

What policy space for diaconal institutions? Challenges from public procurement

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Procurement processes with tender competition have been a preferred approach for engaging service providers in Norway. Even if the present Norwegian government finds it “essential that competition becomes an integral part of all public activity,” a simultaneous push for preserving the welfare mix of Norway has occurred, with public, non-profit, and for-profit actors. What specific measures are being undertaken to preserve the non-profit actors? How have the Norwegian authorities sought to utilize the policy space that the EU/EEA (European Economic Area) provides? The article concludes that Norway has a wide policy space for providing public health and welfare services through non-profit actors, but there is disagreement between Norway and the European Surveillance Authority (ESA) concerning which health and social welfare services that represent exercise of official authority. Procurement processes relating to such services can be reserved to non-profit actors.

Key words: EU, non-economic services, non-profit actors, Norway, welfare providers

Within the Scandinavian context, Norway presently has less public procurement in healthcare and social services than Sweden, but more than Denmark, which is reflected in the approximate share of healthcare and social services provided by non-profit actors (2013 figures; for-profit actors in parenthesis): Sweden: 1.9 % (22.5 %); Norway: 8.7 % (16.6 %); Denmark: 7.1 % (9.2 %).¹ Comparative figures for the non-profit sector in several continental European countries lie around 20–25 %. In Norway, the highest share of non-profit actors is in the drug rehabilitation services (35 %).²

The term applied in Norwegian is “ideell”; this article applies the term “non-profit.”³ Interestingly, the Guidelines for Public Procurement uses the term

- 1 Adapted from Sivesind, K. H. (2016), ‘Endring av fordelingen mellom ideelle, kommersielle og offentlige velferdstjenester i Skandinavia’, in K. H. Sivesind (ed.) *Mot en ny skandinavisk velferdsmodell? Konsekvenser av ideell, kommersiell og offentlig tjenesteyting for aktivt medborgerskap*, ISF Rapport 2016:1, 26–31 (who includes education).
- 2 Myrset Hatlebakk, I. (2014), *Rusbehandling – mye i privat regi*, Samfunnsspeilet Vol. 28, No. 2, 16–19. A figure on the share of non-profit actors in child welfare services of 40 % (Public Commission on Pension Obligations for Non-Profit Actors (2016), NOU 2016:12: *Ideell opprydding. Statlig dekning av ideelle organisasjoners historiske pensjonskostnader*, 24–25) does not correspond to other (lower) figures on non-profit actors’ share of child welfare services.
- 3 There is no official definition of the term ‘ideell’, but see European Surveillance Authority (ESA) (2017), Decision No. 154/17/COL, Case No. 77606, 10–11, available online at <https://www.regjeringen.no/contentassets/39ccee1c40294130a78bf8839988c153/77606—decision—complaint-against-norway-concerning-unl2120060.pdf>. As revealed by VG (2017), ‘Ekspert: Fyrlyktas hundremillioners-avtale var ulovlig’ (9 May), one foundation that has received 50 million Euro since 2012 has been found by the Office of the City Recorder in Oslo (Oslo Byfogdembete) not to be have a non-profit basis (16–147748TVI-OBYF), resulting

“humanistic and social services,”⁴ as do the Guidelines for Public Procurement of Healthcare and Social Services.⁵ The phrase first appeared in the 2006 Report to Parliament on amendments in the public procurement law,⁶ followed by the phrase “humanistic and social tasks.”⁷ It is interesting that the former Government of Norway applied “humanistic” as a value basis when this concept is primarily associated with one Norwegian organization.

Notwithstanding this terminology, all Norwegian Governments have been enthusiastic about the role of non-profit organizations, knowing that this sector is constituted primarily by diaconal organizations. With respect to the demands of the European Economic Area (EAA), which links Norway to the EU without its being a full member, the parties have different strategies, however, as this article shows.

In this article, we first explain the particular Norwegian policy space, including how it operated until the new EU directive on public procurement (2014/24/EU) came into force on 1 January 2017. Second, we outline recent Norwegian efforts to strengthen the role of the non-profit sector. Third, we present the alternatives to public procurement, which may be found either in the “Exclusions” chapter of the EU directive as well as in four documents by the EU Commission seeking to clarify the terms “state aid” and “services of general interest”: a 2016 Notice, a 2012 Decision, and two 2011 Communications.⁸ Fourth, we analyze the flexibilities applying to “social and other specific services” of the 2014 directive, including its influence on the revision of the Act on Public Procurement in the Norwegian Parliament in June 2016. Fifth, the article concludes by asking whether the policy space has been adequately applied.

in Oslo municipality’s ending its cooperation. The Norwegian Foundations Authority was earlier asked for an assessment, but merely said that being a foundation does not imply a non-profit basis, and did not analyze the foundation’s mandate and management. An expert on public procurement notes that Fyrlykta’s statutes does not specify how the foundation will manage a surplus.

- 4 Norwegian Government (2013), *Veileder til reglene om offentlige anskaffelser*, Oslo, 99, 101.
- 5 Norwegian Agency for Public Management and eGovernment [Difi] (2013), *Veileder for anskaffelser av helse- og sosialtjenester*, Difi Veileder 2013:2, Oslo, 23.
- 6 Norwegian Government (2006), Ot.prp. nr. 62 (2005–2006) Om lov om endringer i lov 16. juli 1999 nr. 69 om offentlige anskaffelser, 23.
- 7 Norwegian Government 2006, Ot. prp. 62, 23.
- 8 EU Commission (2016), Commission Notice on the notion of State aid; EU Commission (2012), Commission Decision 2012/21/EU on state aid; EU Commission (2011), Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 final (“Communication I”); EU Commission (2011), A Quality Framework for Services of General Interest in Europe, COM(2011) 900 final (“Communication II”). The article does not analyze the EU directive on concession contracts (2014/23/EU), even if it applies to services. Concession contracts have No. specifications on the amount of services to be provided. Directive 2014/23/EU specifies in preambular paragraph 53 that it allows for exclusion “services that have a limited cross-border dimension, such as certain social, health, or educational services.”

The overall research questions this article seeks to answer are thus: *What policy space is available for giving preference to value-based, non-profit organizations under Norwegian and EEA law? And to what extent is this policy space being utilized in the context of public procurement?*

In addition to sifting through reports from debates in the Norwegian parliaments, party and governmental programs, public commission reports and legislative material, I held interviews with five persons from diaconal organizations in Norway. I interviewed two Secretary-Generals in two of the largest Norwegian diaconal organizations: Crux (previously Kirkens Sosialtjeneste; 18 institutions or programs; close to 500 employees) and Blå Kors Norge (Blue Cross Norway; 50 institutions or programs; around 1100 employees), and with the Director of Social Service and the Negotiator of the Norwegian Salvation Army (57 social institutions and programs; excluding the Fretex second-hand shops, including Iceland and Faroe Islands; almost 2500 employees, including those in Fretex shops), and the Special Advisor to the Secretary-General in Church City Mission Oslo (40 institutions or programs, 1200 employees).

1. Space for diaconal institutions in a competitive Norway?

Diaconal actors have been pioneers in developing welfare services, as mentioned by a Public Commission that submitted its report in August 2016: “The history of the Norwegian welfare state is to a large extent a history about non-profit organizations.”⁹ Moreover, in the mid-20th century diaconal organizations advocated for a greater role of the government and municipalities in the provision of healthcare and social services, even during a period in which some bishops in Church of Norway were warning of a too-dominant state.¹⁰

The Norwegian government (2013–2017), that was reelected in 2017, consisting of the Conservative Party and the (right-wing populist) Progress Party, said in its governmental platform:

the production of welfare services does not differ greatly from other services. Competition encourages value creation and better public services, as well as more effective implementation. It is therefore essential that competition become an integral part of all public activity.¹¹

9 Public Commission on pension obligations for non-profit actors (2016), NOU 2016:12: Ideell opprydding. Statlig dekning av ideelle organisasjoners historiske pensjonskostnader, 40 (own translation; all translations from Norwegian are by the author).

10 Tønnessen, A. (2000), Et trygt og godt hjem for alle? Kirkelederes kritikk av velferdsstaten etter 1945, Oslo.

11 Norwegian Government (2013), Political platform for a government formed by the Conservative Party and the Progress Party, Sundvolden, 7 October 2013, 36; see also 2 and 12.

Moreover, the government will “expand the use of private and non-profit resources for the provision of public welfare services.”¹² These formulations and the documentation of how some of the private actors are organized and have fared¹³ have led to higher awareness over the last years. Critics of commercialization complain that the use of the term “private” diffuses the differences between the commercial and the non-profit actors.¹⁴

The largest political party in Norway, the Labour Party, was earlier reluctant to express strong opposition to commercial welfare, as illustrated by this formulation in the 2013–2017 party program: “Non-profit organizations and other private welfare providers are a useful supplement to the public offerings.”¹⁵ No principal distinction is made between “non-profit organizations” and “other private welfare providers.” This wording is not included in the 2017–2021 party program, which rather states: “Where the Government has to procure services, non-profit organisations will, as a rule, be preferred to commercial ones.”¹⁶

Moreover, when the Labour Party won power in the largest Norwegian municipalities after the 2015 election, the respective city authorities initiated processes to end contracts with commercial welfare providers, primarily in the realm of nursing homes. When the (red-green) Oslo Municipality announced a procurement process in child welfare services exclusively for non-profit actors in May 2016, this was objected by seven for-profit actors, bringing the case before the Office of the City Recorder in Oslo (Oslo Byfogdembete), which they lost.¹⁷

12 Norwegian government, Political platform, 36.

13 Herning, L. (2015), *Velferdsprofitørene – om penger, makt og propaganda i de norske velferdstjenestene*. Oslo; Herning, L. (2012), *Konkurransetsatte sykehjem i Norge*, Oslo; documenting how 33 of 38 nursing homes operating under a municipal contract have been sold or restructured during the contract period; for an alternative perspective, see Gauden-Kolbeinstveit, L. (2011), *Reaksjonært om velferdsstaten*, available online at www.minervanett.no/reaksjonaert-om-velferdsstaten

14 Herning, L (2015), ‘Velferdsprofitørenes strategi’, in *Dagbladet* (19 June).

15 Norwegian Labour Party (2013), *Moving Norway forward. The Programme of the Norwegian Labour Party 2013–2017*, 19.

16 Norwegian Labour Party (2017), *Party manifesto 2017–2021. Everyone participates*, 77. The quote is taken from the section “Child welfare”; for other sections highlighting non-profit actors, see 19 (‘Make provision for non-profit organisations to play a greater role as public sector service providers’), 34 (‘non-profit organisations ... an important supplement ...’) & 41 (‘Strengthen the cooperation with non-profit organisations ...’).

17 Oslo Byfogdembete (2016), *Aberia Ung and six others, v. Oslo Municipality, Agency for Child and Family Welfare Services*, 16–126305TVI-OBYF. The case was decided based on the previous Act and Regulation on public procurement; the new Act is in force as of 1 January 2017, with further regulations. The Byfogdembete is an integral part of the Norwegian court system, with possibilities for appeals. Potential use of force as exercise of official authority is central to the decision by Oslo Byfogdembete.

NHO Service (Confederation of Norwegian Enterprise) brought its objections to *another* procurement process, initiated by the Directorate for Children, Youth and Family Affairs and reserved for non-profit actors, before the European Surveillance Authority (ESA) – and the ESA in September 2017 ruled in favor of Norway.¹⁸ Also a previous decision from ESA has found that the Norwegian approach to non-profit actors (see below) was in compliance with the freedom of establishment and the freedom to provide services of Articles 31 and 36 of the EEA Agreement (Articles 49 and 56 of the Treaty on the Functioning of the European Union, TFEU).¹⁹

All these decisions were based on EU Directive 2004/18/EC, which has been replaced by Directive 2014/24/EU. Hence, while approving of the exemption in the previous Norwegian Regulation, ESA states explicitly that the latest decision, taken after the adoption of Directive 2014/24/EU, applies only to the previous Directive.²⁰ Moreover, ESA said that while the professionals in child welfare institutions represented an “exercise of official authority ...”,²¹ operation of nursing homes was considered to be “activities not linked to the exercise of official authority ...”.²²

Norway’s Regulation on public procurement, in force until 1 January 2017, needs to be briefly explained. In 2004, after an initiative by the Socialist Left Party, the previous Norwegian regulations on public procurement included in § 2–1(3)(a) a temporary exemption for “contracts with a non-profit organization”. In 2006, this was made permanent and incorporated into the Regulation on public procurement. According to one of the interviewees, the exemption was important,²³ but there is no assessment of how much the exemption has actually been applied by public authorities.²⁴ Moreover, little empirical

18 ESA, *Decision 154/17/COL*; the basis were the previous Regulation; in the context of clarifying the facts a process initiated by the Nursing Home Agency in Oslo in 2016 were communicated in the dialogue between NHO, ESA, Oslo Municipality and the Norwegian Government (see notes 61–63); copies of the correspondence between Oslo Municipality and NHO and between NHO and ESA were made available to the author.

19 ESA (2010), Decision No. 248/10/COL, Case No. 66111 and 66744; the ESA decision was appealed to the EFTA Court (2011), 2011/C 141/12, Case E-13/10 — Aleris Ungplan AS v EFTA Surveillance Authority, but was found inadmissible.

20 ESA, *Decision No. 154/17/COL*, 11; see also Sejersted, Rettslig vurdering; Goller, M. (2015), *Handlingsrom for bruk av ideelle organisasjoner*, available online at http://ideeltnettverk.no/sites/ideeltnettverk.no/files/goller_2015-06-16_handlingsrom_for_bruk_av_ideelle_organisasjoner_-_endelig.pdf

21 ESA, *Decision 154/17/COL*, 14, specifying that exercise of official authority relates to “use of force ...” and “autonomous decisional power as to how to deal with minors in critical circumstances.”

22 ESA, *Decision 154/17/COL*, 17.

23 Interview with author on 21 June 2016.

24 Seiersted, F. (2014) *Rettslig vurdering av om unntaket for kjøp av helse- og sosialtjenester fra ideelle organisasjoner kan videreføres*, 10, available online at <https://www.regjeringen.no/contentassets/cada61a19bab448ba0c35ba4a0756fcb/sejersted.pdf?id=2271254>

research has been conducted on the particularities of the non-profit sector in Norway.²⁵

While the exemption is noteworthy, the various Norwegian governments were generally promoters of more competition and more public procurement. First, by requiring a lower threshold than the EU, namely NOK 500.000 (approximately 56.000 Euro) for when procurement process announcements must be made.

Second, Norway did not seek to explore alternatives to competitive tendering. Procurement processes, however, are not required for institutions operating based on agreements signed before the EAA entered into force in 1994. This is specified by Article 32.5 of Directive 2014/24/EU, saying that in “works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract ...” no prior publication is required and contracts can be continued.

Third, neither the Norwegian Guidelines for Public Procurement nor the specific Guidelines for Public Procurement of Healthcare and Social Services specified the wider societal objectives of public procurement, even if a separate Action Plan was published in 2007.²⁶ The emphasis lies primarily on the conditions in other countries. The General Guidelines describe the wider societal concerns applying to Norway when describing the rationale for the exemption in the 2006 Regulation on public procurement.²⁷ In the Specific Guidelines for Procurement of Healthcare and Social Services, there is a stronger emphasis on societal concerns, specifically the emphasis of non-profit actors’ on user involvement as well as civil society and local community involvement, albeit only in a descriptive manner.²⁸ Various public commissions were reluctant to take social concerns into account.²⁹ In this context, it is relevant to note that

25 Dalby Trættestad, H. and K. H. Sivesind (2015), *Ideelle organisasjoners særtrekk og merverdi på helse- og omsorgsfeltet*, Senter for forskning på sivilsamfunn og frivillig sektor Rapport 2015-2, Oslo and Bergen, 15; see also Public Commission on pension obligations for non-profit actors, *Ideell opprydding*, 32.

26 Norwegian Government (2007), *The Norwegian Action Plan on Environmental and Social Responsibility in Public Procurement 2007–2010*, available online (short version) at https://www.regjeringen.no/globalassets/upload/FAD/Vedlegg/Konkurransopolitikk/T-1467_eng.pdf

27 Norwegian Government, *Veileder*, 99, highlighting involvement and collaboration with non-profit actors.

28 Difi, *Veileder*, 10.

29 See NOU 1997:21, *Public Procurement*, Chapter 7, concluding on p. 89 that it does not recommend that social considerations be included in public procurement processes; a slight change can be seen in NOU 2014:4, *Simpler Rules, Better Procurements*, 106, which emphasizes the nature and qualities of non-profit service providers.

the EU Guide for social procurement emphasizes the *local* conditions and situation for the individual user or beneficiary.³⁰

2. Recent efforts to strengthen the role of the non-profit sector

While Norwegian authorities have been cautious to explore and utilize the policy space that the EAA Agreement might provide, an agreement, two specifications, and a Plan of action have been adopted by Norwegian authorities.

First, the Cooperation Agreement of 2012 was signed between the government and four representatives from the non-profit sector. Under the heading “Parties’ Objectives,” the Agreement reads: “The government and the non-profit sector shall further develop and improve their cooperation in order to demonstrate how the uniqueness and qualities of the non-profit sector can be mobilized to provide the best possible services ...”³¹ Moreover, six principles were identified: quality, fiscal efficiency, continuity and predictability, independence, diversity, and dialogue. Under the first of these, one bullet point emphasizes “society’s need for new knowledge of the roles, qualities, and contributions the non-profit actors bring to the development of new healthcare and social services.”³² The cooperation agreement was extended by the new government – with the Norwegian Association of Local and Regional Authorities as a new party.³³

In the first specification in 2011, the then Minister of Health and Care Services specified that the regional health authorities must take into account the need of the non-profit institutions for predictability and a long-term perspective in their public procurement.³⁴

In the second specification in 2016, applying specifically to care for persons with drug addiction or a background as sex-workers, the Ministry of Health and Care Services specified how the EU rules on state aid can be reconciled with the EU prohibition of discriminatory practices. This is analyzed further in the section below.

30 EU (2011), *Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement*, 22 (“identify ... local priorities”).

31 Different parties (2012), *Samarbeidsavtale om leveranser om helse- og sosialtjenester mellom Regjeringen og Hovedorganisasjonen Virke, Frivillighet Norge, Ideelt Nettverk og KS Bedrift*, 3, available online at <https://www.regjeringen.no/globalassets/upload/fad/vedlegg/konkurransepolitikk/anskaffelser/samarbeidsavtale.pdf>

32 Different parties, *Samarbeidsavtale*, 4.

33 Different parties (2015), *Samarbeidsavtale om leveranser om helse- og sosialtjenester mellom Regjeringen og KS og Hovedorganisasjonen Virke, Frivillighet Norge, Ideelt Nettverk og KS Bedrift*, available online at <https://www.regjeringen.no/contentassets/15fcd45f5e34f4ab036cb51c559b532/signert-samarbeidsavtale-med-ideell-sektor.pdf>

34 Norwegian Ministry of Minister of Health and Care Services (2011), *Langsiktige avtaler med ideelle organisasjoner*, Press Release No. 52/2011 (2 September).

Finally, a governmental Action Plan was adopted by the present government, with the purpose of improving the conditions for the non-profit sector.

Based on these examples, it is justifiable to state that the last Norwegian governments have been too reluctant to investigate and make use of the policy space that the EAA membership provides. This is also reflected in a Parliament decision of 1 December 2014 requesting the “government to adopt measures to improve the non-profit providers’ conditions in procurement processes.”³⁵ A report that mapped the developments in the welfare mix in the Scandinavian countries concluded that

the unique and distinctive options non-profit actors can offer have not been adequately developed. Thus, the goal of increased diversity and individual adaptation failed to be achieved.³⁶

Since the uniqueness of non-profit actors is generally acknowledged to be difficult to determine, most surveys on social and healthcare provision used the term “private” and did not distinguish between non-profit and for-profit actors, with relative positive perceptions of private actors.³⁷ There is one recent exception, however, finding that Norwegians are overall more positive than Swedes and trust non-profit, for-profit, and public welfare providers.³⁸

In summary, notwithstanding the exception in the Regulation on Public Procurement, Norway has chosen a relatively strict and non-flexible approach

35 For the decision (No. 52, 2014–2015) and the government’s response, see Ministry of Trade, Industry and Fisheries (2015), *Oppfølging av anmodningsvedtak fra Stortinget*, available online at www.statsbudsjettet.no/Statsbudsjettet-2016/Dokumenter/1/Fagdepartementenes-proposisjoner/Narings-og-handelsdepartementet-NHD/Prop-1-S-/Del-3-Andre-saker-/8-Oppfolging-av-anmodningsvedtak-fra-Stortinget

36 Sivesind, K.H (2016), “Mot en ny skandinavisk velferdsmodell?”, in K. H. Sivesind (ed.) *Mot en ny skandinavisk velferdsmodell?*, 73. See also presentation of the report in *Vårt Land* (2016), *Ideelle aktører som sikrer mangfold i velferdstilbudet* (5 February). On individual adaptation, see Dalby Trætteberg and Sivesind 2015, *Ideelle organisasjoners særtrekk*, 24–26, presuming that the non-profit actors are both more trusted than for-profit actors, and do attract the most vulnerable users.

37 The two surveys are discussed in Gautun, H., H. Bogen and A. Skevik Grødem (2013), *Konsekvenser av Konkurransetsetting. Kvalitet, effektivitet og arbeidsvilkår i sykehjem og hjemmetjenester*, Fafo-rapport 2013:24, 26. 1/3 agree with the statement “Can to a greater extent be operated by private.” The statement applies to public tasks in general and not healthcare and social services in particular. Moreover, as many agree as disagree (4 out of 10 for both) that nursing homes are suitable for competitive tendering.

38 Angell, O. H. (2014), “Kyrkan och Vålfården. Svenska uppfattningar i ett norskt perspektiv,” in A. Bäckström (ed.) *Vålfårdsinsatsar på religiös grund. Förväntningar och problem*, Skellefteå. The deviant figures on p. 151 occur most likely because the question raised in Norway said “the church and other religious organizations,” hence including, for instance, Muslim organizations. The deviant figures on p. 160 (human compassion and profit-minded) might occur because the Church of Norway has been much criticized for its position on same-sex marriage, and because Norwegians do not as easily see the distinction between non-profit and for-profit actors compared to Swedes, where there has been more debate over for-profit actors.

to public procurement, but with several policy initiatives to improve the overall conditions for non-profit actors.

3. New approach beyond public procurement?

The public procurement directive (2014/24/EU) specifies what might be excluded from public procurement. Article 12 on contracts with entities within the public sector (termed “in-house”) has been applied to extend as well to institutions that have chosen to become part of the public sector. Article 12.1 specifies: (a) that the contracting authority exercises over the legal person concerned a control that is similar to that which it exercises over its own departments; (b) that more than 80 % of the activities of the controlled legal person are carried out in the performance of the specified tasks; and (c) that there is no private capital in this controlled legal person. This option has been preferred by institutions in Denmark, but has not been an option for Norwegian non-profit actors.³⁹

What is permissible state compensation or state support, as opposed to non-permissible state aid, and how to understand various forms of services were clarified by a 2011 Commission Communication, a 2012 Commission Decision, and a 2016 Commission Notice. Below, I look at what is said about the nature of particularly social services and the overall societal impact of these services.⁴⁰

On the one hand, the EU specifies that “the social nature of a service is not sufficient in and of itself to classify it as non-economic.”⁴¹ Hence, social and healthcare services are not categorically excluded as economic services. On the other hand, the EU has another category termed *social services of general interest*, specified through the “preventive and socially cohesive/inclusive role” of such services.⁴²

Article 14, the relevant provision of the 2012 TFEU, says that services of general economic interest, while operating on the basis of “economic and financial conditions ...”, are acknowledged as “promoting social and territorial cohesion ...”, giving competence to EU member states “to provide, to com-

39 Minutes from the meeting between the Norwegian Government, the Norwegian Association of Local and Regional Authorities, and non-profit actors in healthcare and social services on 10 December 2015, as quoted in Public Commission on pension obligations, *Ideell opprydding*, 56n59.

40 For an analysis of the territorial scope and trade-affecting impact of social and health services, see Haugen, H. M. (2017), “What policy space for diaconal institutions? Challenges from pensions obligations,” in P. Launonen and M. Valtonen (eds.) *Diaconia in Dialogue – The Challenges of Diversifying Contexts. Diak and Working Life series*.

41 EU Commission, *Communication II*, 4, note referring to specific ECJ cases omitted.

42 EU Commission, *Communication II*, 4, note referring to a previous EU Communication omitted.

mission and to fund such services.” In the 2011 Communication, EU member states are given discretion, so that “tailor-made solutions can be found to concrete and specific problems in different sectors ...”⁴³ This discretion must be presumed to be wide in the realm of provision of social services of general interest, as their contribution to social cohesion and social inclusion are explicitly recognized.

Hence, while prohibiting state aid, the EU/EEA does not exclude state *support* or long-term contracts with certain service providers, given that such support does not favor certain undertakings over others. This is further specified in an EU Guide on social services of general interest,⁴⁴ and an ESA State aid guidelines particularly applying to services of general economic interest.⁴⁵

As elaborated in another article,⁴⁶ the prohibition against state aid (Article 61 EEA, similar to Article 107 TFEU) hinges upon the definition of “undertaking,” not preventing state compensation if the amount of support is fair in relation to the cost of producing the given service, as done by a fairly efficient undertaking.⁴⁷

The EU Commission specified in a 2016 Notice that, when public support was not liable to affect trade, this applied to “hospitals and other healthcare facilities providing the usual range of medical services aimed at a local population and unlikely to attract customers or investment from other Member States.”⁴⁸ Hence, the characteristics of the service provider are relevant. Moreover, a 2012 decision refers to hospitals and undertakings in charge of social services as exempt from a notification requirement.⁴⁹

43 EU Commission, *Communication II*, 5. For references to *social cohesion*, see 2 and 14; for references to *social inclusion*, see 6, 8, 12; see also EU Commission, *Communication I*, 2, 3, 101.

44 EU Commission (2011), Guide on application of EU rules to Services of General Economic Interest and in particular to Social Services of General Interest, Brussels.

45 ESA (n. d.), Compensation granted for the provision of services of general economic interest, available online at www.eftasurv.int/media/state-aid-guidelines/Part-VI—Compensation-granted-for-the-provision-of-services-of-general-economic-interest.pdf

46 Haugen, “What policy space II.”

47 EU Commission (2012), Commission Decision 2012/21/EU on State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, preambular paragraph 4, deriving from the ECJ decision in *Altmark* (C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark* [2003] ECR I-7747) four cumulative criteria for when public service compensation does not constitute State aid; see also Public Commission on pension obligations, *Ideell opprydding*, 52–54 (assessing exemptions under the EEA).

48 EU Commission (2016) Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph 197(c).

49 Community Decision 2012/21/EU on State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, Article 2.1(c); see also preambular paragraph 11. The decision provides an exemption to the overall obligation under Article 108(3) TFEU to notify the EU Commission of any plans

Hence, it is fully possible for EU/EEA member states to fund undertakings providing services of general interest. These services can be either economic services or non-economic services, though only economic services are covered by the internal market and competition rules of the Treaty.⁵⁰ The EU Commission defines services of general economic interest as “economic activities which deliver outcomes in the overall public good that would not be supplied ... by the market without public intervention.”⁵¹

Non-economic services, in essence the exercising of official authority, are not covered by the overall right of establishment, in accordance with Article 32 EEA. Provision of such services are “only subject to the general principles of the EU (transparency, non-discrimination, equal treatment, proportionality) without stipulation of any specific procedures.”⁵² A service that involves legitimate use of force, for instance psychiatric treatment services or child welfare services, represents the exercise of official authority.⁵³ As noted by the Public Commission on pension obligations for non-profit actors, however, there has been relatively little use of the official authority exemption in the context of public procurement.⁵⁴

4. New Approach to Public Procurement?

Public procurement processes take place in the market, but the emphasis on price versus other concerns is determined by the public body announcing the procurement process. We saw above that the Norwegian authorities might have been too cautious when including social considerations in public procurement processes, though there is a clear recognition of the overall contribution of the non-profit organizations, including diaconal actors. The Norwegian Act on public procurement was influenced by jurisprudence from the ECJ and various policy initiatives within Norway. One of the interviewees said: “I never thought that we would come to where we have come today.”⁵⁵ Compared to the situation in 2013–2015, when many of the diaconal institutions

to grant or alter aid, obligating a delay of any proposed measures until their compatibility with the internal market obligations has been decided by the EU Commission.

50 EU Commission, *Communication II*, 3.

51 EU Commission, *Communication II*, 3.

52 European Centre of Employers and Enterprises providing Public Services (2013), *The Acquis Communautaire for Services of General Economic Interest*, 2, available online at www.ceep.eu/images/stories/ceep_acquis_glossary.pdf

53 For arguments that exercising official authority also applies to nursing homes, see the Nursing Home Agency in Oslo and Virke Ideell, note 61 and accompanying text.

54 Public Commission on pension obligations for non-profit actors, 51; for a general presentation on the concept of official authority, saying that it has a narrow application, see *ibid*, 50.

55 Interview with author on 29 June 2016.

feared that they would lose out in the competition with for-profit actors,⁵⁶ there is currently optimism.

Before reviewing the ECJ jurisprudence and the Norwegian process, we would like to analyze the most important provision of the new EU Directive (2014/24/EU). As early as 2011 the EU Commission said that it would propose “a significant reform on the rules of public procurement and concessions ...”⁵⁷ with a “lighter regime” applying to social and health services. It must be remembered, however, that the previous Directive (2004/18/EC) listed health and social services as non-prioritized. The distinction between prioritized and non-prioritized services was discontinued in the new directive.

The “light touch regime” is found in Articles 74 to 77 of the new directive. Of greatest relevance is Article 76.2, which reads:

Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation.

Quality is also emphasized in the subsequent sentence, specifying that the choice of provider shall be made based on a price-quality ratio. Maybe even more important is continuity. As seen above,⁵⁸ 33 out of 38 nursing homes operating under a municipal contract were sold or restructured during the contract period. This is the opposite of continuity. While organizational changes might take place also in the non-profit sector, these changes are usually minor. On the other hand, it might be difficult to distinguish between non-profit and commercial service providers on the three A's (accessibility, affordability, availability). Regarding the comprehensiveness of the services and the specific needs of users, it is an open question whether this will be more easily accomplished by non-profit actors. However, these organizations do have a strong tradition, at least in Norway, of promoting involvement and empowerment of users, as well as innovation. There is no doubt that this provision allows for a wider policy space for health and social services compared to other public procurements.⁵⁹

56 Klassekampen (2013), “Frelsesarmeen bønnfaller Erna” (The Salvation Army pleads Erna) (1 October); Vårt Land (2015), “Nye EU-regler truer ideell omsorg” (New EU rules threatens non-profit care) (12 October).

57 EU Commission, *Communication II*, 7.

58 Herning, *Konkurransetsatte sykehjem*.

59 Fløistad, K. (2017), *Utredning av handlingsrommet for bruk av ideelle leverandører av helse- og sosialtjenester*, 12; available online at https://www.regjeringen.no/contentassets/8dfcb07f91a84a7cadc2b8f14afe84cf/0900sv_22376.pdf2009637.pdf. This legal opinion was promised by the Minister in the debate in the Parliament; see Norwegian Parliament (2016), *Minutes from meeting 9 June 2016*, at 3393, available online at <https://www.stortinget.no/globalassets/pdf/referater/stortinget/2015-2016/s160609.pdf>

As may be seen above,⁶⁰ social cohesion and social inclusion were emphasized in the 2011 EU Commission communications, but neither of the terms is included in the new directive. It was, however, the previous EU directive that applied in Norway when the Nursing Home Agency in Oslo in 2016 announced a procurement process for building and running up to five nursing homes for 30 years – but only for non-profit actors. When justifying that only non-profit actors were eligible to participate, the Agency argued that running nursing homes represented “exercise of official authority.”⁶¹

The ESA has asked the Norwegian government if they agree with this understanding and has asked Oslo Municipality to suspend the procurement process awaiting such clarification.⁶² The Nursing Home Agency in Oslo has, however, reiterated its position, and has proceeded with the process but was stopped by a 2018 decision from the office of the City Recorder in Oslo.⁶³ As we saw above, the ESA stated its decision concerning the Directorate for Children, Youth and Family Affairs that operating nursing homes was not linked to the exercise of official authority.⁶⁴ Surprisingly little is said about exercise of official authority in a Guide on how to reserve procurement processes to non-profit actors in the realm of health and social welfare services.⁶⁵

Moreover, two judgments applying the previous directive (2004/18/EC) opened a policy space allowing contracts to be entered into without procurement processes.⁶⁶ First, the services must be “performed by non-profit organizations or associations ...” Second, the non-profit actor must contribute to the social purpose and the pursuit of the objectives of the good of the community. Third, there must be compliance with budgetary efficiency.⁶⁷

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- 60 EU Commission, *Communication I* and *Communication II*, note 43 and accompanying text.
- 61 Anbud 365 (2017), Oslo-anskaffelse forbeholdt ideelle granskes av EFTAs overvåkingsorgan (31 January). In a letter of 11 January 2017 to NHO Service, the Nursing Home Agency in Oslo specified that exercise of official authority – operationalized as use of force, as specified in Ch. 4A of the Health & Rights Act (pasient- og brukerrettighetsloven) – applies to nursing homes; see also legal opinion by Virke Ideell (2016), Notat. Offentlige innkjøp av helse- og sosialtjenester fra ideell sektor, 8–9, available online at <https://www.virke.no/globalassets/bransje/bransjedokumenter/virke-ideell-offentlige-innkjop-fra-ideell-sektor.pdf>.
- 62 Anbud 365 (2017), Overvåkingsorgan setter strenge vilkår for Oslo i omstridt klagesak (22 February).
- 63 Anbud 365 (2017), Oslo viker ikke en tomme for EFTAs overvåkingsorgan i omstridt anskaffelse (5 April); see also Anbud 365 (2017), Til forsvar for omstridt anskaffelse i Oslo kommune (21 June). The decision – 17-185662TVI-OBYF (on file with the author) – said that the exclusion of PRK Helse from the procurement process, as it was allegedly not a non-profit actor, was unjustified.
- 64 ESA, *Decision No. 154/17/COL*, 17.
- 65 Norwegian Government (2017), Ny uttalelse om ideelle aktører, available online at <https://www.regjeringen.no/no/aktuelt/ny-uttalelse-om-ideelle-aktorer/id2575688>.
- 66 ECJ (2014), Spezzino et al., C-113/13; ECJ (2016), Costa et al., C-50/14. All four scholarly articles in the same issue (1/2016; Vol 11) of *European Procurement & Public Private Partnership Law Review* give a very critical assessment of the Spezzino judgment.
- 67 ECJ, *Spezzino*, paras. 60 and 63; ECJ, *Costa*, para. 63.

Both “social purpose” and “the good of the community” are broad terms, but diaconal, non-profit actors do contribute to these objectives. While the rationale behind public procurement is to make the most efficient use of public money, the current Norwegian Minister of Health and Care Services wrote that his Ministry is positive toward public procurement processes where the price is set and where only quality criteria are decisive.⁶⁸

When the Government proposed a new act on public procurement in 2015, there was limited awareness of the actual space provided by the new EU Directive. Less than one page was devoted to non-profit actors providing healthcare and social services. Many of the above-mentioned factors as well as the 2014 legal opinion and the 2015 Agreement were referred to.⁶⁹ More surprising, while the need for continuity and stability was mentioned explicitly, the legislative proposal made no reference to Article 76.2 of the Directive.

Non-profit actors expressed their concern, and this concern was shared by Norwegian parliamentarians. Two parliamentary initiatives were presented before the new act came up for discussion. First, a proposal in 2014 that contracts in the child welfare services shall be limited to non-profit actors (“skjermede anbud”),⁷⁰ which did not garner the support of a majority of the Parliament.

Second, while a proposal in the Parliament from 2016 resulted in a unanimous decision that the government shall set a target for the share of non-profit sector within 2030 and present a plan to achieve this,⁷¹ a decision by the Oslo City Council was more ambitious: It specified a strategy to strengthen non-profit actors, namely, that 25 % of all healthcare shall be provided by the non-profit sector within 2025, against the votes of the Social Liberal, Conservative and Progress Party. The same parties did not approve that the policy space “shall be utilized as far as possible” when contracts with for-profit actors expire or new contracts are entered into, but all parties voted for a “strategy on how to strengthen the non-profit actors in Oslo’s welfare services.”⁷² The 25 %

68 Høie, B. (2016), “De ideelle organisasjoner styrkes,” *Vårt Land* (5 February). This is contrasted with a public procurement process in child-welfare services, where the second round of allocating places was based merely on price and not on content or quality, a process to which three of my interviewees on 21 June 2016 had objections.

69 Norwegian Government (2015), Prop. 51 L (2015–2016). Lov om offentlige anskaffelser, 75. On the 2014 legal opinion, see note 24; on the 2015 Agreement, see note 33.

70 Norwegian Parliament (2014), Innst. 190 S (2013–2014), Proposal to the Parliament from the Standing Committee on Family and Culture Affairs.

71 Norwegian Parliament (2016), Innst. 102 S (2016–2017) from the Standing Committee on Health and Care Services; the original proposal proposed a share of 25 % by 2030; see Representantforslag 8:85 S (2015–2016).

72 Oslo City Council (2016), Sak med innstilling fra helse- og sosialkomiteen, Sak 304 16/01749 of 16 November 2016, available online at https://www.oslo.kommune.no/dok/Bystyret/2016_11/1171468_1_1.PDF. All documents are available online at https://www.oslo.kommune.no/sru/utv_caseinfo.asp?utvalg=B&caseno=1085412&dayno=304&Year=2016-11-16&db_source=2.

share by 2025 was originally a proposal from a Public Commission submitting its report in 2011.⁷³ As seen above, this share is approximately 9 % today.

When the debate on implementing the EU directives in Norwegian law took place in the Parliament in early June 2016, ensuring the interests of non-profit actors providing healthcare and social services became the most topical issue. To justify a particular approach to non-profit actors, ten separate reasons were given, including competence, engagement, trust, diversity, continuity, and innovation, almost all of which were repeated by the Minister in the debate.⁷⁴ The outcome was a new addition to the Norwegian law on public procurement, Section 7a, reading as follows:

The Ministry shall issue regulations for procurement of health and social services. The Ministry shall when formulating the regulations particularly emphasize the characteristics of health and social services. The regulations shall promote important concerns such as diversity, quality, continuity and user involvement.

We recognize terms from Article 76.2 of the EU directive. However, the terms “accessibility, affordability, availability, and comprehensiveness ...” as well as “specific needs” and “innovation” were not included. Hence, the Norwegian law is not as comprehensive as the EU directive. Moreover, a proposal specifying that contractors be allowed to limit the procurement process to non-profit actors did not receive support from the majority.⁷⁵ As shown in the 2017 legal opinion, there is no prohibition in EU law to limit procurement processes to non-profit actors, provided that this exists in domestic legislation.⁷⁶

The Regulation on public procurement does, however, emphasize the users’ need with regard to quality, continuity, competence, experience and participation, as well as the overall need for innovation, among others.⁷⁷ These are criteria that non-profit actors meet, and these must be emphasized in the specifications when announcing the procurement processes.

The Minister made promises that Norway shall attempt to widen the possibilities under Article 77 of Directive 2014/24/EU to reserve contracts for certain services, when this provision is up for review in 2019.⁷⁸

73 Public Commission on Innovation in Care (2011), NOU 2011:11 *Innovasjon i omsorg*, 17.

74 Norwegian Parliament (2016), *Innst. 358 L (2015–2016)* from the Standing Committee on Business and Industry, 19–20; for the minister’s comments, see Norwegian Parliament 2016, 3391–3392, see also NOU 2014:4, 107–108 (giving eight distinctive qualities).

75 Norwegian Parliament 2016 (proposal), 28.

76 Fløistad, *Utredning*, 25. She finds on p. 26 that the new directive does not set a higher threshold than the previous directive regarding the possibilities for limiting procurement processes to non-profit actors; but specifies on p. 28 that tender competitions must be open to non-profit actors in all EEA states; for ESA jurisprudence; see notes 18 and 19.

77 Norwegian Regulation 974 on public procurement (adopted 8 August 2016; in force 1 January 2017), section 30-1(3); see also Section 30-1(5) on long-term contracts for specific purposes.

78 Norwegian Parliament 2016 (debate), 3399.

When the Parliamentary Committee presented its proposal to the Parliament, the title of one Norwegian newspaper was: “Legislative Amendment Secures Non-Profit Actors.”⁷⁹ This positive assessment came 2 months before a decision that was even more decisive for the non-profit actors: the old and continuing pensions obligations.⁸⁰

5. Conclusion

Both the current and the previous governments of Norway can justifiably be criticized for not having done more to explore the policy space within the EEA obligations. Initiatives from the government on ways to “improve their working together” did not lead to an overall predictability for non-profit actors. Non-profit institutions’ overall contribution to the society were emphasized by neither the current nor the former Norwegian government, and the possibilities for excepting services involving the exercise of official authority was not highlighted, despite the fact that the EU directives and various communications and guidelines allowed for this.

The coming Guide to assist in reserving procurement processes in the realm of health and social welfare service will be important.⁸¹ This Guide should specify the qualities that the tenderer must comply with, as specified by Article 76.2 of Directive 2014/24/EU and Article 30-1(3) of the Norwegian Regulation on public procurement. Primarily emphasizing that a broad range of health and social welfare services represent “exercise of official authority” might not convince ESA.

The 2017 legal opinion will be useful, however. It clarified that the social and healthcare services can be treated differently from other services, allowing states to reserve procurement processes to non-profit actors, but the character of these services must be taken into account.⁸² Such tender competitions cannot, however, exclude any non-profit service providers from any EEA country.

It is interesting that two of the three parties that did *not* support the wording in the Oslo City Council to utilize the policy space,⁸³ will issue a Guide on how to reserve procurement processes to non-profit actors. This will challenge them to explore further the policy space within the legal space formed by Norwegian EEA obligations.

79 Vårt Land (2016), Lovendring sikrer ideelle (3 June).

80 See Haugen, “What policy space II.” Partial implementation was proposed by the government in the 2018 budget proposal, but the proposal was not approved by the Parliament, as more clarifications were required.

81 Norwegian Government, *Ny uttalelse*.

82 Fløistad, *Utredning*, 29.

83 Oslo City Council, *Sak*.