Brussels, 16 September 2026
Case No: 93059
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Decision No: 128/26/COL

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Norway's breach of Article 5(3a) of Regulation 1370/2007

1 Introduction

By a letter dated 30 October 2024, the Internal Market Affairs Directorate ("the Directorate") of the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had opened an own initiative case regarding the application of Regulation 1370/2007[1] (hereafter "the Land PSO Regulation"), as amended by Regulation 2016/2338[2] ("the Amending Regulation") in Norway. The case concerns a temporary direct award of railway services on the basis of Article 5(3a) of the Land PSO Regulation, as amended ("Article 5(3a)").

On 22 October 2024, the Ministry of Transport published an announcement on its website with the title "Vy direktetildeles kontrakt på Sørlandsbanen, Jærbanen og Arendalsbanen fra 2027".[3] According to this announcement, the Ministry instructed the Railway Directorate (Jernbanedirektoratet) as the competent authority to directly award a temporary railway public service contract for the so-called South bundle ("Traffic Package 1 South"),[4] covering the Sørlandet line, the Jæren line and the Arendal line to the state-owned railway operator Vygruppen[5] ("Vy") to allow for a thorough review of the Traffic Packages.

The announcement also stated that State control over train services was important in order to ensure stable and good services.[6] Furthermore, the announcement stated that better quality train services could be achieved by directly awarding train services than through competition. Pending the mandated Railway Directorate's review of Traffic Packages, the announcement highlighted that it was desirable that the contract would be awarded to Vy.

Subsequently, the Railway Directorate adopted a substantiated decision on the aforementioned direct award on 18 June 2025.[7] In the decision, the Railway Directorate directly awarded a temporary contract for a period of two years from December 2027, with the possibility of two prolongations of one year each, referring to Article 5(3a) of the Land PSO Regulation as the legal basis.

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[1] Incorporated into the EEA Agreement by Joint Committee Decision No 85/2008 of 4 July 2008 at point 4a of Annex XIII (Regulation 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and road and repealing Council Regulations 1191/69 and 1107/70) as adapted by Protocol 1. The Regulation entered into force on 1 February 2009 in the EEA.

[2] Incorporated into the EEA Agreement by Joint Committee Decision No 248/2021 of 24 September 2021 at point 4a of Annex XIII (Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail) as amended by Protocol 1. The Regulation entered into force on 1 June 2022 in the EEA.

[3] Website of the Norwegian Government, "Vy direktetildeles kontrakt på Sørlandsbanen, Jærbanen og Arendalsbanen fra 2027" [English: "Vy directly awarded contract for Sørlandsbanen, Jærbanen and Arendalsbanen from 2027"], last visited on 24 September 2025, Vy direktetildeles kontrakt på Sørlandsbanen, Jærbanen og Arendalsbanen fra 2027 - regjeringen.no. The announcement included a mandate (Norwegian: "mandat"), which sets out more details on the measures which the Railway Directorate is supposed to carry out and explicitly states that the Railway Directorate must make the award under Article 5(3a) of the Land PSO Regulation.

[4] Traffic Package 1 South is one of 5 traffic packages. For more information, reference is made to the Letter of Formal Notice section 5.2.

[5] Vygruppen, previously NSB, is the largest land-based transport group in Norway. The company is owned by the Ministry of Transport.

[6] Similar statements have been made by the Norwegian Government in other documents. See the Norwegian Government's website, "Hurdalsplattformen", last visited on 22 October 2025, Hurdalsplattformen - regjeringen.no, page 42. See also the reasoning provided by the Norwegian Government for abandoning the tenders for Traffic Package 4 and 5 East on the Norwegian Government's website, "Togtilbudet på Østlandet: Regjeringen avlyser konkurransene om trafikkpakkene 4 og 5", last visited on 22 October 2025, Togtilbudet på Østlandet: Regjeringen avlyser konkurransene om trafikkpakkene 4 og 5 - regjeringen.no.

[7] Website of the Railway Directorate, "Grunngivning for direktetildeling av ny trafikkavtale for trafikkpakke 1 Sør", last visited on 17 September 2025, Grunngivning for direktetildeling av ny trafikkavtale for trafikkpakke 1 Sør - Jernbanedirektoratet, (our ref Document 1544627).

The Traffic Package 1 South is currently being operated by Go Ahead Norge AS ("Go Ahead"), which was awarded the railway services contract following a competitive tender in 2018. The contract with Go Ahead expires in December 2027.

This reasoned opinion outlines how the measure taken by Norway runs counter to the market opening for passenger services by rail in the EEA and concludes that the decision to temporarily directly award the Traffic Package 1 South to Vy from December 2027 results in a breach of Article 5(3) of the Land PSO Regulation.

At the outset, the incorporation of the 4th railway package into the EEA Agreement entails that domestic passenger services in the EEA are open to competition, by introducing open access rights, tendering for public service contracts, or both. The market opening is intended to have a positive impact on the functioning of the single European railway area, leading to better services for users.

The Land PSO Regulation completes the market opening for domestic passenger services by rail.[8] According to the Regulation an EEA Member State may introduce Public Service Obligations ("PSO") to ensure public passenger transport services that an operator would not provide if it was merely considering its own commercial interests. Those PSOs are generally realised through public service contracts ("PSC") between the competent authority and an operator. The applicable legal framework provides that PSCs must be competitively tendered out following the end of the transition period on 25 December 2023.[9]

As an exception, direct awards may be permitted under specific derogations, such as on the basis of Article 5(3a). As such, under the applicable legal framework, directly awarding a public service contract is an exception to the main rule and is only allowed in the specific circumstances set out in the Land PSO Regulation. It is established case-law that exceptions must be interpreted strictly.

The Authority is of the view that Norway has not justified and demonstrated the existence of exceptional circumstances capable of justifying a direct award under Article 5(3a). The circumstances invoked by Norway, which include the need to analyse the market, possible need to change the scope of the current contracts, implications related to Covid-19, and more – are refuted in this opinion and considered not sufficient to demonstrate the existence of exceptional circumstances within the scope of Article 5(3a). Thus, the decision in question to directly award the contract for Traffic Package 1 South is in breach of EEA law.

The Authority therefore issued a letter of formal notice on 5 January 2026. For further background on the case, reference is made to the letter of formal notice and in particular sections 5.1 to 5.4.[10]

2 Correspondence

Following the aforementioned announcement of 22 October 2024, the matter was discussed during the annual package meeting in Oslo, which took place on 24 and 25 October 2024.[11]

The Directorate sent a request for information to the Norwegian Government on 30 October 2024.[12] The Norwegian Government responded to the Directorate's letter on 27 November 2024.[13]

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[8] See recital 2 of the Amending Regulation

[9] The end date of the transition period is the same for the EU and the EEA.

[10] Our ref.Document 1556098.

[11] See follow-up letter to the Norwegian Government of 29 November 2024, (our ref Document 1502318).

[12] Our ref. Document 1494184.

[13] Our ref. Document 1501678.

On 3 December 2024, the Authority received a complaint where the complainant alleged that the decision taken by the Ministry of Transport to instruct the Norwegian Railway Directorate to award the PSO contract for Traffic Package 1 South constituted a breach of the Land PSO Regulation.[14]

Furthermore, a pre-Article 31 letter was sent to the Norwegian Government on 24 March 2025.[15] In that letter, the Directorate set out its preliminary views on the misapplication of Article 5(3a) of the Land PSO Regulation.

The Norwegian Government sent its response to the letter on 28 May 2025 (a corrected version of the letter was submitted on 4 June 2025).[16]

As noted above, on 24 October 2025, the Authority sent a letter of formal notice to Norway,[17] concluding that Norway had failed to fulfil its obligations under Article 5(3a) of the Land PSO Regulation by deciding to directly award a public service contract for public passenger transport services by rail for Traffic Package 1 South in a situation where such direct award was not justified by exceptional circumstances. Norway was requested to submit its observations on the content of the letter of formal notice within two months from its receipt.

The matter was further discussed at the annual package meeting in Norway in Oslo on 13 and 14 November 2025.[18]

The Norwegian Government replied to the letter of formal notice on 5 January 2026 ("the Reply").[19]

3 Relevant EEA law

The Land PSO Regulation took effect in the EEA on 1 February 2009. Following the adoption of the 4th railway package[20] in 2016, the Land PSO Regulation was amended by the Amending Regulation. The Amending Regulation was incorporated into the EEA Agreement and took effect on 1 June 2022.

Article 1(1) first paragraph sets out the purpose and scope of the Land Regulation:

> "The purpose of this Regulation is to define how, in accordance with the rules of Community law, competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed."

Article 2 provides definitions of terms used in the Land PSO Regulation. Article 2(a) provides that a 'public passenger transport':

> "means passenger transport services of general economic interest provided to the public on a non-discriminatory and continuous basis;"

Article 2(b) defines the 'competent authority' as:

[14] Case No 93321.
[15] Our ref Document 1517632.
[16] Our ref Document 1541435.
[17] Decision No: 176/25/COL, Document 1556098.
[18] Our ref. Document 1578619
[19] Our ref. Document 1582453
[20] The 4th Railway Package is a set of six legislative acts designed to complete the single market for rail services (Single European Railway Area). Its overarching goal is to revitalise the rail sector and make it more competitive vis-à-vis other modes of transport.

> "any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or any body vested with such authority;"

Article 2(d) provides the definition of a 'public service operator' as:

> "any public or private undertaking or group of such undertakings which operates public passenger transport services or any public body which provides public passenger transport services;"

Article 2(e) provides that a 'public service obligation':

> "means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward;"

Article 2(h) defines 'direct award' as:

> "the award of a public service contract to a given public service operator without any prior competitive tendering procedure;"

Finally, Article 2(i) provides that a 'public service contract' means:

> "one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations; depending on the law of the Member State, the contract may also consist of a decision adopted by the competent authority:
>
> — taking the form of an individual legislative or regulatory act, or
>
> — containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator;"

Article 5 contains the rules on how public service contracts are to be awarded. More specifically, Article 5(1) provides:

> "<u>Public service contracts shall be awarded in accordance with the rules laid down in this Regulation</u>. However, service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply." (Emphasis added).

Article 5(3) contains the main rule of competitive tendering of public service contracts:

> "Any competent authority which has recourse to a third party other than an internal operator, <u>shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 3a, 4, 4a, 4b, 5 and 6</u>. The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. Following the submission of tenders and any preselection, the

> procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements.” (Emphasis added).

Article 5(3a) provides for the exception to the main rule of competitive tendering of public service contracts. The Norwegian Railway Directorate has referred to this provision in the decision to directly award a temporary contract to Vy of 18 June 2025:

> “Unless prohibited by national law, as regards public service contracts for public passenger transport services by rail awarded on the basis of a competitive tendering procedure, the competent authority <u>may decide to temporarily award</u> new contracts directly where the competent authority considers that the direct award is justified by <u>exceptional circumstances</u>. Such exceptional circumstances shall include situations where:
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> — there are a number of competitive tendering procedures that are already being run by the competent authority or other competent authorities which could affect the number and quality of bids likely to be received if the contract is the subject of a competitive tendering procedure, or
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> — changes to the scope of one or more public service contracts are required in order to optimise the provision of public services.
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> The competent authority shall issue a substantiated decision and shall inform [the Authority] thereof <u>without undue delay</u>.
>
> The duration of contracts awarded pursuant to this paragraph <u>shall be proportionate to the exceptional circumstance concerned</u> and, in any case, shall not exceed 5 years.
>
> The competent authority <u>shall publish such contracts</u>. In doing so, it shall take into consideration the legitimate protection of confidential business information and commercial interests.
>
> The subsequent contract that concerns the same public service obligations shall not be awarded on the basis of this provision.” (Emphasis added).

Recitals 2-5 of the Amending Regulation state:

> “The Union market for international passenger transport services by rail has been open to competition since 2010. In addition, some Member States have opened their domestic passenger services to competition, by introducing open access rights, or tendering for public service contracts, or both. The opening of the market for domestic passenger services by rail should have a positive impact on the functioning of the single European railway area, leading to better services for users.
>
> In its White Paper on transport of 28 March 2011 the Commission announced its intention to complete the internal market for rail services, abolishing technical, administrative and legal obstacles which impede entry to the railway market.
>
> The completion of the single European railway area should further the development of rail transport as a credible alternative to other modes of transport, inter alia, in terms of price and quality.
>
> A specific objective of this Regulation is to enhance the quality, transparency, efficiency and performance of public passenger transport services by rail.”

Recital 21 of the Amending Regulation states that:

> "In exceptional circumstances, where public service contracts for public passenger transport services by rail are awarded on the basis of a competitive tendering procedure, new contracts may temporarily be directly awarded in order to ensure that services are delivered in the most cost-effective way. Such contracts should not be renewed to cover the same or similar public service obligations." (Emphasis added).

4 Relevant national law

The Land PSO Regulation is implemented into Norwegian law through the Railway Act of 11 June 1993 No. 100[21] and Regulation on public passenger transport of 17 December 2010 No. 1673.[22]

Section 7d of the Railway Act of 11 June 1993 No. 100 provides:

> "The Ministry may issue regulations implementing and supplementing section 4a of Annex XIII to the EEA Agreement (Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, as amended)." [23]

Section 1 of Regulation on public passenger transport of 17 December 2010 No. 1673 provides:

> "Section 4a of Annex XIII to the EEA Agreement (Regulation (EC) No 1370/2007 as amended by Regulation (EU) 2016/2338) on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 shall apply as a [Norwegian] regulation with the adaptations set out in Annex XIII, Protocol 1 to the Agreement and the rest of the Agreement in general." [24]

5 Norway's reply to the Letter of Formal Notice

In the Reply of 5 January 2026,[25] the Norwegian Government maintains that the temporary direct award of Traffic Package 1 South to Vy is fully justified by "exceptional circumstances" under Article 5(3a) of the Land PSO Regulation.

The Norwegian Government argues that the Covid-19 pandemic substantially disrupted the rail market, making revenue risk unpredictable between 2020 and 2023. Significant market

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[21] Lov 11. juni 1993 nr. 100 om anlegg og drift av jernbane, herunder sporvei, tunnelbane og forstadsbane m.m. (jernbaneloven).
[22] Forskrift 17. desember 2010 nr. 1673 om gjennomføring i norsk rett av EØS-avtalen vedlegg XIII nr. 4a (forordning (EF) nr. 1370/2007) om offentlig persontransport med jernbane og på vei og om oppheving av rådsforordning (EØF) nr. 1191/69 og nr. 1107/70 (forskrift om offentlig persontransport).
[23] Unofficial translation. The Norwegian text reads "Departementet kan gi forskrift om gjennomføring og utfylling av EØS-avtalen vedlegg XIII punkt 4a (forordning (EF) nr. 1370/2007 om offentlig persontransport med jernbane og på vei og om oppheving av rådsforordning (EØF) 1191/69 og 1107/70, med senere endringer".
[24] Unofficial translation. The Norwegian text reads "EØS-avtalen vedlegg XIII nr. 4a (forordning (EF) nr. 1370/2007 som endret ved forordning (EU) 2016/2338) om offentlig persontransport med jernbane og på vei og om oppheving av rådsforordning (EØF) nr. 1191/69 og 1107/70 gjelder som forskrift med de tilpasninger som følger av vedlegg XIII, protokoll 1 til avtalen og avtalen for øvrig".
[25] Our ref. Document 1582453.

testing was not meaningful until early 2024 because passenger numbers remained volatile and well below pre-pandemic levels.

In 2024, operators for the first time indicated commercial interest in operating parts of Traffic Package 1 South. The Government contends this was a material change in the market outlook that could not have been reasonably expected earlier.

The existing contract with Go Ahead contained an option for extension that ultimately could not be exercised because the required condition of financial sustainability was not met. The Government argues that exercising this option with "substantial additional compensation" would have constituted an unlawful material change to the contract under EEA law.

The Norwegian Government furthermore asserts that the Authority's interpretation of Article 5(3a) of the Land PSO Regulation is narrower than the wording and context. While the exemption must be applied strictly, it cannot be deprived of its practical effect (*effet utile*).

The Norwegian Government emphasizes that the two situations listed in Article 5(3a) (high number of ongoing tenders and changes to contract scope) are illustrative "safe harbors", not an exhaustive list. The Norwegian Government argues that comparable situations where the underlying rationale applies should also qualify.

The Norwegian Government opposes that all future changes must be predetermined before a direct award. It argues the phrase "changes […] are required" in the Land PSO Regulation also covers situations where the authority has identified a need to reassess the scope but needs time to complete complex analyses of passenger flows and revenue.

The Norwegian Government also argues that Article 5(3a) is intended to prevent authorities from launching a long-term tender prematurely when they lack the information necessary to define a lawful scope, such as when they must determine if a market failure actually exists to justify a PSO.

The Norwegian Government contends that if an authority were required to have fully defined all changes by the pre-notification deadline, it would already have the certainty needed to run an ordinary tender, rendering the Article 5(3a) exemption redundant.

The Norwegian Government furthermore claims a logical inconsistency in the Authority's position: a long-term contract (up to 5 years) is permitted for pre-planned restructuring, but the Authority deems a shorter 2-year award for the purpose of defining those changes as unacceptable.[26]

The Norwegian Government lastly maintains that Article 5(3a) requires a justification, not a demonstration of impossibility. The Norwegian Government argues that it thus does not have to prove that a competitive tender was impossible, only that exceptional developments justify a temporary deviation to ensure compliance with the Land PSO Regulation.

6 The Authority's assessment

The following assessment is split into 5 sections. The first section (6.1) elaborates on the main rule of competitive tendering of PSCs and how any derogations from that main rule must be interpreted restrictively. The second section (6.2) explains that the decision to directly award is final and binding and that the breach has already taken place. The third section (6.3) provides that an EEA Member State must sufficiently demonstrate on the basis of sufficient evidence and analyses the existence of exceptional circumstances if it seeks to rely on Article 5(3a). The fourth section (6.4) details that the need to conduct a market analysis is inherent in the Land PSO Regulation and cannot be considered

[26] What the Norwegian Government refers to as '*a maiori ad minus*'.

exceptional. Finally, the fifth section (6.5) refutes Norway's arguments that an interpretation from the greater to the lesser could justify the direct award in question.

6.1 The main rule of competitive tendering of public service contracts

The general principle of the Land PSO Regulation is that the passenger railway market is open for competition, as expressed in Recitals 2-5 of the Amending Regulation. Thus, free competition is the default state of the market. When justified and necessary, an EEA Member State may implement Public Service Obligations ("PSO") through PSCs in order to ensure the provision of services of a certain price, quality or frequency. That however represents an exception where intervention in the market is permitted.

Accordingly, where market intervention is necessary and permitted, Article 5(3) of the Regulation lays down as a main rule that competent authorities are to award public service contracts based on a competitive tendering procedure. The same provision, however, recognises certain exceptions to this rule, i.e. situations and circumstances in which contracts may be awarded directly. One such provision is Article 5(3a), which provides that under *exceptional circumstances*, EEA States may decide to directly award a public service contract.

As an exception from the general rule of competitive tendering set out in Article 5(3), and in line with well-established case-law of the European Courts,[27] the provision must be interpreted strictly.[28] Furthermore, a provision allowing for a derogation from the main rule cannot be interpreted to extend its effects beyond what is necessary to safeguard the interests which it seeks to secure.[29] The European Commission expressly stressed the same in its interpretative guidelines on the application of the Land PSO Regulation by specifying that the term *exceptional circumstances* has to be interpreted in a strict manner.[30]

It is also settled case-law that the party relying on an exception must prove that the conditions for doing so are fulfilled.[31] In other words, it is for the Norwegian Government to demonstrate that the conditions in Article 5(3a) are met.[32]

Contrary to what the Norwegian Government suggests, the Authority fails to see that other language versions of the Regulation, such as the Danish and French, support a less strict interpretation of Article 5(3a).[33] In any case, the Authority notes that it follows from settled case-law that in the case of divergence between the language versions of a legal act, a provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.[34]

According to settled case-law, both the uniform application of EEA law and the principle of equality require that the terms of a provision of EEA law which makes no express reference to the law of the EEA States, for the purpose of determining its meaning and scope, must

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[27] Case E-10/20 *ADCADA Immobilien AG PCC in Konkurs v Finanzmarktaufsicht*, paragraph 47 and Case C-337/06 *Bayerischer Rundfunk and Others*, EU:C:2007:786, paragraph 64.
[28] See, inter alia, Case-C-83/99 *Commission v Spain*, EU:C:2001:31, paragraph 19, Case C-166/23 *Naturvårdsverket*, EU:C:2024:465, paragraph 47 and Case E-13/24 *Friends of the Earth*, paragraph 27. In addition, the Regulation includes other provisions permitting derogation from that main rule, such as Article 5(4) and 5(4a), which are not relevant in this case.
[29] Case C-13/21 *Pricoforest SRL v. ISCTR,* EU:C:2022:188, paragraph 30 and case-law cited.
[30] See in particular section 2.5.3.1 of the Commission notice on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road 2023/C 222/01, C/2023/3978, OJ C 222, 26.6.2023, p. 1–27.
[31] Case C-394/02 *Commission v Greece*, EU:C:2005:336 , paragraph 33.
[32] See, for example, judgment of the CJEU of 11 January 2005 in case C-26/03 *Stadt Halle*, paragraph 46.
[33] See Reply page 16.
[34] See Case E-6/25 *Saga Subsea*, paragraph 88.

normally be given an autonomous and uniform interpretation throughout the EEA. In addition, the meaning and scope of terms for which EEA law provides no definition must be determined by reference to their usual meaning, while also taking into account the context in which they occur and the purposes of the rules of which they are part.[35] Thus, the Authority maintains that the term "extraordinary circumstances" in the Land PSO Regulation must be understood strictly and in line with normal interpretative rules of EEA law.

In the Reply, the Norwegian Government states that:

> "[…] the structure and purpose of Article 5(3a) indicate that it is intended to apply where *exceptional circumstances justify* a temporary deviation from the main rule, even if alternative mechanisms – such as conducting a short-term tender or exercising a contractual option – might theoretically be available.
>
> The legal test under Article 5(3a) is therefore not one of impossibility, but one of justification. The competent authority must show that exceptional developments have arisen which require a temporary arrangement before a new long-term award can lawfully be made. In this respect, the provision serves to ensure that an original tender is not launched prematurely, at a time when the authority lacks the information necessary to define the lawful scope of the future contract."[36]

The Authority does not claim that it must be impossible to competitively award a contract in order to apply Article 5(3a). However, the Authority is of the view that it is upon the EEA State to justify and demonstrate the existence of the exceptional circumstances which, in turn, is capable of justifying a direct award. As Article 5(3a) represents an exception from the general rule of competitive tendering the threshold for such justification must be understood in that context. Despite requests from the Authority, Norway has not demonstrated the existence of exceptional circumstances capable of justifying the direct award of Traffic Package South, for the reasons set out in sections 6.3 and 6.4 below.

The objective of the 4th Railway Package is to abolish technical, administrative, and legal obstacles to market entry, fostering a single European railway area characterized by transparency and efficiency. Therefore, the concept of *exceptional circumstances* in Article 5(3a) must, in the Authority's view, be interpreted as circumstances which are atypical and objectively distinguishable from the regular administrative management by the competent authorities. Tasks alluded to by Norway, such as analysing the market, defining PSOs, drafting PSCs and preparing and executing tenders for such PSCs are, in the Authority's view, inherent in the day-to-day application of the Land PSO Regulation. Consequently, the need to perform such tasks, for example analysing the market regardless of the presence of market interest or not, cannot be understood as amounting to exceptional circumstances in the context of Article 5(3a). The Authority thus considers that the reasons provided by the Norwegian Government in the case at hand, that overall pertain to the need to analyse the market, fall under regular administrative management.

Lastly, in the Reply to the pre-Article 31 letter, the Norwegian Government stated that the Authority must find a manifest error in the application of Article 5(3a) by Norway in order to establish a breach.[37] While the Norwegian Government has not maintained those claims in the Reply, the Authority refers to the letter of formal notice in which the Authority sets out that the manifest error test applies only to the definition of a service of general economic interest (SGEI). In that field, the EEA States enjoy a wide margin of discretion. However, and set out in case-law, the EEA States' discretion is limited by secondary legislation and

[35] Case C-656/19 *BAKATI PLUS*, EU:C:2020:1045, paragraphs 38 and 39 and the case-law cited.
[36] Reply page 13.
[37] Our ref Document 1541435.

in this case the Land PSO Regulation.[38] The Authority reiterates that where a measure is thus based on a wrongful application of EEA law and results in a breach of the Land PSO Regulation, the manifest error-test does not apply.[39]

6.2 The decision to directly award the contract is final and binding

As stated above, on 18 June 2025, the competent authority adopted a substantiated decision on the direct award for Traffic Package 1 South on the basis of Article 5(3a) of the Land PSO Regulation.[40] That decision was taken subsequent to an instruction from the Ministry to carry out a direct award under Article 5(3a),[41] stipulating the procedure to be used and provided for other specifics such as to which operator and by when such a contract should be awarded.[42]

The Norwegian Government informed the Authority by email on 27 January 2025 that the competent authority intended to publish a notification in the Official Journal in accordance with Article 7(2)[43] of the Land PSO Regulation at least one year before entry into force of the contract. The Norwegian Government, furthermore, informed the Authority that the notice could be issued as late as December 2025 or early January 2026.[44] A notice on the direct award in line with Article 7(2) of the Land PSO Regulation was published in the Supplement to the Official Journal ('TED') of the EU on 19 June 2025.[45]

At the time of drafting this reasoned opinion, the Authority is not aware of a contract having been signed.

As pointed out in the letter of formal notice, the case-law of the Court of Justice of the European Union ("the CJEU") focuses on the moment the public authorities choose the type of procedure to be followed and definitively decides whether it is necessary for a prior call for competition, as opposed to the actual award of the contract, in order to determine what law applies to the award of that contract.[46] In this context, the CJEU has referred to "the decision which is alleged to have infringed EU law",[47] thereby acknowledging that a

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[38] Judgment of the General Court of 29 November 2018 in case T-720/16 *ARFEA*, paragraph 88; judgment of the CJEU of 24 November 2020 in case C-445/19 *Viasat Broadcasting UK Ltd*, paragraphs 33 and 34; judgment of the CJEU of 20 February 2001 in case C-205/99 *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v. Administracion del Estado*, paragraphs 31–35; judgment of the CJEU of 20 December 2017 in cases C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco and Others v Commission*, paragraphs 69 and 70.
[39] Letter of formal notice page 16.
[40] Website of the Railway Directorate, "Grunngivning for direktetildeling av ny trafikkavtale for trafikkpakke 1 Sør", last visited on 17 September 2025, Grunngivning for direktetildeling av ny trafikkavtale for trafikkpakke 1 Sør - Jernbanedirektoratet, (our ref Document 1544627).
[41] E-mail sent from the Railway Directorate to the Ministry on 30 August 2024, titled "*Utkast til gjennomlesning*", marked as Annex 8 in the reply letter of 27 November 2024 (our ref Document 1501664).
[42] The mandate did not set the exact duration but specified the maximum duration of the temporary contract with its expiry being in December 2032, at the latest. Furthermore, the mandate did not leave any discretion to the competent authority as to the choice of operator, as the Ministry set out that the temporary contract must be awarded to Vy.
[43] According to this provision, the competent authority must publish certain specified information, such as the type of award and the geographical scope covered by the award, at least one year before the launch of an invitation to tender procedure or one year before the direct award.
[44] Our ref Document 1521624.
[45] Notice publication number: 398466-2025, OJ S issue number: 116/2025, https://ted.europa.eu/en/notice/-/detail/398466-2025.
[46] Case C-285/18 *Irgita*, EU:C:2019:829, paragraph 31; Case C-337/98 *Commission v France*, EU:C:2000:543, paragraphs 36 and 37 and Case C-576/10 *Commission v Netherlands*, EU:C:2013:510, paragraph 52.
[47] Case C-576/10 *Commission v Netherlands*, EU:C:2013:510, paragraph 58. It can also be noted that in the context of national review proceedings in relation to public procurement, the CJEU has held that the concept of "decisions taken by the contracting authorities" (being those which must be

decision taken prior to the award of a contract may breach EEA law, notwithstanding that the contract itself has not yet been signed.

In the present case the competent authority has decided to directly award the temporary contract pursuant to the publication of the substantiated decision and the publication of the notification in the TED. As such, the procedure for the award has already been decided in a binding form and the Authority underlines that this is not disputed by the Norwegian Government in the Reply.

Additionally, the Authority emphasises that Member States are generally obliged under EEA law to demonstrate that they have available the necessary data, evidence and reasoning justifying a measure or a decision.[48] The Authority considers that such an obligation is particularly stringent where the applicable legislation not only requires the State to adopt a substantiated decision but also obliges the State to notify that decision to the Authority, as is the case under Article 5(3a) of the Land PSO Regulation. For that reason, the relevant justification must be assessed on the basis of the reasons invoked in the decision at the time of its adoption. Despite requests from the Authority, the Norwegian Government has neither provided data demonstrating the existence of exceptional circumstances nor submitted evidence or reasoning capable of justifying the direct award of Traffic Package South.

6.3 A temporary award under Article 5(3a) requires sufficient information and analysis

Article 5(3a) of the Land PSO Regulation provides for an exception from the main rule of competitive tendering of public service contracts to directly award a temporary contract. However, to rely on the exception, EEA States must be able to demonstrate the existence of *exceptional circumstances* justifying the need to deviate from the general rule of competitive tendering. The duration of that contract cannot exceed five years, and the subsequent contract cannot be awarded on the basis of that same provision.

Article 5(3a) provides two non-exhaustive examples of situations constituting "exceptional circumstances". The first example concerns situations where multiple competitive tendering procedures are already ongoing within the jurisdiction, thereby potentially limiting the number and quality of bids received. The second example is of situations where modifications to the scope of one or more public service contracts are required to optimise the provision of public transport services. The Commission, in its interpretative guidelines, states that the latter situation includes the alignment of expiration dates of multiple existing contracts to facilitate future integration and operational efficiency.[49]

The Norwegian Government relies on the second situation provided for in Article 5(3a),[50] i.e. where changes to the scope of one or more contracts are required to optimise the provision of public services. In the Reply, the Norwegian Government argues that "[*t*]*he wording does not imply that the competent authority must already have determined what those changes will be. The phrase "are required" naturally also covers situations in which the authority has identified a need to reassess the scope of one or several contracts, while the necessary analyses are still ongoing and the precise future scope is not yet known*".[51]

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capable of review), must be interpreted broadly (see, for example, Case C-927/19 *Klaipėdos*, EU:C:2021:700, paragraph 105).

[48] Case E-2/24 *Bygg & Industri Norge AS and Others v the Norwegian State, represented by the Ministry of Labour and Social Inclusion*, paragraph 133.

[49] See section 2.5.3.1 of the Commission's interpretive guidelines.

[50] Our ref Document 1541435 and website of the Railway Directorate, "Grunngivning for direktetildeling av ny trafikkavtale for trafikkpakke 1 Sør", last visited on 17 September 2025, Grunngivning for direktetildeling av ny trafikkavtale for trafikkpakke 1 Sør - Jernbanedirektoratet, (our ref Document 1544627).

[51] Reply page 12.

As set out in the letter of formal notice, the second situation in Article 5(3a) refers to changes to the scope that are "required". To meet the threshold of justifying that changes are 'required', national authorities must demonstrate that they have assessed the need to change the scope of contracts and that this assessment supports the chosen path is required to optimise the provision of services.

In the present case, the Norwegian Government has not presented any information demonstrating, or even indicating that, at the point in time when the decision was taken to directly award the temporary contract, it had assessed in any meaningful manner the need to change the scope of the public service contract. Consequently, the Authority must conclude that the Norwegian Government has not demonstrated that the conditions were fulfilled to rely on the exception. Here, the Authority underlines that it is not sufficient to claim that "there is a real need to make significant changes" when the Authority has asked the Government to demonstrate what this need objectively entails and how this was concluded. The Authority recalls that this information must have been gathered and assessed at or by the time of the decision making.

Despite the Authority's requests and discussions with the Norwegian Government, the latter has not at any stage clarified how the conclusion was drawn that there is a need to change the scope of the contracts, nor has the Government clarified what objective criteria formed the basis for this statement. In this regard, it is important to note that if it is sufficient for any competent authority to indicate that there 'is a real need' without demonstrating on what basis, the general rule of competitive tendering would be made entirely meaningless. For the very same reason it is not possible for the competent authority to retroactively rectify the absence of a pre-implementation (*ex ante*) assessment with an assessment undertaken after having taken the measure (*ex post*) under Article 5(3a) of the Land PSO Regulation.

The consequences of a decision to directly award a contract can be severe for the system as a whole, as such decisions may influence market interest in offering services on commercial terms, particularly if it can be seen as arbitrary. Looking at the present case, the Authority notes that to this date, the Norwegian Government has yet to conclude whether any changes are even to be made to the structures of the PSCs. It has, however, determined that no changes will be made to the structure of the PSOs.[52] The Authority must therefore conclude that the Norwegian Government has not demonstrated that the present situation meets the threshold to justify the need to rely on the exception on which it relies in Article 5(3a). Already based on this, the circumstances in the present case cannot be considered exceptional.

The wording of Article 5(3a) implies that the State must have, at the point in time when it decided to directly award the temporary contract, assessed not only whether changes to the scope are needed, but also *how* the scope of the contracts must be changed. This is evident as the concept of a PSO, realised through a PSC under Article 5(3a), may only be imposed in situations where market forces alone would not have allowed for such services, in accordance with Article 1(1) of the Land PSO Regulation. Additionally, the Authority maintains that the determination of whether changes to the scope are in fact required, necessitates that it be known what those changes are, or could be, as an analysis might conclude that no changes are required.

[52] The report mentioned in the substantiated decision of 18 June 2025 (on page 2) concludes that no changes are to be made to the current structure of PSO's in the Norwegian railway market, see: report of the Norwegian Railway Directorate: *Fremtidige trafikkavtaler: Omfang og innretning*, Oppdrag 24-2024. Dokument nr: 2025/525-6, 9 February 2026 https://www.jernbanedirektoratet.no/content/uploads/2026/02/Fremtidige-trafikkavtaler-omfang-og-innretning.pdf; A request for information to inform the analysis of the structure of the PSC's themselves was initiated on 6 March 2026 with a Request for Information (See Norwegian Railway Directorate Document 2026/238 – our ref Document 1617337)

This understanding is further substantiated by the full wording and context of Article 5(3a). As detailed in the third paragraph thereof, the duration of the award shall be proportionate to the exceptional circumstances in question. In order to be able to determine the proportionality of the length of the award, certain elements need to have been established. When evaluating the proportionality of a direct award to achieve optimisation in the provision of public services, it would be necessary to at the very least know which changes would need to be implemented.

EEA States may award a public service contract only where the competent authority has *determined* that the provision of public passenger transport services is necessary in the general interest. This is the case where an operator, if it were considering its own commercial interests, would not assume, or would not assume to the same extent or under the same conditions, these services without reward.[53] Accordingly, before imposing a public service obligation and awarding a public service contract, the competent authority must assess both the existence of a public service need and the scope of that obligation. A public service contract may therefore only be awarded after the competent authority *has decided* that there is a real public service need.[54]

Consequently, the Authority maintains that national authorities must have carried out an assessment of whether changes were required to the scope of the contract(s) before awarding a public service contract under Article 5(3a). The provision cannot be interpreted as allowing national authorities to temporarily directly award a contract in order to conduct that very assessment, even if the intention is to potentially redefine the scope of services covered by the public service contract in question, as the award would then be in breach of Article 1(1) and 2(e) of the Land PSO Regulation.[55]

In the Reply, the Norwegian Government has provided that Article 5(3a) "covers situations in which the authority has identified a need to reassess the scope of one or several contracts, while the necessary analyses are still ongoing and the precise future scope is not yet known."[56] This interpretation would in the Authority's view result in a situation where national authorities could easily circumvent the main rule of competitive tendering and the core spirit of the Land PSO Regulation. Indeed, as set out below, if the constant obligation to assess the need for intervention before imposing a PSO in itself could be used as an exceptional circumstance, it would lead to a situation where failure to perform an obligation under the Land PSO Regulation enables a derogation from it.

If the interpretation presented by the Norwegian Government were to be accepted, it would lead to a situation where all public service contracts could be temporarily directly awarded without properly establishing the need for the PSO as well as its scope, to a specific operator after the expiry of every competitively awarded public service contract. Such an interpretation would render the main rule of the Land PSO Regulation, as set out in Article 5(3), on competitive tendering largely ineffective and run counter to the objectives thereof.

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[53] See the definitions of a 'public service obligation' and a 'public service contract' in Articles 2(e) and (i) of the Land PSO Regulation.
[54] See, in particular, judgment of the CJEU of 20 February 2001, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v. Administracion del Estado*, C-205/99, EU:C:2001:107, paragraph 31–35, judgment of 24 July 2003, *Altmark Trans*, C-280/00, EU:C:2003:415, paragraph 89, judgment of the General Court of 1 March 2017, *Société nationale maritime Corse Méditerranée (SNCM) v European Commission*, T-454/13, EU:T:2017:134, paragraphs 130 and 134, judgment of the CJEU of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and others v. The Netherlands*, C-817/18P, EU:C:2020:637, paragraph 105.
[55] Had the determination already been made to redefine the scope, such as to merge two PSCs in line with the Land PSO Regulation, such an award could however be legitimate, see section 2.5.3.1 of the Commission's interpretive guidelines.
[56] Reply page 12.

The Norwegian Government states that the unexpected market interest necessitated a re-evaluation of the need and scope of public service contracts nationwide.[57] In this regard, the Authority emphasises that it should not be unexpected that the market expresses interest to operate certain lines on commercial basis, as the legal framework in the EEA presumes, facilitates for and promotes commercial operations. While the Norwegian Government claims in the Reply that there were credible interests expressed for commercial services within the geographic scope,[58] the Government has also presented to the Authority documented evidence that the competent authority had deemed the expressed market interest for Traffic Package 1 South to have not been credible.[59]

Consequently, the Authority maintains that the circumstances in the present case cannot justify the use of the exception from the basic rule of competitive tender on the basis of the exceptional circumstances referred to in the second situation set out in Article 5(3a), or in any other way be considered exceptional. Such an interpretation could result in the exception easily becoming the main rule, as a need for assessment may always be present in any operation. That is contrary to the objective of the Land PSO Regulation which is to have competitive tendering as a main rule.

6.4 The need to conduct a market analysis is not an exceptional circumstance

As noted above, PSOs represent a derogation from an open and free market. Their implementation and application are thus bound by certain procedural elements as represented in the Land PSO Regulation. EEA States are thus, amongst other things, under a constant obligation to assess the need for intervention before imposing a PSO, and thereby a public service contract, irrespective of which award provision of the Land PSO Regulation is applied.[60]

Furthermore, the general principle under the Land PSO Regulation is that the market should be open.[61] This means that national authorities must identify the lack of willingness of market operators to provide services without reward before imposing a PSO. The assessment of the need and scope of PSOs is a presupposition for awarding contracts under Article 5 of the Land PSO Regulation. Therefore, the fact that national authorities need time to finish their assessment on the need and scope of new PSOs cannot qualify as an "exceptional circumstance" justifying the use of Article 5(3a).

The Norwegian Government has argued that, due to market disruptions caused by the Covid-19 pandemic, it was not possible to conduct a market analysis between 2020 and early 2024. In this regard, it should be noted that all restrictions to address the pandemic were lifted by Norway as of 12 February 2022.[62] As such, after that date there were no State interventions restricting the operations of the passenger railway market.

However, in the Reply, the Norwegian Government points to passenger developments following the lifting of restrictions claiming that the market could only be tested in 2024 at the earliest.[63] It should be noted that this argument was first raised in the Reply and, in any

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[57] Reply page 7.
[58] Reply pages 9 and 17.
[59] Annex II to the reply letter from Norwegian Government of 28 May 2025, page 14, our ref Doc No [1539662](1539662) .
[60] See page 14 of the Letter of Formal Notice, our ref. Document 1582453.
[61] See section 6.1 and footnote 43.
[62] Website of the Norwegian Government: "Timeline: News from Norwegian Ministries about the Coronavirus disease Covid-19", last visited 14 August 2026 (https://www.regjeringen.no/en/topics/health-and-care/public-health/timeline-for-news-from-norwegian-ministries-about-the-coronavirus-disease-covid-19/id2692402/)
[63] The Authority notes that no references were made to Covid-19 or problems with analysing the market offering in the substantiated decision of 18 June 2025. References to new obligations of EEA law and sudden market interest were, however, cited.

event, well after the decision was made to directly award the contract for Traffic Package South. The Authority recalls, as stated above in Section 6.2, that the EEA States are obliged to have the necessary data and information substantiating a decision, as in the current case, at the time of its adoption. An EEA State cannot subsequently alter, supplement or replace those reasons by relying on new justifications advanced only during the administrative or judicial proceedings.

Although it is not disputed that the Covid-19 pandemic in and of itself was initially an exceptional circumstance, it cannot be accepted that any effect or action taking place during the Covid-19 years or in their aftermath intrinsically constitutes an exceptional circumstance. On the contrary, the Authority notes that the same strict interpretation of exceptional circumstances applies to such effects or actions, which would have to be justified on a case-by-case basis. This is substantiated by case-law from the Court of Justice in other areas concerning Covid-19 which suggests that, although the pandemic and related Governmental measures may constitute exceptional circumstances, their legal consequences must be assessed concretely and proportionately in the circumstances of each individual case.[64]

In the current case, the Authority notes that at the point in time when restrictions were lifted, there was even more of an impetus to engage with the market in order to determine the level of services that market operators would be willing to provide. The operators could have held valuable insight into their forecasts of how the market would develop and thus their willingness to undertake passenger transport services. Furthermore, the award at issue concerns services to be provided from December 2027 onwards. In this regard, and in any event, the Authority contests that a full return of passenger demand to pre-Covid-19 levels was necessary in order to assess market interest for the provision of services more than three years in advance.

In the Reply, to justify the application of Article 5(3a), the Norwegian Government further argues that it did not have any other realistic alternatives to a direct award, and that the duration and scope of the temporary contract is proportionate.[65] In this regard, the Norwegian Government refers to how it was not able to extend the current public service contract with Go Ahead as well as pointing to the need for time to assess whether the PSO structure had to be realigned with evolving market conditions, while highlighting that the amended EEA legal framework meant that it was not possible to prepare a long-term award in time.

In this regard, the Authority would like to emphasize that the obligation to properly assess the need for a PSO was an existing obligation prior to the Amending Regulation.[66] The latter Regulation did not expand on the already existing obligation.[67]

Furthermore, the reason for the non-exercisability of the contract extension option was a clause conditioning it to the economic sustainability of the performance of the contract. As Go Ahead did not fulfil these criteria under the contract, the Norwegian Government

[64] Compare Case C-18/21 *Uniqa Versicherungen*, EU:C:2022:682, paragraph 32.
[65] Reply pages 6-7.
[66] Pursuant to the definition of a public service obligation in Article 2(e), which was not changed or replaced by the Amending Regulation: "a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that *an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward*" (Emphasis added). See the Case T-454/13 *Société nationale maritime Corse Méditerranée (SNCM) v European Commission*, EU:T:2017:134.
[67] Prior to the Amending Regulation the possibility to directly award a public service contract was more lenient compared to after the Amending Regulation but the obligation to assess the need for a PSO still existed. The Authority maintains that once a market has been opened, there is an obligation to analyse the need for intervention, primarily through a market analysis.

informed that it was not permitted to extend the contract. On that point, the Authority notes that exercisability of a contractual option is a matter of administrative and commercial planning. The "economic sustainability" condition in the contract was a result of a modification to the contract agreed upon by the Railway Directorate and Go Ahead in June 2022.[68] A competent authority must plan for the foreseeable risk that such a condition might not be met. A failed commercial negotiation or the non-materialization of a contractual option is in the Authority's opinion an inherent administrative risk, which can be anticipated, and thus not an atypical or exceptional event within the meaning of Article 5(3a).

Moreover, the contention that the Norwegian Government lacked any realistic alternatives to a direct award is not a relevant consideration in this case. The need for time to assess the necessity and scope of future public service contracts cannot constitute a circumstance justifying the application of Article 5(3a). On the contrary, as noted above, an assessment of the necessity and scope of a public service obligation is a prerequisite for the imposition of a public service contract. Accordingly, the absence of a proper market analysis demonstrating a market failure cannot amount to an exceptional circumstance within the meaning of Article 5(3a).

Additionally, the Authority has not received any convincing explanations as to why the Norwegian Government could not carry out a competitive tender for the temporary contract for the Traffic Package 1 South. The Authority considers that the Government could have determined the alleged need for a short-term contract prior to the autumn of 2024, and it maintains that there was sufficient time to initiate and finalise a legitimate tender procedure under the Land PSO Regulation. The Norwegian Government decided on the award for a temporary contract in autumn 2024. That would have left the Government with more than three years to competitively tender out that contract.

The Norwegian Government stated that competitive tendering of a short-term contract would be disproportionately costly for all involved.[69] However, those are economic reasons and economic reasons do not, in and of themselves, justify a derogation from the main rule of competitive tendering. This reasoning therefore does not justify an exemption under Article 5(3a). Tendering procedures may after all always include costs for the State and the tenderers; it would thus in many circumstances save costs in the short term to directly award a contract rather than tendering it out. However, in this context, the Authority emphasises that the reference to cost-efficiency in Recital 21 of the Land PSO Regulation concerns long-term efficiency gains from changing the scope of contracts. That Recital cannot be understood as allowing for a direct award under Article 5(3a) because the *interim measure* is said to be economically more viable or palatable than a competitive tender.

The Norwegian Government also claims in the Reply that "*[T]he provision* [Article 5(3a)] *has consistently been viewed as one that may be relied upon when exceptional conditions arise in the management of the PSO system, for example where the authorities need time to assess the impact of emerging commercial interest, to redefine the scope of the PSO obligations, or to complete a necessary restructuring of traffic packages.*"[70] The Norwegian Government, however, does not provide any further reasoning in support of this understanding and the Authority is unaware of any case-law supporting such a view.

Furthermore, the Norwegian Government argues that the Authority sets the threshold for applying the exception in Article 5(3a) too high, stating that the interpretation of "exceptional circumstance" cannot be so narrow that it deprives the *effet utile* of that provision.[71]

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[68] Reply page 5. The Authority notes the inconsistency in the Norwegian Government's position: while it claims that a market analysis could not have been carried out until 2024 due to market disruptions following the covid-19 pandemic, it held Go Ahead to normal market standards during that same period.
[69] See Document 1541435, page 15.
[70] Reply page 9.
[71] Reply page 14.

The Authority disagrees with this assertion and does not consider that its interpretation renders the provision inapplicable in practice. On the contrary, the Authority maintains that the conditions for applying Article 5(3a) must be interpreted in line with the general principles of interpretation and in accordance with the objectives pursued by the Land PSO Regulation. In the Authority's view, the provision requires a case-by-case assessment of the circumstances relied upon to justify recourse to the exception.

In the present case, the Authority has examined the circumstances relied upon by Norway in support of its decision to make a direct award under Article 5(3a). That examination concerns whether Norway has justified and demonstrated both the existence of the alleged exceptional circumstances and that those circumstances are capable of warranting recourse to an exception from the general rule of competitive tendering. For the reasons set out in this reasoned opinion, the Authority has concluded that Norway has not demonstrated the existence of exceptional circumstances capable of justifying the direct award of Traffic Package South under Article 5(3a).

Against that background, it cannot be argued that the Authority's interpretation of Article 5(3a) is so restrictive as to deprive the provision of its practical effect (*effet utile*). The fact that Norway has failed to substantiate, by means of sufficient data, evidence and reasoning, the existence of exceptional circumstances capable of justifying the direct award in the present case does not mean that the conditions laid down in Article 5(3a) cannot be satisfied in other cases. Accordingly, the principle of practical effect cannot be invoked to justify a broader derogation from the Land PSO Regulation than is supported by the wording, context and purpose of Article 5(3a).

6.5 On the adverse consequences from an *a maiori ad minus* perspective

In the Reply, the Norwegian Government argues that since a five-year direct award is permitted where a decision to change the scope of one or more contracts has been made, a two-year direct award justified by the need to make those assessments must be legitimate in light of what they cite as an *"a maiori ad minus"* perspective.[72]

In that regard, the Authority would like to stress that this comparison equates two incomparable cases. The first situation presumes a legitimate direct award, where it has been decided that changes to the scope of the contract are necessary in order to optimise the provision of the services, and the duration of the award is considered proportionate. The other situation is one where it has yet to be decided that any changes to the scope are required in order to optimise the services, which, in the Authority's view, presumes an illegitimate direct award. The Authority considers that a direct award in such circumstances, where the need to change the scope has neither been assessed nor determined, does not fulfil the criteria of Article 5(3a).[73]

The Norwegian Government further argues that the Authority's interpretation of Article 5(3a) would negatively impact the service offering to train passengers if the routes were to be split and not directly awarded.[74] This argument of the Norwegian Government in this regard is based on the incorrect presumption that the Authority claims that the routes of the PSO would need to be split up. The contention of the Authority in the current case is that

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[72] Reply page 15; It should be noted that in the Railway Directorate's substantiated decision of 18 June 2025, the Directorate refers to the award as a 2-year contract with the possibility of 1+1-year extension, thus being a contract with a duration of up to four years.
[73] See Section 6.3.
[74] Reply page 15 where the Government states: "[I]t would have negative impact on the service offering to train passengers (Annex 1 to the Ministry's letter of 28 May 2025, which notes that splitting TP1 alone would materially worsen the offer for more than 20 percent of passengers on the railway corridor) – and where such negative consequences could be avoided with the help of a short-term temporary award under Article 5(3a).".

the criteria of Article 5(3a) are not met, and the direct award cannot be based on that provision. The Authority considers that Article 5(3a) does not provide the competent authority with the possibility of postponing the assessment of what services the market could provide and to determine the scope and structure of the PSO.[75]

The Authority further notes that Article 5(3a) is not a legal basis for bundling of non-profitable and profitable routes, that is regulated by Article 2a(1) of the Land PSO Regulation. In any event, it appears that this argument put forth by the Norwegian Government is hypothetical as there are no indications that the routes will be split.[76]

In light of the reasoning set out in sections 6.1 to 6.5 above, the Authority concludes that the circumstances referred to by the Norwegian Government in the present case do not constitute "exceptional circumstances" within the meaning of Article 5(3a) of the Land PSO Regulation. The decision to directly award a temporary contract for Traffic Package 1 South to Vy fails to meet the strict interpretative standards required for exceptions from the principle of competitive tendering.

[75] As outlined in sections 6.1 to 6.4 above.

[76] It should be noted that the Railway Directorate issued a report on 9 February 2026 titled “Future traffic agreements: Scope and arrangement”. In the report the Directorate assesses the future setup of passenger PSO railway services in Norway. On page 98 of the report, the Directorate states that while the Service F5 Oslo-Kristiansand-Stavanger received some commercial interest, it is proportionate to include those services in a PSO bundle as splitting those services out would have significantly reduced the achievement of the transport policy goals. It is also stated that this assessment is valid until 2032. As such, it seems that the argument raised by the Norwegian Government is hypothetical. See Report of the Norwegian Railway Directorate: *Fremtidige trafikkavtaler: Omfang og innretning*, Oppdrag 24-2024. Dokument nr: 2025/525-6, 9 February 2026 https://www.jernbanedirektoratet.no/content/uploads/2026/02/Fremtidige-trafikkavtaler-omfang-og-innretning.pdf

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by deciding to directly award a public service contract for public passenger transport services by rail for Traffic Package 1 South in a situation where the direct award is not justified by exceptional circumstances, Norway has failed to fulfil its obligations under Article 5(3a) of Regulation 1370/2007 as amended by Regulation 2016/2338 and adapted to the EEA Agreement by Protocol 1 thereto.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

Done at Brussels.

For the EFTA Surveillance Authority

Arne Røksund President	Árni Páll Árnason Responsible College Member	Nuscha Wieczorek College Member

Melpo-Menie Joséphidès
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.