Social Services Europe

EFTA Court Case E-4/22 – Submission Social Services Europe (SSE)

28 June 2022

1) Who is Social Services Europe?

Social Services Europe (SSE) is a **network of eight European umbrella organisations** – comprising Caritas Europa, CEDAG, E.A.N., EASPD, EPR, Eurodiaconia, FEANTSA and the Red Cross EU Office – **representing over 200,000 not-for-profit social and health care organisations**. We are **active in a sector employing over 11 million people, of which about half employed by social economy organisations**. It is also characterised by a strong employment growth dynamic in the last 10 to 15 years (with an increase of the workforce of more than 10% only between 2013 and 2018), also due to growing social needs. The COVID-19 pandemic clearly showed its relevance, its resilience, but also exposed challenges and weaknesses.

Our national members **support millions of people in various stages in life**, such as children, the elderly, persons with disabilities, people at risk or experiencing poverty and social exclusion, homeless people, migrants and asylum seekers and other vulnerable groups. They offer **care, support, guidance, education, and training services**, also with the aim to empower the people needing them. Social services are a **core part of national social protection systems** and are **services of general interest**.

2) Why is public procurement relevant for SSE and for the services provided by its members?

Public procurement and the relevant EU-level legislation in place – as part of a sustainable and supportive legal, regulatory, financial, and quality EU-level framework for social services – **is of high relevance for our members**; **and this for more than a decade already**.

In the last 10 to 15 years, **SSE has regularly and intensively worked on this topic** with the aim to influence Directive 2014/24/EU and the EC Guidance on Socially Responsible Public Procurement (SRPP):

- SSE had also issued an assessment of the 2014 Procurement Directive and prior to this had made proposals to the European institutions on the scope of the directive being revised and relevant wording (2012).
- SSE contributed to the EC Consultation on the scope and structure of a EC Guide on Socially Responsible Public Procurement (February 2018). Based on input from its members, in 2019 we compiled examples for the use of public procurement.
- On 6 December 2021 SSE published its **Statement on EC Guide "Buying Social"**. In this Statement, SSE made an overall positive assessment of the Guide, but also critisised, e.g., that the **Guidelines**
  - **do not mention that there are proven, tested and long-functioning alternatives across the EU MS to public procurement**, including for the social services sector. On p. 55 the EC Guide lists in-house provision, the cooperation of different public buyers and (a specific constellation for) the award of grants, but **unfortunately omits to mention alternative modalities to purchase and finance social services by public authorities and to proceed to the selection of service providers**. SSE thinks of, a) the more general use of public grants based on contracts with service providers having the authorisation, accreditation, or license by the relevant public authority to deliver social services, b) triangular contractual relationships between a funding agency, a provider and a user of social services and c) user-based modalities (personal

budgets; service vouchers).

  - **are silent about the fact that in order to have sustainable ways of organising, providing, and funding social services, all providers need a level-playing field**, also as they need to invest in service infrastructure and qualified personnel and thus incur costs to sustain this infrastructure and to qualify and employ their personnel. This point is essential as in the field of social services, at least in some sub-sectors, it is difficult to fully plan ahead both the precise needs of the (current and future) service users and the exact number of those having those needs for care, support, guidance, education, or training.

- SSE is monitoring and plans to contribute to the initiatives in relation to the use of SRPP as announced by the Social Economy Action Plan (8 December 2021).
  - On 15 December 2021 SSE issued its **Statement on the Social Economy Action Plan** that, i.a., covers the topic of public procurement and SRPP.
  - On 4 May 2022 SSE shared with the European Commission Services a **Position Paper "Proposals for the Implementation of the Social Economy Action Plan - From Ambition to Implementation"** (28 April 2022), again **containing a section on public procurement and SRPP**. SSE there reiterates its conviction that **SSE does not believe that public procurement is often the right funding mechanism through which to finance social service provision and has serious doubts regarding the concrete benefits of using public procurement to contract out quality social services within the social economy**. SSE also provides evidence on this and explains the reasons in detail in its Statement on the EC Guide "Buying Social" (6 December 2021). Social Services Europe also expresses its wish to engage in an exchange with the Commission Services and interested EU MS with the aim to **obtain legal and political recognition for alternative instruments to public procurement** (respecting the general principles of EU law such as transparency, non-discrimination/equal treatment and proportionality).

Public procurement is a **complex process** which starts well before publishing a contract notice as first needs are to be assessed. It does not end with a contract award notice but continues with the contract performance and its evaluation.

- **Where public procurement is chosen by a public authority and/or has to be used** in order to organise and finance the delivery of social services, according to a national legislation or regulation in place in an EU Member State, **SSE strongly promotes socially responsible public procurement** (SRPP).
  - In other words: **In a public procurement context, SRPP should generally be considered as "best practice**". Why? Because **for SSE best value** in public contracting when using public procurement does not mean lowest price. It **means** the **delivery of the best service quality** (in line with state-of-the-art methodologies, equipment, and technology, too), a **focus on the needs and capacities of the users** and **supportive rules and frameworks for employment, decent pay, and training of an adequate number of well-qualified staff**.
  - In addition, for SSE **wider social, ethical, and environmental benefits of quality social services** need to be given clear weight by public buyers in the design of the appropriate instrument and in procurement decisions.
- This being said, **SSE does not believe that public procurement is often the right funding mechanism** through which to finance social service provision **and promotes the use of alternative models which focus more on partnerships and less on buyer-supplier logics**.

3) EFTA Court Case E-4/22

Social Services Europe (SSE) was informed via *Stiftelsen Diakonhjemmet* (Norwegian member of SSE member Eurodiaconia) and *Virke* about the case in which the Oslo District Court (*Oslo Tingrett*) has requested an Advisory Opinion from the EFTA Court in Case No 21-021791TVI[1]TOSL/01. The

proceedings concern the procurement of service agreements for long-term places in nursing homes by the Oslo Municipality. They have **reserved the part of the procurement relating to operation of the nursing home places ("the nursing home services") for non-profit organisations**.

The **Oslo Municipality has put forward three legal bases** to justify why the procurement may be reserved for non-profit organisations, which may be briefly described as follows:

- Principally: the procurement of the nursing home services must be considered procurement of "non-economic services of general interest" falling outside the scope of the EEA Agreement and the Public Procurement Directive.
- In the alternative: the procurement is exempt from the EEA Agreement under Article 32 read in conjunction with Article 39, because it involves services entailing an exercise of official authority.
- In the further alternative: the Public Procurement Directive does not preclude reserving the procurement of the nursing home services for non-profit organisations in the manner permitted under national law.

Key message: SSE politically supports the views, considerations, (policy) objectives and positions of the Oslo Municipality as presented in the Request for an Advisory Opinion of the Oslo District Court, submitted to the EFTA Court on 14.03.2022.

Neither the SSE Secretariat nor its members are familiar with any details of the EEA Law/Agreement. Still, SSE would like to submit **some written observations** to the EFTA Court (by e-mail: cases@eftacourt.int). We do this below, by **highlighting three points**.

Due to the short notice and a full calendar end of June, we can only submit a shorter written observation and not elaborate in more detail on a number of points. Should this be wished by the EFTA Court, SSE could provide more input.

1) Linked to legal basis 3 above: Norwegian legislation: The national provision allowing tendering procedures to be reserved for non-profit organisations - Section 30-2a of the Public Procurement Regulation

As well explained in detail in the Request for an Advisory Opinion of the Oslo District Court and underpinned with a number of quotes (p. 5), a separate provision – which entered into force in February 2020 – is included in Section 30-2a of the Public Procurement Regulation, giving contracting authorities the possibility of reserving tendering procedures for health and social services for non-profit organisations.

For SSE, the conditions set out in paragraphs (1) and (2) of Section 30-2a of the Public Procurement Regulation – 1) the reservation contributes to the attainment of social objectives, the good of the community and budgetary efficiency; 2) non-profit organisation providing the social service pursuing solely a social objective for the good of the community; 3) non-profit organisation providing the social service reinvest any profits in activity that fulfils the organisation's social objectives – **are both fully justifiable and appropriate to achieve the objectives pursued by the Norwegian legislator (in abstract terms) and the Oslo Municipality in the concrete procurement case**.

SSE fully shares the points (and reasoning) contained in the Consultation Paper of the Norwegian Government in relation to the newly introduced Section 30-2a of the Public Procurement Regulation (cf. pp. 5 to 8) in view of the qualities and the characteristics of non-profit organisations (underlining by SSE):

- *The non-profit operators provide a value-add in the society and confer advantages on the society beyond the provision of the relevant health and social services. Non-profit organisations and*

businesses are concerned with the users' participation at the individual and system levels and have had a tradition of creating new services to offer. Non-profit organisations also have a culture of cooperating with other operators and of making use of volunteers. This entails that the users, in certain service areas, are followed-up through different offers and forms of contact, including after the provision of services. That access to follow-up, activities and social community makes the transition from an institutional setting to daily life capable of building on the rehabilitative effect after the institutional stay in a manner that prevents or postpones costly readmissions.

- *(…) it is difficult for a party ordering the services to be specific on the non-profits' qualitative advantages. This is linked to the fact that the non-profit operators confer qualitative and financial benefits on the society going beyond the benefits they generate in the provision of the specific service and falling outside the contracting authority's area of responsibility, which is thus difficult to weight in traditional tendering procedures.*
- *Non-profit operators are perceived as being important contributors to the provision of welfare services, in addition to the public sector and commercial operators. By facilitating the provision of good welfare services by non-profit operators, it is assumed that a greater breadth and variation will be created in the overall offer of welfare, a "welfare mix".*
- *Greater freedom of choice, and thus greater co-determination for the users of publicly funded welfare services, will potentially be perceived as a societal asset.*
- *(…) there will still have to be competition between the non-profit operators, with the result that the provision of services will nevertheless be exposed to a certain level of competitive pressure.*
- *As regards the organisation's objectives, non-profit businesses differ from commercial businesses in that they do not have profit as an objective but that they rather have another basis for their business. Non-profit businesses thus have a business concept that goes beyond the production of services and is characterised by idealism because it is operated without financial motive and in order to alleviate social needs in the society or to provide assistance to certain vulnerable groups. The organisation contributes, for example, to the pursuance of a social objective and endeavours for the good of the society.*
- *The assessment that the contracting authority must undertake relates not only to benefits of using non-profit operators in the specific procurement in the narrow sense, but also to how the use of the non-profits can contribute towards ensuring service quality and attaining social objectives, the good of the community and budgetary efficiency more generally.*
- *The Ministry sees it as a fundamental requirement that the service in question for which the tendering procedure is to be reserved must relate to health and social services intended to contribute to social purposes and be founded on the principle of solidarity. This will include services regulated by legislation in relation to which a public authority is required to take care of a specified range of services being offered.*
- *There is accordingly a presumption that non-profit operators contribute to budgetary/economic efficiency, economise on resources for the State and avoid waste, provided that they do not operate with a profit-making objective and direct any profits back towards the services or social objectives.*

Section 30-2a of the Public Procurement Regulation also does not infringe on any horizontal or specific EU value, such as gender equality, equal treatment or non-discrimination due to nationality, gender, age, sex, sexual orientation, etc.

Assessment by SSE:

- The **quotes** presented above from the Consultation Paper of the Norwegian Government in relation to the newly introduced Section 30-2a of the Public Procurement Regulation are **fully shared by SSE**. **They correspond to 100% with the experiences of not-for-profit social service providers across Europe**, not least when applying open public procurement procedures.

- The **quotes also support an approach which takes on board the positive externalities** of involving non-profit organisations in the provision of social, health, education, training, cultural, etc. services in the general interest. They **rightfully go beyond a narrow functional approach** and consider the institutional set-up of social protection schemes and social services across Europe and also do justice for the role and function of non-profit organisations/the social economy.
- They also show the **political will of a government which should be respected in the field of social services by the European legislator and European institutions**. Why? According to the distribution of competences, the **EU MS (and the same then has to apply for Norway) have/keep the full competence to decide on the design of their social protection schemes and their services of general (economic) interest** – and this covers the whole sector of social services and the services at stake in this legal case – **as long as fundamental principles of EU law**, such as equal treatment, non-discrimination, transparency and proportionality, **are respected. For SSE this is fully the case for Section 30-2a of the Public Procurement Regulation**.
- If a competent public authority aims to outsource the provision of **social services which help guarantee and realise the principles of the European Voluntary Quality Framework for Social Services of General Interest** (2010), such as accessibility, affordability, continuity, quality, user involvement and user rights, adequate staffing and decent/good employment, working and pay conditions, SSE has serious – evidence-based doubts – that public procurement should be used with non-profit providers of social services/social service providers from the social economy.
- **Alternative models** such as 1) the use of public grants based on **contracts with service providers having the authorisation, accreditation, or license by the relevant public authority to deliver social services**, 2) triangular contractual relationships between a funding agency, a provider and a user of social services (such as in Germany: *"sozialrechtliches* Dreiecksverhältnis") or 3) user-based modalities (personal budgets; service vouchers) seem the appropriate option.

2) Linked to legal basis 3 above: The case of Italy: Code of Third Sector (CTS), co-programming "model" and judgement of the Italian Constitutional Court (N. 131/2020, 20 May 2020)

In 2017 Italy adopted a **Code of Third Sector** (*Codice del Terzo Settore*), not least to better structure legislation relevant for not-for-profit entities. The definition of "not-for-profit entities" covers, i.a., associations, foundations, social enterprises, social cooperatives, associations for social promotion and mutual aid societies, i.e., different types and legal forms of the social economy and of not-for-profit organisations

The Code of Third Sector also introduces a **"model" of co-programming** (*co-programmazione*), i.e., a participative and shared administrative procedure for the mapping of needs and related necessary actions, for the identification of the implementation procedures and available resources. It is realised by means of contracts "provided that this proves to be more favourable than resorting to the market". A second **"model"** is **project co-development** (*co-progettzione*), i.e., the implementation of pre-defined project through shared human and capital resources based on a contract, **combined with the accreditation of third sector organisations** (*accreditamento*). This is the procedure to identify the third sector organisations with whom the project development partnership will be activated.

What is the **rationale behind these new partnership models anchored in Italian legislation**: 1) The **recognition of the pivotal role played by third sector organisations in society**; 2) The expressed intention by government agencies and the competent public authorities (as a rule at local level) to **use the synergies from this partnership** between public authorities and third sector organisations/not-for profit organisations in order to **achieve better outcomes for people in need (when it comes to the social and labour market inclusion and services provided close to or in their community or neighbourhoods)**. This partnership approach and model building on falling back exclusively on third sector organisations was backed and recognised by a judgement of the Italian Constitutional Court (N.

131/2020, 20 May 2020). It pointed out that third sector organisations *"constitute a capillary net of proximity and solidarity on the territory, (...) able to put at the disposal of the public administration both precious informative data (otherwise achievable in longer times and with organizational costs at its own charge), as well as an important organizational and intervention capacity: which often produces positive effects, both in terms of saving of resources and of increase of the quality of the services and of the performances supplied in favour of the 'society of need'"*.

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Please find below in light blue **more detailed information on the judgement of the Italian Constitutional Court (N. 131/2020, 20 May 2020)**

The Italian Constitutional Court stressed the lack of any apparent conflict between EU rules, in particular on public procurement, and the Code of the Third Sector (CTS) partnership models (those regulated by Article 55), supporting the exclusion of the latter from public procurement mechanisms.

- *The models provided by Article 55 of the CTS establish "a channel of shared administration, alternative to that of the profit and the market: 'co-programming', 'co-development' and 'partnership' (which can also lead to forms of 'accreditation') are configured as phases of a complex procedure that expresses a different relationship between the public and the private social sector, not based simply on a […] relationship [of reciprocal obligations]".*
- *The above-mentioned models are "not based on the payment of prices from the public to the private sector, but on the convergence of objectives as well as on the aggregation of public and private resources for the planning and development, in common, of services and interventions aimed at raising the levels of active citizenship, cohesion and social protection, according to a relational sphere that goes beyond the mere utilitarian exchange".*
- *"EU law itself – including under the [Public Procurement Directive and the Concessions Directive], as well as according to the relevant case law of the Court of Justice [in particular Casta and Spezzino] – maintains, on closer inspection, in the hands of Member States the possibility of providing, in relation to activities with a marked social value, an organizational model inspired not by the principle of competition but by that of solidarity".*

In the attempt of drawing a demarcation line between CTS models and Public Contracts Code, the Italian Ministry of Labour in its Guidelines on the subject clarified that: "*In the context of a public procurement procedure, the public administration defines substantially everything, with the exception of* […] *the content of economic operator's offer. The relationship of subsidiary collaboration, characterizing the CTS models, is – for the entire duration of the contractual/conventional relationship – based on co-responsibility, starting from the co-construction of the project (of the service and/or intervention), passing through the reciprocal provision of resources that are functional to the project, up to the conclusion of the project activities and the reporting of expenses*". [Source: Guidelines of the Italian Ministry of Labour concerning the interaction between third sector organisations and public authorities as set out in Article 55 to 55 of the CTS, adopted by Decree 72/2021, page 6.

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Assessment by SSE:

- **National legislation** (here: from Italy in the form of the Code of the Third Sector which was explicitly designed and adopted not least as a reaction to the endorsement of Directive 2014/24/Eu by the European legislator) **defines special partnership models between public authorities and third sector organisations/non-profit organisations and the delivery of social services restricted to those latter entities**.
- It well explains the **rationale behind** and presents a number of reasons for the **mutual advantage of such models** for national, regional and local governments, for the society, the taxpayers, etc.
- The "arrangement" and the intended objectives as well as the rationale given are very similar to the Norwegian case. The political intention of the Italian legislation referred to is very similar to

the one expressed by the Norwegian legislation in the consultation paper of the Norwegian government for introducing in Section 30-2a of the Public Procurement Regulation.
- In sum, **for SSE it clearly supports the legal position of the Oslo Municipality**.

3) Linked to legal basis 3 above: ECJ ruling in the Case C-598/19

SSE has made an analysis of a recent **ECJ ruling** of 6 October 2021, more precisely **on the Case C-598/19 on the use of public procurement and national legislation reserving the right to participate in certain public procurement procedures for social initiatives special employment centres**.

- ECJ Case C-598/19 addresses the **question if additional conditions not provided by Directive 2014/24/EU, but stipulated in national legislation, can be used by a national/regional or local authority to justify a differentiated treatment of (different types of) providers when it comes to the access to contracts for reserved markets** – and how and under which conditions this is possible.
- The main conclusion of the ruling is: "***Article 20(1) of Directive 2014/24 must be interpreted as not precluding a Member State from imposing additional criteria beyond those laid down by that provision***, *thereby excluding from reserved public procurement procedures certain economic operators which satisfy the criteria laid down in that provision (...).*"
- "In a nutshell": **The ECJ thus allows, if this is explicitly stipulated in national legislation** – as this is the case e.g. in Spain in relation to article 20 of Directive 2014/24/EU – **that additional national criteria can be set, including the one to reserve certain contracts** – i.e. here in the context of art. 20 on reserved contracts – **to not-for-profit/social economy organisations if evidence can be provided that this helps to better achieve the intended social, health and/or employment objective**. In other words: this is possible if not-for-profit/social economy organisations are more effective doing this, in a way also due to the not-for-profit/social economy orientation). **SSE fully supports this conclusion and ECJ ruling**.

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Please find below in italics and light blue **more detailed information** (N.B.: All text marking by SSE)

- *In order to "counter-balance" EU law or to allow for "openings" it is **indispensable to have (clear/ambiguous) national legislation** (which can confer competences to the competent regional and local authorities, and **which creates legal security**). In the concrete case, Spanish legislation stipulates the following: "By decision of the Council of Ministers or of the competent body within the sphere of the autonomous communities and local authorities, **minimum percentages shall be set for reservation of the right to participate in procurement procedures for the award of certain contracts or certain lots of those contracts to social initiative special employment centres and to work integration social enterprises** (...) which satisfy the eligibility criteria laid down in that legislation to qualify as such, or **establish a minimum percentage for reservation of the performance of those contracts in the context of sheltered employment programmes, provided that the proportion of disabled or socially excluded staff of special employment centres, work integration social enterprises and programmes is** that stipulated in the legislation in question and, in any event, **at least 30%**."*
- *The **Spanish legislation** "**imposes requirements in addition to those laid down in Article 20 of Directive 2014/24**. That provision, by **limiting its scope to only 'social initiative special employment centres'**, has the effect of excluding from the reservation undertakings and economic operators which otherwise satisfy the conditions laid down in Article 20 in that at least 30% of their employees are disabled or disadvantaged persons and their main aim is to further the social and professional integration of those persons."*
- *The ECJ concludes that it follows that **Article 20(1)** of Directive 2014/24 **does not contain an exhaustive list of conditions, but leaves it to Member States to adopt additional criteria** which the entities referred to in that provision must satisfy in order to be allowed to participate in reserved public procurement procedures pursuant to that provision, provided that those additional criteria contribute to ensuring the (EU-level) social and employment policy objectives pursued by that provision."*
- *The ECJ continues to state that "Member States may, where appropriate, stipulate additional criteria which the entities referred to in that provision must satisfy in order to be allowed to participate in*

*reserved public procurement procedures." And it sets a clear condition for this to be/become possible: "However, it is important to note that Member States, in making use of this option, **must respect the fundamental rules of the TFEU**, in particular those relating to the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles deriving from them, such as the principles of equal treatment and proportionality."*

- *The ECJ refers the case back with some question to the competent Spanish court:*
  - *Non-discrimination: Tenderers must be in a position of equality when they formulate their tenders, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure. (...) **The referring court will have to determine**, inter alia, **whether social initiative special employment centres are in the same situation as business initiative special employment centres** as regards the objective pursued by Article 20(1) of Directive 2014/24."*
  - *Purpose and effectiveness of legislation/regulation to pursue (EU-level) social policy objective: In making that determination, that court must take into account, in particular, first, the fact that it is apparent from the national legislation that the **purpose of a special employment centre, whether a social or business initiative, is to provide paid employment for disabled persons** and is regarded as a means of **including as many of those people as possible in regular employment**, and, second, that **at least 70% of the employees of special employment centres are disabled**."*
  - *Effectiveness of social service provision and achievement of better outcomes: However, that court will also have to determine whether, as the Spanish Government stated, in essence, in its written observations, **social initiative special employment centres, on account of their particular characteristics, are in a position to implement more effectively the social integration objective pursued** by Article 20(1) of Directive 2014/24, **which could objectively justify a difference in treatment with respect to business initiative special employment centres**."*
- *Regarding the suitability of non-profit entities "particular characteristics" to achieve objective of Art. 20 the ECJ states the following: "It should be noted that **both the condition that centres be promoted and more than 50% of its shares be held**, directly or indirectly, **by non-profit entities, and the condition relating to the obligation to reinvest all profits in social initiative special employment centres (...) appear to be suitable** for ensuring that the main purpose of such special employment centres is the integration of disabled or disadvantaged persons."*

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Assessment by SSE:

- We see that **the reasoning put forward there in general support the approach and positions of *Stiftelsen Diakonhjemmet* and *Virke* on the one hand and of the Oslo Municipality on the other**, even though it deals with additional criteria laid down in national legislation in the context of reserved markets, article 20 of Directive 2014/24/EU.
- The **political intention**, again, is **very similar to the one expressed by the Norwegian legislation in the consultation paper of the Norwegian government for introducing in Section 30-2a of the Public Procurement Regulation**, installing a separate provision giving contracting authorities the possibility of reserving tendering procedures for health and social services for non-profit organisations.

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