



## JUDGMENT OF THE COURT

16 July 2020\*

*(Public procurement – Directive 2014/24/EU – Definition of “contracting authority” – Foreign mission of an EFTA State – Applicability of EEA law – Article 126 EEA – Geographic scope of the EEA Agreement)*

In Case E-8/19,

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 Complaints Board for Public Procurement (*Klagenemnda for offentlige anskaffelser*), in the case between

**Scanteam AS**

and

**The Norwegian Government, represented by the Ministry of Foreign Affairs**

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, as adapted to the Agreement on the European Economic Area,

THE COURT,

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

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

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

- Scanteam AS (“Scanteam”), represented by Tor Arne Solberg-Johansen, lawyer;
- the Norwegian Government, represented by Janne Tysnes Kaasin and Helge Røstum, acting as Agents;
- the Austrian Government, represented by Dr Michael Fruhmann, acting as Agent;
- the French Government, represented by Esther de Moustier and Cyrielle Mosser, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler, Ewa Gromnicka and Erlend M. Leonhardsen, acting as Agents; and
- the European Commission (“the Commission”), represented by Petr Ondrůšek, Luke Haasbeek and Markéta Šimerdová, acting as Agents;

having regard to the Report for the Hearing,

having heard oral argument of Scanteam, represented by Tor Arne Solberg-Johansen; the Norwegian Government, represented by Janne Tysnes Kaasin and Helge Røstum; the Austrian Government, represented by Dr Michael Fruhmann and Dr Franz Koppensteiner, acting as Agent; the French Government, represented by Esther de Moustier and Cyrielle Mosser; the Spanish Government, represented by Sonsoles Centeno Huerta, acting as Agent; ESA, represented by Ewa Gromnicka and Erlend M. Leonhardsen; and the Commission, represented by Markéta Šimerdová and Petr Ondrůšek; at the hearing on 11 March 2020;

gives the following

## **Judgment**

### **I Legal background**

*EEA law*

- 1 Article 65(1) of the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) reads:

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

2 Article 126(1) EEA reads:

*1. 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.*

3 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.*

4 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, and EEA Supplement 2018 No 84, p. 556 (Norwegian)) (“the Directive”) was incorporated into the EEA Agreement by Joint Committee Decision No 97/2016 of 29 April 2016 (OJ 2017 L 300, p. 49, and EEA Supplement 2017 No 73, p. 53) (“Decision No 97/2016”) and is referred to at point 2 of Annex XVI to the EEA Agreement. Constitutional requirements were indicated and fulfilled in November 2016. Consequently, Decision No 97/2016 entered into force on 1 January 2017.

5 Recital 1 of the Directive reads:

*The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.*

6 Recital 2 of the Directive reads:

*Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled ‘Europe 2020, a strategy*

*for smart, sustainable and inclusive growth* ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council <sup>(4)</sup> and Directive 2004/18/EC of the European Parliament and of the Council <sup>(5)</sup> should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

7 Article 1(1) and (2) of the Directive reads:

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.*

8 Points (1) to (5) of Article 2(1) of the Directive read:

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;*

9 Article 4 of the Directive reads:

*This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:*

...

10 Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76, and EEA Supplement 2017 No 55, p. 3 (Norwegian)) ("Directive 2009/81/EC") was incorporated into the EEA Agreement by Joint Committee Decision No 129/2013 of 14 June 2013 (OJ 2013 L 318, p. 31, and EEA Supplement 2013 No 67, p. 36) and is referred to at point 5c of Annex XVI to the EEA Agreement. Constitutional requirements were indicated and fulfilled in December 2013. Consequently, Decision No 129/2013 entered into force on 1 February 2014.

11 Article 13 of Directive 2009/81/EC, entitled "Specific exclusions", reads:

*This Directive shall not apply to the following:*

...

- (d) *contracts awarded in a third country, including for civil purchases, carried out when forces are deployed outside the territory of the Union*

*where operational needs require them to be concluded with economic operators located in the area of operations;*

...

12 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243, and EEA Supplement 2018 No 84, p. 636 (Norwegian)) (“Directive 2014/25/EU”) was incorporated into the EEA Agreement by Joint Committee Decision No 97/2016 and is referred to at point 4 of Annex XVI to the EEA Agreement. Constitutional requirements were indicated and fulfilled in November 2016. Consequently, Decision No 97/2016 entered into force on 1 January 2017.

13 Article 19(1) of Directive 2014/25/EU reads:

*This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 8 to 14 or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Union nor shall it apply to design contests organised for such purposes.*

14 Appendix 1 to Annex XVI to the EEA Agreement, as amended by Decision No 97/2016, listing the central government authorities referred to in point 2 of Article 2(1) of the Directive, reads:

...

*III. In NORWAY:*

<i>Statsministerens kontor</i>	<i>Office of the Prime Minister</i>
<i>Arbeids- og sosialdepartementet</i>	<i>Ministry of Labour and Social Affairs</i>
<i>Barne-, likestillings- og inkluderingsdepartementet</i>	<i>Ministry of Children, Equality and Social Inclusion</i>
<i>Finansdepartementet</i>	<i>Ministry of Finance</i>
<i>Forsvarsdepartementet</i>	<i>Ministry of Defence</i>
<i>Helse- og omsorgsdepartementet</i>	<i>Ministry of Health and Care Services</i>
<i>Justis- og beredskapsdepartementet</i>	<i>Ministry of Justice and Public Security</i>
<i>Klima- og miljødepartementet</i>	<i>Ministry of Climate and Environment</i>
<i>Kommunal- og moderniseringsdepartementet</i>	<i>Ministry of Local Government and Modernisation</i>
<i>Kulturdepartementet</i>	<i>Ministry of Culture</i>
<i>Kunnskapsdepartementet</i>	<i>Ministry of Education and Research</i>
<i>Landbruks- og matdepartementet</i>	<i>Ministry of Agriculture and Food</i>
<i>Nærings- og fiskeridepartementet</i>	<i>Ministry of Trade, Industry and Fisheries</i>

*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*

15 Point 2 of the Sectoral Adaptations in Annex XVI to the EEA Agreement reads:

2. *When the acts referred to in this Annex require the publication of notices or documents the following shall apply:*

(a) *the publication of notices and other documents as required by the acts referred to in this Annex in the Official Journal of the European Communities and in the Tenders Electronic Daily shall be carried out by the Office for Official Publications of the European Communities;*

(b) *notices from the EFTA States shall be sent in at least one of the Community languages to the Office for Official Publications of the European Communities. They shall be published in the Community languages in the S-Series of the Official Journal of the European Communities and in the Tenders Electronic Daily. EC notices need not be translated into the languages of the EFTA States.*

*National law*

16 The Directive is implemented into Norwegian law by Act of 17 June 2016 No 73 on Public Procurement (*lov 17. juni 2016 nr. 73 om offentlige anskaffelser*) (“the Public Procurement Act”) and Regulation of 12 August 2016 No 974 on Public Procurement (*forskrift 12. august 2016 nr. 974 om offentlige anskaffelser*) (“the Public Procurement Regulation”).

17 Section 2 of the Public Procurement Act reads:

*The act applies when contracting authorities mentioned in the second paragraph enter into goods, services or works contracts, including concession contracts, or carry out planning or design contests, with an estimated value equal to or exceeding NOK 100 000 excluding value added tax.*

*The act applies to the following contracting authorities:*

a) *state authorities,*

b) *county and municipal authorities,*

- c) *bodies governed by public law,*
- d) *associations with one or more contracting authorities mentioned in points a to c,*
- e) *public undertakings that carry out supply activities as defined in international agreements which Norway is bound by and*
- f) *other undertakings that carry out supply activities on the basis of exclusive or special rights as defined by international agreements which Norway is bound by.*

*The act does not apply to procurement that may be exempted by Article 123 of the EEA Agreement. The Ministry can by regulation determine further exemptions from the scope of the act.*

*The Ministry can by regulation determine that the act shall apply to works contracts and associated service contracts that contracting authorities mentioned in points a to d have not entered into themselves, but to which they provide a direct subsidy of more than 50 per cent.*

*The Ministry can by regulation determine that the act shall apply to Svalbard and lay down special rules with regard to local conditions.*

18 Section 11 of the Public Procurement Act reads:

*The King can establish a body for the resolution of disputes concerning rights and obligations under the act and regulations issued in accordance with the act. Contracting authorities that are covered by the act are obligated to participate in proceedings before the body.*

*The Ministry can issue a regulation on the case handling procedure of the body.*

*The Freedom of Information Act applies to the dispute resolution body's activities.*

19 Section 12 of the Public Procurement Act, in extract, reads:

*If the dispute resolution body finds that the contracting authority or someone acting on its behalf has intentionally or with gross negligence made an unlawful direct procurement, the body shall impose an administrative fine on the contracting authority. If the body finds that the contracting authority or someone acting on its behalf has negligently made an unlawful direct procurement, the Board may impose an administrative fine on the contracting authority.*

...



*In deciding whether an administrative fine shall be imposed pursuant to Section 12 first paragraph second sentence, and in determining the amount of the fine, particular emphasis shall be placed on the seriousness of the infringement, the size of the procurement, whether the contracting authority has undertaken repeated unlawful direct procurements and the preventive effect. The administrative fine cannot be set higher than 15 per cent of the procurement value.*

*Decisions to impose an administrative fine are not subject to administrative appeals. The administrative fine becomes due two months after the decision is made. The right to impose a fine lapses two years after the contract is signed. The limitation period is suspended by the dispute resolution body when sending the contracting authority a notice that it has received a complaint concerning an alleged unlawful direct procurement.*

...

- 20 The Public Procurement Regulation sets out procedural rules for public procurement. That regulation includes, inter alia, the obligation to publish a contract notice in the Norwegian national notification database for public procurement - Doffin - where the procurement is above the relevant national threshold (Section 8-17), and the obligation to publish a contract notice in the EU database for notices (Tenders Electronic Daily ("TED")) where the procurement is above the relevant threshold laid down in the Directive (Section 21-1).
- 21 Section 3 of the Regulation of 15 November 2002 No 1288 on the Complaints Board for Public Procurement (*forskrift 15. November 2002 nr. 1288 om klagenemnd for offentlige anskaffelser*) ("the Regulation on the Complaints Board for Public Procurement") reads:

*Members of the Complaints Board are appointed by the King for four years at a time. In special circumstances a member may be appointed for a shorter period. The maximum term is eight years. Members may exceptionally be reappointed after eight years. The King appoints a chair among the members. The Ministry of Trade, Industry and Fisheries may appoint an ad hoc chair if the chair is disqualified. Members cannot be dismissed or suspended during the period of appointment unless a special reason exists.*

- 22 Section 5 of the Regulation on the Complaints Board for Public Procurement reads:

*The King cannot instruct members of the Complaints Board or the secretariat on neither the interpretation of law, the exercise of discretion, decisions in individual cases nor case handling.*

- 23 The second paragraph of Section 15 of the Regulation on the Complaints Board for Public Procurement reads:

*The members of the Complaints Board act independently of their profession, employer and position. They cannot be instructed on substance by the Ministry, the secretariat, or the other members, including the chair of the Complaints Board.*

## **II Facts and procedure**

### *Background*

- 24 On 27 March 2017, the Royal Norwegian Embassy in Luanda, Republic of Angola, (“the Norwegian Embassy in Luanda”) published a voluntary tender procedure notice on Doffin. The contract notice concerned the procurement of consulting services in connection with the planning, management and implementation of a human rights project in Angola (Angola Human Rights Training Project 2017-2021). In the tender procedure notice, the value of the contract was estimated at NOK 20 500 000 and it was stated that the time limit for submitting tenders was 25 April 2017. The notice was published under “foreign affairs and other services” with the Common Procurement Vocabulary code 75210000.
- 25 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 achieving objectives, inputs and risk management. The second phase would involve the execution of the project. It was further stated that the maximum budget for phase one was NOK 500 000 and for phase two NOK 20 000 000.
- 26 The tender specifications stated that the contract would be awarded to the most economically advantageous tender with the following weightings: “proposed solution” (30 per cent); “competence and experience” (40 per cent); and “hourly rate” (30 per cent) being applied. The tenderers’ proposed solutions had to contain the following components as a minimum: a detailed timetable, and management structure for phase one; a risk factor assessment; a discussion of the relevant approaches for capacity building and training projects; and proposals for a management structure and follow-up for phase two.
- 27 In connection with the “competence and experience” criterion, tenderers were requested to describe the relevant competence and experience of the key staff they would use. Furthermore, a CV was to be attached for each member of the key staff. It was stated that up to five key staff could be included in the tender. Particular emphasis would be placed on whether overall the key staff included in the tender had the following competence and experience: knowledge of the political, social and economic situation in Angola and the region; knowledge of Norwegian aid policy and Norwegian interests

in Angola; legal expertise in the field of human rights; teaching experience; experience with project management, objective management and risk management from countries with high levels of corruption; and written and spoken Portuguese, English and Norwegian.

- 28 Three tenders were received within the time limit. Those tenders were from Scanteam, KPMG AS / Bjørknes Høyskole AS and the Governance Group AS (“the Governance Group”). By letter of 23 May 2017, the Norwegian Embassy in Luanda announced that the contract had been awarded to the Governance Group.
- 29 By letters of 2 and 15 June 2017, Scanteam lodged objections against the award decision. The Norwegian Embassy in Luanda replied to the complaint by letter of 3 July 2017 and upheld the award decision. On 5 July 2017, Scanteam 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. By letter of 7 July 2017, a reply was given to that complaint and the claim for cancellation was dismissed. On 14 July 2017, the Norwegian Embassy in Luanda entered into a contract with the Governance Group.
- 30 On 7 May 2018, Scanteam lodged a complaint with the Complaints Board for Public Procurement (*Klagenemnda for offentlige anskaffelser*) (“the Complaints Board”), which claimed, inter alia, that the procurement procedure was an unlawful direct procurement.

#### *The dispute before the Complaints Board*

- 31 The dispute in the main proceedings concerns whether the tender procedure carried out by the Norwegian Embassy in Luanda was unlawful as the notice had not been published in the EU database for notices (TED) pursuant to the rules set out in the Public Procurement Regulation. In particular, the decisive question is whether the Norwegian Embassy in Luanda was under an obligation to publish the tender procedure in TED.
- 32 The Complaints Board notes that both the Public Procurement Act and the Public Procurement Regulation are silent as to their geographical scope. Furthermore, that issue is not addressed in the preparatory works of the Public Procurement Act.
- 33 The Complaints Board observes that the most apparent approach is to construe Norwegian legislation as not having been intended to have a broader scope than required under EEA law. Therefore, in the view of the Complaints Board, the issue of whether the Norwegian public procurement rules are applicable to a procurement procedure undertaken by a Norwegian foreign mission outside the EEA cannot be answered until it has been ascertained whether EEA public procurement law applies.
- 34 The Complaints Board notes that it is apparent from the facts of the case, that the tender procedure in the present case had the particular feature that practically all potential

suppliers were domiciled in the EEA. At the same time, the service being procured was to be provided primarily in a third country outside the EEA. The Complaints Board further notes that it is not aware of any case law of the Court of Justice of the European Union (“ECJ”) or of the Court clarifying the question of whether EEA public procurement law is applicable to a tender procedure undertaken by a foreign mission of an EEA State in a non-EEA State.

- 35 On 5 July 2019, the Complaints Board wrote to the parties to the case and stated that it was considering the possibility of requesting an advisory opinion from the Court in order to have the geographical scope of EEA public procurement law clarified. On 11 September 2019, the Complaints Board was informed of the views of the parties to the case. On the same day, the Complaints Board received a letter from the Norwegian Government, which questioned whether the Complaints Board was eligible to request an advisory opinion under Article 34 SCA.
- 36 In relation to the admissibility of the request for an advisory opinion, the Complaints Board refers to Section 11 of the Public Procurement Act and the Regulation on the Complaints Board for Public Procurement, as well as the case law of the Court relating to the “court or tribunal” criterion under Article 34 SCA. The Complaints Board states that the present case involves an allegedly unlawful direct procurement procedure, and that, in such cases, the Complaints Board has jurisdiction to adopt decisions on administrative fines. Such decisions are not subject to further administrative appeals. In addition, the Complaints Board notes that an interpretation of Article 34 SCA that would render the Complaints Board ineligible to make a reference will significantly restrict the possibility of referring EEA law questions involving, in particular, unlawful direct procurement procedures to the Court.
- 37 In these circumstances, the Complaints Board took the view that resolution of the dispute before it depended on the interpretation of EEA law. The Complaints Board thus decided to stay the proceedings and refer a question to the Court for an advisory opinion.
- 38 The following question was referred to the Court:
- 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)?*
- 39 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the summary of 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*

- 40 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.
- 41 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 homogeneous 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 (see Case E-21/16 *Pascal Nobile* [2017] EFTA Ct. Rep. 554, paragraph 23 and case law cited). That purpose must also be taken into account in interpreting the notion of court or tribunal (see Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 25). The Court has repeatedly held that the purpose of Article 34 SCA does not require a strict interpretation of the notion of court or tribunal, which is an autonomous notion of EEA law (see Case E-5/16 *Municipality of Oslo* [2017] EFTA Ct. Rep. 52, paragraph 36 and case law cited).
- 42 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 Joined Cases E-3/13 and E-20/13 *Fred. Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraph 60 and case law cited).
- 43 In the present case, it is clear from the relevant national legal framework, such as Section 11 of the Public Procurement Act and the Regulation on the Complaints Board for Public Procurement, that the Complaints Board is established by law, has a permanent existence, exercises binding jurisdiction, and applies rules of law. Furthermore, the procedure before the Complaints Board is sufficiently similar to an *inter partes* procedure. In this regard, it must be noted that the requirement that the procedure be *inter partes* is not an absolute criterion (see Case E-1/11 *Dr A* [2011] EFTA Ct. Rep. 484, paragraph 36 and case law cited).
- 44 The Norwegian Government has argued that the Complaints Board cannot be considered independent in the light of the case law of the ECJ on Article 267 of the Treaty on the Functioning of the European Union. In particular, the Norwegian Government has referred to the ECJ's judgments in *TDC*, C-222/13, EU:C:2014:2265, and *Banco de Santander*, C-274/14, EU:C:2020:17. First, the Norwegian Government submits that if a decision of the Complaints Board is appealed before the ordinary courts, the Complaints Board would, under Norwegian civil procedure law, have the status of a defendant. Second, the Norwegian Government argued at the oral hearing that the dismissal of the members of the Complaints Board is not determined by specific rules,

by means of express legislative provisions, as expressed in the judgment in *Banco de Santander*, and that, therefore, the Complaints Board cannot be considered as independent for the purposes of Article 34 SCA.

- 45 Although the Court has, as a matter of principle, recognised the concept of procedural homogeneity (see Case E-14/11 *DB Schenker v ESA* [2012] EFTA Ct. Rep. 1178, paragraphs 77 and 78), it follows from well-established case law that while the reasoning which has led the ECJ to its interpretation of the term court or tribunal may be relevant, the Court is not required by Article 3 SCA to follow that reasoning when interpreting the main part of the SCA (see Case E-5/16 *Municipality of Oslo*, cited above, paragraph 37 and case law cited). It is for the Court to determine the relevance of the case law of the ECJ as regards the interpretation of Article 34 SCA.
- 46 The interpretation of the notion of court or tribunal under Article 34 SCA must pay due regard to the constitutional and legal traditions of the EFTA States. Accordingly, that interpretation must take account of the important role played by administrative appeal boards in the EFTA States, also in the application of EEA law (see Case E-1/94 *Restamark*, cited above, paragraph 27, and Case E-5/16 *Municipality of Oslo*, cited above, paragraph 35 and case law cited). An interpretation that would render administrative appeal boards ineligible to request an advisory opinion would undermine the objective of Article 34 SCA, which is to establish a system of cooperation as a means of ensuring a homogenous interpretation of EEA law.
- 47 It is in the light of these considerations that the judgment of the ECJ in *Banco de Santander* is not capable of altering the Court's case law under Article 34 SCA.
- 48 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 (see Case E-1/11 *Dr A*, cited above, paragraph 37). As such, the concept of independence has both an external and an internal aspect. The external aspect entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. The internal aspect is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings (see Joined Cases E-3/13 and E-20/13 *Fred. Olsen and Others*, cited above, paragraph 68 and case law cited).
- 49 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (see Joined Cases E-3/13 and E-20/13 *Fred. Olsen and Others*, cited above, paragraph 69 and case law cited).
- 50 The assessment of whether a referring body is independent is based on an overall examination of the factors characterising the independence of that body. The 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 (see Case E-5/16 *Municipality of Oslo*, cited above, paragraph 39).

- 51 In the present case, the Court notes that Section 5 and the second paragraph of Section 15 of the Regulation on the Complaints Board for Public Procurement provide that the members of the Complaints Board cannot be instructed in the performance of their duties and that they are to act independently. Furthermore, Section 3 of the Regulation on the Complaints Board for Public Procurement lays down specific rules on the composition of the Complaints Board, as well as the length of service, appointment and dismissal of its members. In addition, it follows from the Regulation on the Complaints Board for Public Procurement that the disqualification of members of the Complaints Board is regulated under general Norwegian administrative law. The Court understands that those rules are intended to ensure the impartiality of the members of the Complaints Board.
- 52 In the light of these factors, the Complaints Board acts as a third party in relation to the authority which adopted the contested decision. Accordingly, it must be held that the Complaints Board satisfies the criterion of independence for the purposes of Article 34 SCA.
- 53 That finding is not called into question by the fact that the Complaints Board may have the status of a defendant if an appeal is made against its decision before the ordinary courts. Formal designation as a party for procedural purposes, due to the structure of legal remedies at the national level, cannot be decisive for the conclusion of whether a referring body is to be considered as independent.
- 54 The Court therefore holds that the Complaints Board constitutes a court or tribunal within the meaning of Article 34 SCA. Therefore, the present request for an advisory opinion must be held to be admissible.

#### *Findings of the Court*

- 55 By its question, the Complaints Board asks whether the Directive is applicable to procurement procedures undertaken by a foreign mission of an EFTA State in a third country.
- 56 As set out in Article 1(1) of the Directive, it 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 of the Directive. Procurement, within the meaning of the Directive, is defined in Article 1(2) of the Directive as 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.

- 57 The Court observes that the question referred does not directly relate to the thresholds laid down in Article 4 of the Directive or whether a contract, such as the one at issue in the main proceedings, constitutes a ‘public contract’ within the meaning of the Directive. Accordingly, those issues are not subject to further examination.
- 58 In the present case, it must be determined whether a foreign mission of an EFTA State constitutes a contracting authority within the meaning of the Directive.
- 59 The notion of “contracting authorities” is defined in point (1) of Article 2(1) of the Directive as meaning 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. The term “the State” has been given a functional interpretation in the case law of the ECJ in order to facilitate the aim of the public procurement directives, which is, inter alia, to ensure the effective attainment of the freedom of establishment and freedom to provide services in respect of public contracts (compare the judgment in *Beentjes*, 31/87, EU:C:1988:422, paragraph 11), and it encompasses all the bodies which exercise legislative, executive and judicial powers (compare the judgment in *Commission v Belgium*, C-323/96, EU:C:1998:411, paragraph 27).
- 60 The Court observes that Norway has included the Norwegian Ministry of Foreign Affairs in the list of central government authorities referred to in point (2) of Article 2(1) of the Directive, which is contained in Appendix 1 to Annex XVI to the EEA Agreement. The final subparagraph of that appendix explicitly includes agencies and institutions subordinate to the ministries listed therein.
- 61 A foreign mission of an EFTA State is a body that exercises executive powers and, therefore, must be considered as falling within the definition of the State (compare the judgment in *Commission v Belgium*, C-323/96, cited above, paragraphs 27 to 29). In addition, a foreign mission, such as the Norwegian Embassy in Luanda, must be considered to be an agency or institution subordinate to the Norwegian Ministry of Foreign Affairs, which is listed in Appendix 1 to Annex XVI to the EEA Agreement.
- 62 As noted by ESA and the Commission, the Directive does not contain any provisions pertaining to the relevance of the location of a contracting authority or the place of performance of a public contract for the applicability of the Directive. The definition of “contracting authorities” under point (1) of Article 2(1) of the Directive is not dependant on the location of an entity covered by that definition. Furthermore, the definition of “public contracts” under point (5) of Article 2(1) of the Directive does not depend on the place of performance of a contract. The obligations under the Directive could easily be circumvented, if the location of a contracting authority or the place of performance of a public contract were decisive for its application.
- 63 The aims pursued by the Directive, as may be seen, inter alia, from recitals 1 and 2 of the Directive, are to ensure compliance with the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition,



proportionality and transparency. The Directive ensures that those principles are given practical effect and public procurement is opened up to competition, as well as ensuring the most efficient use of public funds. The Court notes that those aims are equally relevant where the contracting authority or the place of performance of a public contract are located in a third country.

- 64 As pointed out by the Austrian Government, unlike the Directive, both Directive 2009/81/EC and Directive 2014/25/EU contain explicit exclusions as regards their scope of application depending on the existence of certain geographical factors. Article 13(d) of Directive 2009/81/EC provides that it shall not apply to contracts awarded in a third country carried out when forces are deployed outside the territory of the EEA where operational needs require the contracts to be concluded with economic operators located in the area of operations. Article 19(1) of Directive 2014/25/EU provides, inter alia, that Directive 2014/25/EU shall not apply to the pursuit of activities covered by that directive in a third country not involving the physical use of a network or geographical area within the EEA.
- 65 However, the fact that the scope of application of the Directive is not subject to any specific geographical limitation does not entail that the applicability of the Directive is without limit. Legal acts incorporated into the EEA Agreement apply, in principle, to the same area as the EEA Agreement (compare the judgment in *Parliament v Council*, C-132/14 to 136/14, EU:C:2015:813, paragraph 77 and case law cited).
- 66 However, the geographical scope of the EEA Agreement does not preclude EEA law from having effects outside the territory of the EEA (compare the judgment in *Boukhalfa*, C-214/94, EU:C:1996:174, paragraph 14). In this regard, the Court notes that Articles 53 and 54 of the EEA Agreement have been interpreted as being applicable to conduct adopted outside of the EEA which would have foreseeable, immediate and substantial effects in the EEA (compare the judgments in *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraphs 40 to 65, and *Toshiba Samsung Storage Technology and Toshiba Samsung Storage Technology Korea v Commission*, T-8/16, EU:T:2019:522, paragraphs 165 to 168).
- 67 It follows from well-established case law of the ECJ that EU law applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the European Union (compare the judgments in *Walrave and Koch*, 36/74, EU:C:1974:140, paragraph 28, and *Petersen*, C-544/11, EU:C:2013:124, paragraph 40 and case law cited). The ECJ has also held that EU law may apply to professional activities pursued outside the territory of the European Union as long as the employment relationship retains a sufficiently close link with the European Union (compare the judgment in *Petersen*, C-544/11, cited above, paragraph 41 and case law cited).
- 68 Procurement, within the meaning of the Directive, will necessarily come within the scope of the EEA Agreement if it is sufficiently closely linked to the EEA, as argued by ESA. Acquisition by an EFTA State's foreign mission located in a third country by

means of a public contract of supplies or services from an economic operator established in the EEA, is liable to have a direct impact on the functioning of the internal market within the EEA. Such procurement must, in principle, be considered sufficiently closely linked to the EEA and will, therefore, come within the scope of the EEA Agreement. This applies regardless of any effects that the contract resulting from the procurement may also have outside the EEA.

- 69 Accordingly, procurement is subject to EEA law where it is sufficiently closely linked to the EEA, such as when it is liable to have a direct impact on the functioning of the internal market within the EEA. Factors which may, by themselves or in combination, indicate the existence of a sufficiently close link to the EEA include, among others, the language of the procurement procedure, language requirements, the law applicable to the procurement procedure or the awarded contract, the location of the competent review body or courts having exclusive jurisdiction, domestic registration requirements, the publication of a contract notice within the EEA, or the fact that a procurement procedure has been designed to engage economic operators established in the EEA.
- 70 Conversely, in the absence of any link to the EEA, procurement conducted outside the territory of the EEA will not come within the scope of EEA law.
- 71 In this regard, as pointed out by the Austrian Government, a distinction must be made between the law applicable to the procurement procedure, which will come within the scope of EEA law, and the law that may be applicable to the contract that is subsequently concluded.
- 72 Where a procurement is sufficiently closely linked to the EEA it will fall within the scope of EEA law. This will be the case if the procurement is liable to have a direct impact on the functioning of the internal market within the EEA. It is for the referring body to assess whether the procurement at issue is sufficiently closely linked to the EEA.
- 73 The Norwegian Government has argued that the territorial scope of the EEA Agreement differs between EFTA States and EU Member States due to the wording of Article 126 EEA. As the Court has already found that the Directive applies if the procurement at issue is sufficiently closely linked to the EEA, there is no reason to examine Article 126 EEA.
- 74 In the light of the foregoing, the Court therefore finds that the answer to the question referred must be that the Directive is applicable to a procurement procedure undertaken by a foreign mission of an EFTA State in a third country if the procurement is sufficiently closely linked to the EEA.

#### IV Costs

- 75 The costs incurred by the Austrian Government, the French Government, the Spanish Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Complaints Board, 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 Complaints Board for Public Procurement (*Klagenemnda for offentlige anskaffelser*) hereby gives the following Advisory Opinion:

**Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement is applicable to a procurement procedure undertaken by a foreign mission of an EFTA State in a third country, if the procurement is sufficiently closely linked to the EEA.**

Páll Hreinsson

Per Christiansen

Bernd Hammermann

Delivered in open court in Luxembourg on 16 July 2020

Ólafur Jóhannes Einarsson  
Registrar

Páll Hreinsson  
President