such a link existed.

63. Second, the seminal *Wood Pulp* cases concerning anticompetitive agreements concluded outside the EU but having effects within the EU.[45] Here, the Commission took action against 43 undertakings producing bleached sulphate pulp, used in the production of paper, based in both the Union and other producing states. A large number of customers were based in the Union. On the question of the territorial scope of EU competition law, the CJEU held that there was nothing in the wording of what is now Article 101 TFEU that precluded its application to undertakings based outside the EU, and to situations where unlawful conduct might have been initiated outside the EU. The CJEU resolved the case in this respect by reference to traditional international law principles, and fixed on the circumstance that on the facts the concerted practice had been implemented in the EU. Here, the CJEU held:

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[42] Case C-214/94, *Ingrid Boukhalfa v Bundesrepublik Deutschland*, ECLI:EU:C:1996:174, paragraph 14.
[43] *Ibid*, paragraph 15.
[44] *Ibid*, paragraph 15
[45] Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *A. Ahlström Osakeyhtiö and others* v *the Commission*, ECLI:EU:C:1993:120.

> *"If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented."*[46]

In other words, even though the conduct took place outside the internal market, it still had an effect on the internal market, which was decisive. In public procurement it is even easier to determine this, as the cross-border element is present when the Directive threshold values are reached[47], and in ESA's submission thereby also establishing an effect on the internal market.

64. Third, Case C-494/06 P, *Commission v Italian Republic and Wam*. Here, the Court examined state aid in the form of subsidised loans, given by Italy to an Italian company in order to penetrate markets in Asia. It held:

> *"that although it follows from the case-law cited (…) that such effects can, in principle, result from the fact that the beneficiary of an aid is active on a liberalised European market, the fact remains that (…), the aid at issue is not directly connected to the activity of the beneficiary on that market, but is intended to finance expenditure for a non-member State market penetration programme. In those circumstances (…), the effect of the aid on trade and on intra-Community competition is less immediate and even less discernible and this requires a greater effort to state reasons on the part of the Commission."*[48]

Consequently, aid intended to finance expenditure for a non-member State market penetration programme is covered, provided there is clear justification.

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[46] Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *A. Ahlström Osakeyhtiö and others* v *the Commission,* ECLI:EU: C:1988:447 , paragraph. 16.

[47] Case C-115/14 *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz*, ECLI:EU:C:2015:760, paragraph 51: *"Thus, the value of the contract at issue in the main proceedings clearly exceeding the relevant threshold for the application of Directive 2004/18, that contract must be regarded as having a certain cross-border interest"* and Case C-213/07 *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, ECLI:EU:C:2008:731, paragraph 30.

[48] Case C-494/06 P, *Commission v Italian Republic and Wam*, ECLI:EU:C:2009:272, paragraph 62.

8.2.2 ESA practice on the applicability of the EEA Agreement outside the "territory" of the EEA EFTA States

65. The Authority's own practice, established over a long period of time, mirrors the sufficiently close link-based approach of the CJEU case law. Here, it suffices to mention two examples:

66. First, the Authority's reasoned opinion of 24 September 1999.[49] This case concerned the application of Regulation 1408/71 to a worker who was a radio operator on an oil platform located on the Norwegian continental shelf. ESA referred, *inter alia,* to Case C-214/94 *Boukhalfa*, discussed above, and adopted a similar approach, finding that the employment relationship entailed sufficiently close link.[50]

67. Second, the Authority's letter of formal notice of 16 July 2003.[51] Here, ESA took the view that Norway had acted in breach of Article 28 EEA and of Articles 1 and 4 of Regulation 1612/68 on freedom of movement for workers within the Community. The case concerned a complainant company, which had been held responsible in Norwegian law for e.g. allowing a fishing vessel, registered in Norway and sailing

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[49] Decision 233/99/COL.

[50] Page 5.

[51] Letter of formal notice for breach of Article 28 of the EEA Agreement and of Articles 1 and 4 of the Act referred to at point 2 of Annex V to the EEA Agreement (Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community), as amended, 16 July 2003, decision 144/03/COL. This was followed by ESA's reasoned opinion of 31 March 2004, decision 61/04/COL, which referred to the LFN reasoning on the territorial scope. The case was closed following Norway's compliance. This letter of formal notice was issued after the complainant company had been held responsible in Agder Court of Appeal under Norwegian law for fishing activities within the Norwegian Exclusive Economic Zone. Instead, that Court considered such activities to be outside the "territory". See Judgment of Agder Court of Appeal, 12 October 2001, LA-2001-1152. ESA considered that these activities were not unlawful under EEA law and issued its Letter of formal notice.
In a subsequent judgment from 2006, this letter of formal notice and reasoned opinion was explicitly referred to by Frostating Court of Appeal, which held that it would be a "too formalistic interpretation" to hold that the EEA Agreement cannot have an effect outside the borders of the territory. It referred to the "functional approach" taken by ESA, in light of CJEU practice and that the relevant test was whether the issue at hand was "sufficiently closely tied to the EEA". It held that "as concerns the geographical scope, the Court of Appeal agrees with ESA's conclusion" that there was a sufficiently close link. (In Norwegian: «Selv om EØS-avtalens artikkel 126 første ledd omtaler anvendelse av avtalen på de aktuelle lands territorier, er lagmannsretten kommet til at det vil være en for formalistisk fortolkning å legge til grunn at EØS-avtalen ikke får virkning utenfor territorialgrensen. ESA hadde i brev av 16. august 2002 uttalt at EØS-avtalens virkeområde skal defineres på en funksjonell måte og i lys av EØS-avtalens formål og hensikt. […] Hva angår geografisk virkeområde for EØS-avtalen slutter lagmannsretten seg til ESA's konklusjon i åpningsbrevet om at fiskernes ansettelsesforhold er tilstrekkelig nært knyttet til EØS-territoriet til at EØS-reglene om fri bevegelse av arbeidstakere gjelder for arbeidstakere om bord på norske fiskefartøyer, også i norsk økonomisk sone.») Judgment of 21 September 2006, lf-2006-24118, especially p. 14-15.

under Norwegian flag, to engage in fishing in the Norwegian EEZ with a Dutch captain and a Dutch crew. The Norwegian Government had disputed the application of the EEA Agreement in the Norwegian EEZ.[52] ESA again referred to Case C-214/94 *Boukhalfa* and similar case law and concluded that the employment relationship in question entailed a sufficiently close link.

8.2.3 EEA law provisions reflecting a pragmatic approach to Art 126 EEA

68. There are further illustrations of what can be termed a pragmatic approach to territoriality in a range of sometimes arcane provisions of EEA law demonstrating that the on its face strict territorial delimitation laid down in Article 126 EEA has in practice been handled flexibly and been the subject of exceptions, notably when there has been an effect on the internal market.[53]

8.3 Application of the sufficient link test under the Directive to the case

69. Taking similar approach here, ESA submits that the Directive may apply outside the "territory" of Norway within the meaning of Article 126 EEA. The relevant test, under the *ratione loci* approach, is whether the obligation in question has a sufficient link to the EEA.
70. For the purposes of the Directive, ESA submits that the factors presented in the request from KOFA serve to establish a sufficient link *ratione loci* in the case at hand.
71. The procurement procedure was carried out by the Norwegian State in order to enter into a contract using Norwegian public money and governed by Norwegian law, the subject matter and value of which can be considered to give rise to cross-border interest in the EEA.
72. As is clear from the tender documents[54] and the request for an advisory opinion, the project in the present case consisted of two phases. The first "would include

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[52] Letter of formal notice of 16 July 2003, Page 4.
[53] See e.g. Article 4(1) of Protocol 4 to the EEA Agreement on rules of origin, Decision of the EEA Joint Committee No. 19/95 of 5 April 1995 amending Annex IV (Energy), by incorporating Directive 94/22/EC on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons into the Agreement, the joint statement issued in connection with that decision, and Decision of the EEA Joint Committee No. 115/2012 of 15 June 2012 amending Annex XX (Environment) to the EEA Agreement by incorporating Directive 2009/31/EC.
[54] Documents available at:

planning and preparation of a project document".[55] The second phase "would consist in the execution of the project."[56] The Norwegian Ministry of Foreign Affairs as such appears pursuant to the tender documents to be named as the party and signatory to the second phase, which it also appears to have directly funded.[57] he Ministry of Foreign Affairs itself was also identified on Doffin as the buyer.[58] It was therefore deeply involved in the procurement process, over which it exercised decisive influence and control.

73. The fact that the tender was actually published in Doffin and prompted Norwegian companies, registered and established in Norway, to bid for the project, indicates that this was the area where the actual effects on the market took place – certainly not in Angola.[59] The service in question is not intrinsically linked to the territory of Angola either.

74. ESA submits that the effect on the internal market in the procurement cases like the present one is established by reference to the nature of the procuring body and the value of services to be procured. Therefore the link test referred to in the CJEU case law following Case C-214/94 *Boukhalfa* will similarly be fulfilled once the threshold and the contracting authority criteria are fulfilled, as explained in paragraph 36.

75. Finally, since the Embassy is part of the State, to treat different parts of the State differently would not be compatible with the purpose of the Directive. It would also make it possible to avoid the application of the Directive by tendering through a diplomatic mission outside the EEA. Indeed, any EEA State could then simply set

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https://eu.eu-supply.com/app/rfq/publicpurchase_docs.asp?PID=183417&LID=213161&AllowPrint=1.

[55] Paragraph 5 of the Request for an Advisory Opinion. While not decisive, because the price included flight tickets to Angola, the Authority assumes that this phase would actually take place in the home State of the winning bidder, i.e. in Norway.

[56] *Ibid*.

[57] Avtale om konsulentoppdrag Del I – Angola Human Rights Training Project 2017-2021, page 2. 1st paragraph. In the standard contract ("*Tilskuddsavtale*"), apparently incorporated in *Avtale om konsulentoppdrag* and annexed to the Doffin notice, "Utenriksdepartementet" is referred to as both "party" (in Norwegian "part") and signatory. This standard contract is also governed by Norwegian law. See Section 14 of the Agreement ("*Tilskuddsavtale")* which states that the parties accept to be bound by The General Conditions Applicable to Grants from the Norwegian Ministry of Foreign Affairs. Its Section 24.1 reads: *"The Agreement shall be governed and construed in accordance with Norwegian law."*

[58] https://eu.eu-supply.com/ctm/Company/CompanyInformation/Index/245665

[59] This does not however make this a purely internal situation outside of the scope of the Directive. See to that effect C-213/07 *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, ECLI:EU:C:2008:731, paragraphs 27–30.

up an entity in such a territory –, and thereby completely escape the application of the Directive. That cannot be the case.

9 CONCLUSION

76. In the light of the entirety of the above observations, the Authority respectfully submits that the question referred by KOFA should be answered as follows:

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement must be interpreted to the effect that EEA State bodies which qualify as contracting authorities within the meaning of its Article 2(1)(1) are bound by the Directive irrespective of whether they are based inside or outside EEA territory, and irrespective of whether what they are procuring is to be performed or delivered inside or outside EEA territory.

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