



JUDGMENT OF THE COURT

16 July 2020*

(Public Procurement – Directive 2014/24/EU – Public works contract – Public service contract)

In Case E-7/19,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Public Procurement Complaints Committee (*Kærunefnd útboðsmála*), in a case pending before it between

Tak – Malbik ehf.

and

the Icelandic Road and Coastal Administration and Próttur ehf.,

concerning 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, and in particular points (6), (7) and (9) of Article 2(1) thereof,

THE COURT,

composed of: Páll Hreinsson, President, Per Christiansen, and Bernd Hammermann (Judge-Rapporteur), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- the Icelandic Road and Coastal Administration (*Vegagerðin*) (“the Defendant”), represented by Eypóra Hjartardóttir, Attorney; and
- the EFTA Surveillance Authority (“ESA”), represented by Ewa Gromnicka, Ingibjörg-Ólöf Vilhjálmisdóttir and Carsten Zatschler, acting as Agents,

* Language of the request: Icelandic. Translations of national provisions are unofficial and based on those contained in the documents of the case.

having regard to the Report for the Hearing,

having heard oral argument of ESA, represented by Ewa Gromnicka and Ingibjörg-Ólöf Vilhjálmisdóttir; at the hearing on 10 March 2020,

gives the following

Judgment

I Legal background

EEA law

- 1 Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”) reads:

The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.

Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.

An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law.

- 2 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 (OJ 2014 L 94, p. 65) (“the Directive”) was incorporated into the Agreement on the European Economic Area (“the EEA Agreement”) by Decision of the EEA Joint Committee No 97/2016 (OJ 2017 L 300, p. 49, and EEA Supplement 2017 No 73, p. 53) at point 2 of Annex XVI to the EEA Agreement. Constitutional requirements were indicated and fulfilled in November 2016. The decision entered into force on 1 January 2017, and the time limit to implement the Directive expired on the same date.

- 3 Recitals 8 and 9 of the Directive read:

(8) A contract should be deemed to be a public works contract only if its subject-matter specifically covers the execution of activities listed in Annex II, even if the contract covers the provision of other services necessary for the execution of such activities. Public service contracts, in particular in the sphere of property management services, may, in certain circumstances, include works. However, in so far as such works are incidental to the principal subject-matter of the contract, and are a possible consequence thereof or a complement thereto, the

fact that such works are included in the contract does not justify the qualification of the public service contract as a public works contract.

However, in view of the diversity of public works contracts, contracting authorities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. This Directive is not intended to prescribe either joint or separate contract awards.

(9) The realisation of a work corresponding to the requirements specified by a contracting authority requires that the authority in question must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design. Whether the contractor realises all or part of the work by his own means or ensures their realisation by other means should not change the classification of the contract as a works contract, as long as the contractor assumes a direct or indirect obligation that is legally enforceable to ensure that the works will be realised.

4 Title I of the Directive, entitled “Scope, Definitions and General Principles”, contains Articles 2 and 23 of the Directive.

5 Article 2 of the Directive, entitled “Definitions”, reads:

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

...

(6) ‘public works contracts’ means public contracts having as their object one of the following:

(a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II;

(b) the execution, or both the design and execution, of a work;

(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

(7) ‘a work’ means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;

...

(9) ‘public service contracts’ means public contracts having as their object the provision of services other than those referred to in point 6;

...

6 Article 23 of the Directive, entitled “Nomenclatures”, provides in its first paragraph:

1. Any references to nomenclatures in the context of public procurement shall be made using the Common Procurement Vocabulary (CPV) as adopted by Regulation (EC) No 2195/2002.

7 Title II of the Directive, entitled “Rules on Public Contracts”, contains Articles 42, 49 and 51 of the Directive.

8 Article 42 of the Directive, entitled “Technical specifications”, provides:

1. The technical specifications as defined in point 1 of Annex VII shall be set out in the procurement documents. The technical specification shall lay down the characteristics required of a works, service or supply.

Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

...

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

(a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

(b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when any of those do not exist - national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words ‘or equivalent’;

(c) in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;

(d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

...

9 Article 49 of the Directive, entitled “Contract notices”, provides:

Contract notices shall be used as a means of calling for competition in respect of all procedures, without prejudice to the second subparagraph of Article 26(5) and Article 32. Contract notices shall contain the information set out in Annex V part C and shall be published in accordance with Article 51.

10 Article 51(2) of the Directive, entitled “Form and manner of publication of notices”, provides in its second paragraph:

2. Notices referred to in Articles 48, 49 and 50 shall be drawn up, transmitted by electronic means to the Publications Office of the European Union and published in accordance with Annex VIII. ...

11 Annex II to the Directive, entitled “List of the activities referred to in Point 6(a) of Article 2(1)”, lists activities in accordance with the statistical classification of economic activities in the European Community (“NACE”) and the Common Procurement Vocabulary (“CPV”) codes.

12 Annex II to the Directive provides:

In the event of any difference of interpretation between the CPV and the NACE, the CPV nomenclature will apply.

<i>NACE Rev. (1)</i>					<i>CPV code</i>
<i>SECTION F</i>			<i>CONSTRUCTION</i>		
<i>Division</i>	<i>Group</i>	<i>Class</i>	<i>Subject</i>	<i>Notes</i>	
45			<i>Construction</i>	<i>This division includes: — construction of new buildings and works, restoring and common repairs</i>	45000000
...

	45.2		<i>Building of complete constructions or parts thereof; civil engineering</i>		45200000
...
		45.23	<i>Construction of highways, roads, airfields and sport facilities</i>	<p><i>This class includes:</i></p> <p>...</p> <p>—<i>painting of markings on road surfaces and car parks.</i></p> <p><i>This class excludes:</i></p> <p>—<i>preliminary earth moving, see 45.11.</i></p>	<p>45212212 and DA03</p> <p>45230000</p> <p><i>except:</i></p> <p>– 45231000</p> <p>– 45232000</p> <p>– 45234115</p>
...

13 Annex VII to the Directive, entitled “Definition of certain technical specifications”, provides in its first paragraph:

For the purposes of this Directive:

(1) ‘*technical specification*’ means one of the following:

(a) *in the case of public works contracts the totality of the technical prescriptions contained in particular in the procurement documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is intended by the contracting authority; those characteristics include levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods at any stage of the life cycle of the works; those characteristics also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position*

to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

(b) in the case of public supply or service contracts a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures;

14 Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (OJ 2002 L 340, p. 1, and EEA Supplement 2006 No 15, p. 226) was incorporated into the EEA Agreement by Joint Committee Decision No 180/2003 amending Annex XVI (Procurement) to the EEA Agreement (OJ 2004 L 88, p. 61, and EEA Supplement 2004 No 15, p. 18) (“the CPV Regulation”).

15 Article 1(1) and (2) of the CPV Regulation reads:

1. A single classification system applicable to public procurement, known as the ‘Common Procurement Vocabulary’ or ‘CPV’ is hereby established.

2. The text of the CPV is set out in Annex I.

16 Annex I to the CPV Regulation provides:

Structure of the classification system

1. The CPV consists of a main vocabulary and a supplementary vocabulary.

2. The main vocabulary is based on a tree structure comprising codes of up to nine digits associated with a wording that describes the supplies, works or services forming the subject of the contract.

The numerical code consists of 8 digits, subdivided as follows:

- the first two digits identify the divisions;*
- the first three digits identify the groups;*
- the first four digits identify the classes;*
- the first five digits identify the categories.*

Each of the last three digits gives a greater degree of precision within each category.

A ninth digit serves to verify the previous digits.

...

National law

- 17 The Directive has been implemented in Iceland by way of Act No 120/2016 on Public Procurement (*lög nr. 120/2016 um opinber innkaup*) (“the Icelandic Public Procurement Act”).
- 18 Chapter I of the Icelandic Public Procurement Act, entitled “Purpose, definitions and scope”, contains Article 4.
- 19 Article 4 of the Icelandic Public Procurement Act, entitled “Contracts governed by the Act”, provides in its second and fourth paragraphs:

(2) Work contracts are contracts having as their object either the execution, or both the design and execution of works, or the execution of works, by whatever means corresponding to the requirements specified by the contracting authority. A work in this sense is the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

...

(4) Service agreements are contracts having as their object the provision of services, other than that referred to in works contracts, according to paragraph 2 ...

- 20 Article 21 of the Icelandic Public Procurement Act within Chapter II “General Provisions”, entitled “Common procurement vocabulary”, provides:

All references to classification systems in connection with public procurement that exceed threshold amounts for the EEA, according to paragraph 4 of Article 23, shall be based on the common procurement vocabulary (CPV).

- 21 Chapter III of the Icelandic Public Procurement Act, entitled “Threshold amounts”, contains Article 23. Article 23(1), of the Icelandic Public Procurement Act, entitled “Threshold amounts”, provides:

Any public procurement of supplies and services exceeding ISK 15 500 000 and procurement of works exceeding ISK 49 000 000 shall be put up for tender and made in accordance with the procurement procedures stipulated in Chapter IV. Threshold amounts for procurement of public service contracts relating to social

services and other specialised services according to Chapter VIII shall comply with paragraph 4.

...

22 Chapter XI of the Icelandic Public Procurement Act, entitled “The Public Procurement Complaints Committee” (“the Complaints Committee”), details, inter alia, the role and composition of the Complaints Committee and the manner in which complaints are to be processed.

23 Article 103 of the Icelandic Public Procurement Act entitled “The role and composition of the Public Procurement Complaints Committee” provides:

(1) The Public Procurement Complaints Committee consists of three persons and the same number of alternates appointed by the Minister following nominations by the Supreme Court for a term of four years. Two members of the Committee and their alternates shall fulfil the legal requirements to hold the office of a district judge, and one of these shall be the chairman of the Committee. The third member of the Committee and his alternate member shall have extensive experience and knowledge of commerce. The members of the Committee shall be independent of the interest of the state and of other public bodies.

(2) The role of the Public Procurement Complaints Committee is to resolve in an expedient and impartial way the complaints of economic operators for alleged violations of this Act and regulations issued on the basis of the Act, including regarding the general procurement by public bodies, procurements in the fields of defence and security, the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and the awarding of concessions.

(3) The Committee is independent in its activities. Its rulings and decisions as provided for in this Act may not be appealed to other public authorities.

...

24 Article 108 of the Icelandic Public Procurement Act, entitled “Processing of a complaint and evidence gathering”, provides:

(1) Should a complaint be admissible as provided for in Article 106, the Committee shall grant a defendant against which the complaint is directed an opportunity to express itself on the substance of the complaint.

(2) The complainant shall generally be allowed a short time limit to address the comments made by the defendant and those of others who have been provided with the opportunity to make a statement.

(3) The pleadings shall be conducted in writing, but the Committee may give the parties an opportunity to present verbal comments. In the event that a case is

brought before the Public Procurement Complaints Committee where it is necessary to interpret the EEA agreement, its Protocols, Annexes, or acts mentioned in the Annexes, the Committee may in accordance with Article 40 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, request an advisory opinion by the EFTA court concerning clarification of an aspect of the case before the matter is concluded. Whether or not a party to the case demands that such an opinion be sought or the Committee thinks that there is a need for this, the parties must be given the opportunity to express themselves before a ruling is rendered.

...

(7) The processing of complaints before the Committee shall otherwise be governed by the Administrative Act.

- 25 Regulation No 178/2018 on the Advertisement of procurement on a tender website, threshold amounts for public procurement and procurement pursuant to the World Trade Organisation Agreement on Government Procurement (*reglugerð nr. 178/2018 um auglýsingu innkaupa á útboðsvef, viðmiðunarfjárhæðir vegna opinberra innkaupa og innkaup samkvæmt samningi Alþjóðaviðskiptastofnunarinnar (WTO) um opinber innkaup*) (“Icelandic Regulation No 178/2018”) provides in its Article 2:

Threshold amounts for the obligation of tendering out domestically according to paragraph 1, Article 23 of the Act on Public Procurement are ISK 15 500 000 for the procurement of goods and services and ISK 49 000 000 for works contracts.

- 26 Article 3 of Icelandic Regulation No 178/2018 provides:

Threshold amounts for the obligation to tender out in the European Economic Area according to paragraph 4, Article 23 of the Public Procurement Act shall be as follows:

Public entities, other than local authorities, their agencies, other public entities under their auspices or organisations that such entities may be organised into:

<i>Goods contracts</i>	<i>ISK 18 734 400</i>
<i>Service contracts</i>	<i>ISK 18 734 400</i>
<i>Work contracts</i>	<i>ISK 721 794 800</i>

...

II Facts and procedure

- 27 In March 2019, the Defendant called for bids for the production of material from a quarry near Fossamelar, Iceland. The procurement documents stated that the successful tenderer should produce base materials of specific sizes and stockpile them within a specified area. The material produced was to meet detailed specifications prescribed by the procurement documents. The successful tenderer would be responsible for producing material in accordance with the requirements of the Defendant, and production tests should be carried out to verify this. The Defendant would provide the successful tenderer with undisturbed material and bedrock for processing. The estimated value of the procurement was ISK 91 000 000. A contract notice was not published in the EEA in accordance with the Directive.
- 28 On 26 March 2019, the submitted bids were opened. The lowest bid was from Þróttur ehf. (“Þróttur”) in the amount of ISK 92 579 082. The second lowest bid was from Tak – Malbik ehf. (“the Complainant”) in the amount of ISK 92 965 700. On 1 April 2019, the Defendant announced to the tenderers that the contract for the production and processing of materials and stockpiling (“the Contract”) would be awarded to Þróttur.
- 29 By e-mail of 11 April 2019, the Complainant contested the Defendant’s decision to award the Contract to Þróttur and requested, inter alia, documentation outlining the means by which the lowest bidder had been determined. The Complainant alleged that Þróttur did not fulfil the general requirements of the procurement procedure as regards professional experience and requirements relating to the experience of the chief project supervisor, and, therefore, that Þróttur’s offer was invalid.
- 30 On 12 April 2019, the Defendant responded to the Complainant by e-mail declining to disclose information regarding the determination of the lowest bidder. The Defendant maintained that Þróttur had fulfilled all of the requirements contained in the procurement documents and that, therefore, as the lowest bidder, the Contract should be awarded to Þróttur. On the same day, the Complainant lodged a complaint with the Complaints Committee, asking it to annul the Defendant’s decision to award the Contract to Þróttur. The complaint had the effect of automatically suspending the procurement procedure.
- 31 On 13 May 2019, the Complaints Committee requested information from the Defendant as to whether a contract notice had been published in the EEA and, if not, on what grounds.
- 32 On 20 May 2019, the Defendant responded stating that a contract notice had not been published in the EEA, as the Contract involved the award of a “public works contract” within the meaning of Article 4(2) of the Icelandic Public Procurement Act, read in conjunction with points (6) and (7) of Article 2(1) of the Directive, the value of which fell below the threshold amount for the obligation to tender out in the EEA under Icelandic Regulation No 178/2018.

- 33 On 7 June 2019, the Complaints Committee rejected the Defendant’s application to lift the automatic suspension of the procurement procedure, on the basis that there was a substantial likelihood that the Defendant had infringed the Icelandic Public Procurement Act. The suspension of the procurement procedure is thus pending until the Complainant’s claims have been resolved. The Complaints Committee stated in its decision that it considered that the appealed procurement was intended to conclude a public service contract, within the meaning of Article 4(4) of the Icelandic Public Procurement Act and point (9) of Article 2(1) of the Directive, not a public works contract. The Complaints Committee noted that the materials processing involved in the procurement procedure at issue did not seem to fall within the scope of the activities specified in Annex II to the Directive, in view of the CPV codes contained therein. In the light of these considerations, as the threshold amount for a public service contract set out in Icelandic Regulation No 178/2018 was exceeded, the Complaints Committee considered that a contract notice should have been published in the EEA.
- 34 On 15 July 2019, the Complaints Committee notified the parties to the case that it was considering seeking an advisory opinion of the Court in order to determine what kind of public contract was involved in the procurement procedure and invited the parties to the case to submit their observations.
- 35 The Defendant and Próttur maintained, inter alia, that the Contract was a “public works contract”, as it involved the manufacture of road construction material, which is an integral part of civil engineering activities in the form of road construction. The Complainant agreed with the Complaints Committee’s characterisation of the Contract as a “public service contract”.
- 36 In these circumstances, the Complaints Committee took the view that resolution of the dispute before it depended on the interpretation of EEA law. The Complaints Committee thus decided to stay the proceedings and refer a single question to the Court for an advisory opinion. The request, dated 17 September 2019, was registered at the Court on 23 September 2019.
- 37 The following question was referred to the Court:
- Is a contract to be pursued following an invitation to tender, in which tenderers undertake to process and stockpile certain raw materials provided by the contracting authority, and in accordance with the contracting authority’s requirements, considered a works contract within the meaning of Directive 2014/24/EU, cf. in particular paragraphs 6 and 7 of Article 2, or a service contract within the meaning of the Directive, cf. in particular Article 2(9)?*
- 38 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answer of the Court

Admissibility

- 39 Under Article 34 SCA, any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if that court or tribunal considers it necessary to enable it to give judgment. The purpose of Article 34 SCA is to establish cooperation between the Court and national courts and tribunals. That cooperation is intended to contribute to ensuring a homogenous interpretation of EEA law by providing assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law. That purpose must also be taken into account in interpreting the notion of court or tribunal (see Case E-8/19 *Scanteam*, judgment of 16 July 2020, not yet reported, paragraph 41 and case law cited).
- 40 When assessing whether a referring body qualifies as a court or tribunal within the meaning of Article 34 SCA, the Court takes account of a number of factors. These include, in particular, whether the referring body is established by law, has a permanent existence, exercises binding jurisdiction, applies rules of law, is independent, and, as the case may be, whether its procedure is *inter partes* and similar to a court procedure (see Case E-8/19 *Scanteam*, judgment of 16 July 2020, not yet reported, paragraph 42).
- 41 The Complaints Committee is an administrative appeals board which has the role of resolving, in an impartial manner, complaints from economic operators regarding alleged infringements of the Icelandic Public Procurement Act, as stated in Article 103(2) of that act. Article 103(1) and (3) of the Icelandic Public Procurement Act provides that the Complaints Committee shall be independent of the interests of the State and other public entities, and that it shall function independently. Furthermore, its decisions are not subject to further administrative appeal. It follows from Article 108(1), (2) and (3) of the Icelandic Public Procurement Act that the procedure before the Complaints Committee entails that parties to a case may make written submissions, such as commenting on the submissions of another party, and that the Complaints Committee may conduct an oral hearing.
- 42 In the present case, it has not been disputed that the Complaints Committee can be considered to be a court or tribunal within the meaning of Article 34 SCA. In the light of the above description of the relevant national legal framework, as well as the observations submitted to the Court, it appears that the Complaints Committee is established by law, has a permanent existence, exercises binding jurisdiction, is independent, and applies rules of law. Furthermore, the procedure before the Complaints Committee is similar to an *inter partes* procedure.
- 43 Consequently, the Court finds that the Complaints Committee constitutes a court or tribunal within the meaning of Article 34 SCA and the present request for an advisory opinion is, therefore, admissible.

Findings of the Court

- 44 By its question, the Complaints Committee asks, in essence, whether a public contract to process and stockpile certain raw materials provided by the contracting authority and in accordance with its requirements, constitutes a public works contract within the meaning of point (6) of Article 2(1) of the Directive, or a public service contract, within the meaning of point (9) of Article 2(1).
- 45 The question referred is formulated in abstract terms and must be construed in the light of the information contained in the request for an advisory opinion. The Court observes that proceedings under Article 34 SCA are based on a clear separation of functions between national courts or tribunals and the Court. Any assessment of the facts of the case is a matter for the national court or tribunal. However, in order to give the national court or tribunal a useful answer, the Court may, in the spirit of cooperation with national courts and tribunals, provide it with all the guidance that it deems necessary (see Case E-2/12 *HOB-vín* [2012] EFTA Ct. Rep. 1092, paragraph 38).
- 46 According to point (9) of Article 2(1) of the Directive, a public service contract is defined as a public contract having as its object the provision of services other than those covered by the definition of public works contracts under point (6) of Article 2(1). Accordingly, public service contracts are defined in a negative manner in relation to public works contracts. Therefore, it must first be examined whether a public contract, such as the one at issue in the main proceedings, constitutes a public works contract under point (6) of Article 2(1).
- 47 Public works contracts are defined under point (6) of Article 2(1) of the Directive as those public contracts which have as their object one of the activities set out in points (a), (b) or (c) of point (6) of Article 2(1).
- 48 Under point (a) of point (6) of Article 2(1) of the Directive, a public contract which has as its object the execution, or both the design and execution, of works related to one of the activities listed in Annex II to the Directive constitutes a public works contract.
- 49 Accordingly, it must first be determined whether a public contract, such as the one at issue in the main proceedings, has as its object the execution of works related to one of the activities listed in Annex II to the Directive. In this regard, as also stated in recital 8 of the Directive, it must be noted that a public contract should be deemed to be a public works contract only if its subject-matter specifically covers the execution of activities listed in Annex II.
- 50 Annex II to the Directive provides a list of activities related to construction specifically identified by certain NACE and CPV codes. It is stated in Annex II to the Directive that in the event of any difference of interpretation between the CPV and the NACE, the CPV nomenclature will apply. As set out in Article 1(1) and (2) of the CPV Regulation, the CPV is a single classification system applicable to public procurement and the text of the CPV is contained in Annex I to that regulation. As further explained in that annex, the main vocabulary of the CPV is based on a ‘tree structure’ comprising codes of up

to nine digits associated with a wording that describes the supplies, works or services forming the subject of a contract.

- 51 The Defendant has argued that materials processing comes within the scope of the CPV codes 45250000 and 45262000, which are both listed in Annex II to the Directive. The first CPV code is described as “construction works for plants, mining and manufacturing and for buildings relating to the oil and gas industry” in the main vocabulary of the CPV. The second CPV Code is described as “special trade construction works other than roof works”.
- 52 The assessment of whether a public contract covers an activity listed in Annex II to the Directive, must be based on the description of the relevant CPV code, as well as the title of the division of the CPV, within its tree structure, in which it is located (compare the judgment in *Felix Swoboda GmbH v Österreichische Nationalbank*, C-411/00, EU:C:2002:660, paragraph 65). Based on the description of CPV codes 45250000 and 45262000, as well as the title of the division in which they are located, it is evident that the activities identified by those CPV codes relate to specific construction work. By comparison, a public contract, such as the one at issue in the main proceedings, relates to the production of material from a quarry and that materials of specific sizes should be produced and stockpiled within a specific area. It is for the Complaints Committee to assess whether the public contract at issue in the main proceedings is covered by the descriptions of those CPV codes (compare the judgment in *Felix Swoboda GmbH v Österreichische Nationalbank*, cited above, paragraphs 62 and 63). However, such activities do not seem to correspond to those descriptions.
- 53 The Defendant has further argued that materials processing constitutes an inseparable part of road construction, and to an even greater degree than the painting of markings on road surfaces, since a road cannot be constructed unless adequate materials for road construction are at hand.
- 54 That argument cannot be accepted. The relevant question is whether the subject matter of a public contract is covered by the description of a CPV code listed in Annex II to the Directive. While the painting of markings on road surfaces is explicitly identified in Annex II to the Directive under the notes to NACE code 45.23, the production or processing of material and its stockpiling is not. The production or processing of material, and its stockpiling, which may at a later stage be used to construct a road, cannot be considered to be an inseparable part of road construction in such a way that it constitutes a public works contract if it is not covered by the description of an activity in Annex II to the Directive. The mere relation of the processing of the material to road construction is not sufficient for a contract to fall within the description of an activity covered by Annex II to the Directive. Such a wide interpretation of public works contracts, as argued by the Defendant, would be liable to narrow the ambit of public procurement rules and undermine the objectives pursued by the Directive, which include ensuring that public procurement is opened up to competition.
- 55 The question referred by the Complaints Committee specifically refers to the processing and stockpiling of certain raw materials provided by a contracting authority and in

accordance with that contracting authority's requirements. The Court cannot see that a public contract such as the one at issue in the main proceedings corresponds to any of the activities described in Annex II to the Directive. All of the activities listed in that annex relate to the CPV code division 45000000, which is described as "construction work" in the main vocabulary of the CPV. It is, however, for the Complaints Committee to determine in the light of the facts of the case in the main proceedings whether the contract at issue is covered by any of the activities listed in Annex II to the Directive.

- 56 Finally, as argued by ESA at the hearing, it must be noted that the legal classification of a contract as a public works contract under the Directive is a matter of EEA law. Accordingly, any classification given under national law, long-standing national practice, or by the parties to the contract, is not decisive (see Case E-4/17 *ESA v Norway* [2018] EFTA Ct. Rep. 5, paragraph 77, and compare the judgment in *Commission v Germany*, C-536/07, EU:C:2009:664, paragraph 54).
- 57 Point (b) of point (6) of Article 2(1) of the Directive provides that a public contract which has as its object the execution, or both the design and execution, of a work constitutes a public works contract under the Directive. A work is defined in point (7) of Article 2(1) of the Directive as the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function.
- 58 Accordingly, it must be determined whether a public contract, such as the one at issue in the main proceedings, has as its object the execution of a work. The existence of a work must be determined in relation to the economic or technical function of the result of the works undertaken. This entails that the result of the works must be capable of facilitating or serving an economic or technical function in itself. For example, the construction of a leisure centre which is intended to accommodate commercial and service activities, has been held to fulfil an economic function (compare the judgment in *Auroux and Others*, C-220/05, EU:C:2007:31, paragraph 41). Furthermore, the construction of motorway connections, which are capable of solving serious road problems, has been held to constitute the result of civil engineering works fulfilling a technical function (compare the judgment in *Commission v Italy*, Joined Cases C-187/04 and 188/04, EU:C:2005:652, paragraph 27).
- 59 In the present case, there is no indication that the outcome of the production or processing of materials and their stockpiling, in circumstances such as those of the main proceedings, is capable of fulfilling an economic or technical function in itself. The Court cannot see that a public contract, such as the one at issue in the main proceedings, has as its object the execution of "a work" within the meaning of point (7) of Article 2(1) of the Directive. However, this is for the Complaints Committee to determine in the light of the facts of the case in the main proceedings.
- 60 Finally, point (c) of point (6) of Article 2(1) of the Directive provides that a public contract having as its object the realisation, by whatever means, of a work corresponding to the requirements specified by a contracting authority exercising a decisive influence on the type or design of the work constitutes a public works contract.

- 61 Similar to point (b) of point (6) of Article 2(1) of the Directive, the definition in point (c) is also contingent on the existence of “a work” within the meaning of point (7) of Article 2(1). Further, the execution of the planned work must correspond to the requirements specified by a contracting authority. As also mentioned in recital 9 of the Directive, this is the case where the contracting authority has taken measures to define the characteristics of the work or the type of work or, at the very least, has had a decisive influence on its design (compare the judgment in *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraphs 43 and 44).
- 62 As already noted in relation to point (b) of point (6) of Article 2(1) of the Directive, the Court cannot see that a public contract, such as the one at issue in the main proceedings, has as its object the realisation of “a work” within the meaning of point (7) of Article 2(1). The fact that the contracting authority may have defined specific requirements for the material, is in itself not capable of bringing a public contract within the ambit of point (c) of point (6) of Article 2(1).
- 63 Having regard to the foregoing, the Court cannot see that a public contract, such as the one at issue in the main proceedings, constitutes a public works contract as its object does not seem to come within the scope of points (a), (b) or (c) of point (6) of Article 2(1) of the Directive. In that case, where a public contract has as its object the provision of services other than those referred to in point (6) of Article 2(1), it follows that such a public contract constitutes a public service contract within the meaning of point (9) of Article 2(1) of the Directive. It is for the Complaints Committee to make a final determination, in the light of the facts of the case in the main proceedings, as to whether the public contract at issue constitutes a public works contract under points (a), (b) or (c) of point (6) of Article 2(1) of the Directive, or, conversely, whether it constitutes a public service contract under point (9) of Article 2(1) of the Directive.
- 64 Accordingly, the answer to the question referred must be that in circumstances such as those of the case in the main proceedings, there is no public works contract within the meaning of point (6) of Article 2(1) of the Directive. A public contract, which has as its object the provision of services other than those referred to in point (6) of Article 2(1) of the Directive, constitutes a public service contract within the meaning of point (9) of Article 2(1) of the Directive.

IV Costs

- 65 The costs incurred by ESA, which has submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Complaints Committee, any decision on costs for the parties to those proceedings is a matter for that body.

On those grounds,

THE COURT

in answer to the question referred to it by the Public Procurement Complaints Committee (*Kærunefnd útboðsmála*) hereby gives the following Advisory Opinion:

In circumstances such as those of the case in the main proceedings, there is no public works contract within the meaning of point (6) of Article 2(1) 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. A public contract which has as its object the provision of services other than those referred to in point (6) of Article 2(1) of Directive 2014/24/EU, constitutes a public service contract within the meaning of point (9) of Article 2(1) thereof.

Páll Hreinsson

Per Christiansen

Bernd Hammermann

Delivered in open court in Luxembourg on 16 July 2020.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President