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Ministry of Transport
Postboks 8010 Dep
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Norway

Dear Sir or Madam,

Subject: Own initiative case concerning incorrect application of Article 5(3a) of Regulation 1370/2007

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 1370/2007¹ (hereafter "the Land PSO Regulation"), as amended by Regulation 2016/2338² ("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.

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 has 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"), covering the Sørlandet line, the Jær line and the Arendal line to the railway operator Vygruppen ("Vy") for a period of up to five years under Article 5(3a) of the Land PSO Regulation.

The announcement includes a mandate ("mandat"), which sets out more details on the measures which the Railway Directorate is supposed to carry out. That mandate is undated and not signed but the Directorate's understanding is that under Norwegian administrative law, the mandate is a binding instruction by the Ministry of Transport to the Railway Directorate as a subordinate public entity.

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 matter was also brought up by the Norwegian Government and discussed during the annual package meeting in Oslo, which took place on 24 and 25 October 2024.⁴

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.

² Of 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.

³ [Vy direktetildeles kontrakt på Sørlandsbanen, Jærbanen og Arendalsbanen fra 2027 - regjeringen.no](https://www.regjeringen.no).

⁴ See follow-up letter to the Norwegian Government of 29 November 2024, Doc No 1502318.

Following the announcement of 22 October 2024, the Directorate sent a request for information to the Norwegian Government on 30 October 2024.⁵ The Norwegian Government responded to the Directorate's letter on 27 November 2024.⁶

On 3 December 2024, the Authority received a complaint where the complainant alleges that the decision taken by the Ministry of Transport to instruct the Norwegian Railway Directorate to award the public service obligation (PSO) contract for Trafikkpakke 1 to Vy Gruppen A/S for a period of (up to) 5 years constituted a breach of Regulation (EC) No 1370/2007.⁷

The Directorate's preliminary view is that the decision to directly award a temporary contract cannot be justified under the provision of Article 5(3a) of the Land PSO Regulation, as the conditions justifying such a direct award of a public service contract are not fulfilled. The Land PSO Regulation completes the liberalisation of the railway market, and the legal framework currently provides that all public service contracts must be competitively tendered out following the end of the transition on 25 December 2023. Direct award of a public service contract applies now as an exception to the main rule and is only allowed in the specific circumstances set out in the Land PSO Regulation and which must be strictly interpreted.

1 Relevant EEA law

The Land PSO Regulation entered into force in the EEA on 1 February 2009. Following the adoption of the 4th railway package⁸ in 2016, the Land PSO Regulation was amended by the Amending Regulation. The Amending Regulation was incorporated into the EEA Agreement⁹ and entered into force on 1 June 2022.

Article 2 provides the definitions of the 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:

“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'

⁵ Document No 1494184.

⁶ Document No Document 1501678.

⁷ Case No 93321.

⁸ The 4th Railway Package is a set of 6 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.

⁹ Incorporated into the EEA Agreement by Joint Committee Decision No 248/2021 on 24 September 2021 at point 4a of Annex XIII

“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 shall be awarded. More specifically, Article 5(1) specifies:

“Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. 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.” (Our emphasis).

Article 5(3) contains the general principle of competitive tendering of public service contracts:

“Any competent authority which has recourse to a third party other than an internal operator, 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. 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.” (Our emphasis).

Article 5(3a) provides for the exception which the Norwegian Government has referred to in the decision to directly award a temporary contract to Vy of 22 October 2024:

“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 may decide to temporarily award new contracts directly where the competent authority considers that the direct award is

justified by exceptional circumstances. Such exceptional circumstances shall include situations where:

- 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
- changes to the scope of one or more public service contracts are required in order to optimise the provision of public services.

The competent authority shall issue a substantiated decision and shall inform [ESA] thereof without undue delay.

The duration of contracts awarded pursuant to this paragraph shall be proportionate to the exceptional circumstance concerned and, in any case, shall not exceed 5 years.

The competent authority shall publish such contracts. 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.”

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).

2 Relevant national law

Section 7d of the Railway Act of 11 June 1993 No. 100¹⁰ 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).”

Section 1 of Regulation on public passenger transport of 17. December 2010 No. 1673¹¹ 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

¹⁰ Lov 11. juni 1993 nr. 100 om anlegg og drift av jernbane, herunder sporvei, tunnelbane og forstadsbane m.m. (jernbaneloven).

¹¹ 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).

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.”

3 Background

3.1 Introduction

Since before the entry into force of the EEA Agreement, Norwegian authorities have granted compensation for unprofitable passenger railway services to meet defined transport needs based on the overall transport objectives. Norwegian authorities have directly awarded contracts for passenger railway services since the early 1990s. However, following a reform of the national legislation in 2017, certain public service contracts were tendered out via a competitive procedure.

3.2 The railway reform and traffic packages

A reform of the railway sector in Norway was initiated in 2015 where the intention was to increase competition and market access for passenger railway services in Norway.¹² The railway reform entailed four initiatives:

- i. **Structure** with the aim of clear division of labour and governmental responsibilities separated from infrastructure management.
- ii. **Business orientation** with new funding structure that increases customer focus and more efficient operations, with current safety and quality requirements.
- iii. **Lower barriers to entry** by separating the infrastructure and other production factors into neutral companies.
- iv. **Establishing competition** for the market for railway passenger services, maintenance of railway infrastructure and maintenance of rolling stock.

As a part of that reform, subsidiaries of NSB/Vy¹³ were restructured as independent entities to provide for open and non-discriminatory access to necessary services for ticketing, rolling stock and train maintenance. The management of railway infrastructure was vested in Bane NOR SF, which is a State limited company (statsforetak). An entity was created, Entur AS, to provide a central digital infrastructure for all public transport services in Norway, as well as ticketing services for railway operators. Norske Tog AS was created to purchase and own rolling stock on behalf of the Norwegian authorities. Finally, the ownership of Mantena AS which provides train maintenance services to train operators was transferred from Vy.

The railway reform brought about the competitive awarding of separate railway service contracts for geographically coherent but distinct parts of the railway network. The geographically different parts have been organized as five “traffic packages”, which cover five large parts of Norway. Each of the traffic packages include several railway lines within the respective area:¹⁴

¹² Section 1.1 of Meld. St. 27 (2014–2015).

¹³ NSB, now Vy Group is the largest land-based transport group in Norway. The company is owned by the Norwegian government and its Ministry of Transport and Communications.

¹⁴ Website of the Railway Directorate, “Trafikkavtaler”, last visited on 11 March 2025, [Trafikkavtaler - Jernbanedirektoratet](#); section 10.4.4 of Meld. St. 14 (2023–2024); website of the Norwegian Government, “Togtilbudet på Østlandet: Regjeringen avlyser konkurransene om trafikkpakkene 4 og 5”, last visited on 11 March 2025, [Togtilbudet på Østlandet: Regjeringen avlyser konkurransene om trafikkpakkene 4 og 5 - regjeringen.no](#); website of the Railway Directorate, “Konkurransen om

- i. **Traffic Package 1 South**, or Tender 1 South, covers the southern part of the railway network. This package encompasses the Sørlandet line, Arendal line and Jær line.
- ii. **Traffic Package 2 North**, or Tender 2 North, covers the central and northern part of the railway network. This package encompasses the Dovre line, Rauma line, Røros line, Trønder line, Meråker line, Nordland line, and Saltenpendelen line.
- iii. **Traffic Package 3 West**, or Tender 3 West, covers the western part of the railway network. This package encompasses Bergen line, Vossebanen line, and the lines between Arna and Bergen.
- iv. **Traffic Package 4 East**, or Tender 4 East, covers one part of the eastern side of the railway network. This package encompasses Østfold line, Gjøvik line, and the lines between respectively Spikkestad–Lillestrøm and Stabekk–Ski.¹⁵
- v. **Traffic Package 5 East**, or Tender 5 East, covers the other part of the eastern side of the railway network. This package encompasses the so-called InterCity-trains consisting of Skien–Eidsvoll line and Drammen–Lillehammer line, the local trains on Kongsberg–Eidsvoll line, Drammen–Dal line and Asker–Kongsvinger, as well as the lines between Porsgrunn and Notodden.¹⁶

The Railway Directorate is responsible for coordinating the railway sector, imposing public service obligations (“PSO”) and awarding public service contracts on behalf of the Norwegian authorities.¹⁷ The Norwegian Government has informed the Authority that the Railway Directorate is the relevant “competent authority in the context of the Land PSO Regulation.

The process for competitive tendering of passenger railway services was launched in March 2016. Traffic Package 1 South was tendered out in 2017, with the contract being awarded to the Norwegian railway operator Go Ahead in 2018. Traffic Package North was awarded to SJ Norge AS, while Traffic Package West was awarded to Vy. The traffic packages for the Eastern region were never competitively awarded. More specifically, the tender for Traffic Package East 4 was initiated in early 2021, but the process was cancelled in November 2021.¹⁸ The government also decided to not tender out Traffic Package East 5.

Trafikkkpakke 5 utsettes ett år, trafikkstart blir i desember 2025”, last visited on 11 March 2025, [Konkurransen om Trafikkkpakke 5 utsettes ett år, trafikkstart blir i desember 2025 - Jernbanedirektoratet](#); notice from the Railway Directorate on Doffin concerning a tender for Traffic Package East 4, [Trafikkkpakke 4 | Doffin, Database for offentlige anskaffelser](#).

¹⁵ Following the cancellation of the tender for Traffic Package East 4, the package is currently named as “Østlandet 1”: Website of the Norwegian Government, “Togtilbudet på Østlandet: Regjeringen avlyser konkurransene om trafikkkpakkene 4 og 5”, last visited on 11 March 2025, [Togtilbudet på Østlandet: Regjeringen avlyser konkurransene om trafikkkpakkene 4 og 5 - regjeringen.no](#); section 10.4.4 of Meld. St. 14 (2023–2024); website of the Railway Directorate, “Trafikkavtaler med Vygruppen for Austlandet”, last visited on 11 March 2025, [Trafikkavtaler med Vygruppen for Austlandet - Jernbanedirektoratet](#).

¹⁶ Following the cancellation of the tender for Traffic Package East 5, the package is currently named as “Østlandet 2”, see footnote 9.

¹⁷ Website of the Norwegian Government, “Slik er norsk jernbane organisert”, last visited on 11 March 2025, [Slik er norsk jernbane organisert - regjeringen.no](#).

¹⁸ Website of the Norwegian Government, “Togtilbudet på Østlandet: Regjeringen avlyser konkurransene om trafikkkpakkene 4 og 5”, last visited on 11 March 2025, [Togtilbudet på Østlandet: Regjeringen avlyser konkurransene om trafikkkpakkene 4 og 5 - regjeringen.no](#)

The contract with Go Ahead from 2018 on Traffic Package 1 South will expire in January 2027 but can be extended by two additional years. However, based on the information received from the Norwegian Government and the current operator, there does not seem to be consensus on whether that option can be applied.

3.3 Temporary direct award for Traffic Package 1 South

On 22 October 2024, the Norwegian Government announced its decision to directly award a temporary contract to Vy for Traffic Package 1 South. The contract would be effective from January 2027 following the expiry of the contract with Go Ahead. The contract duration would be up to five years. Although the decision to directly award the contract is taken, both the award and the signing of the contract has yet to take place. However, the Norwegian government has decided that a prior call for competition does not need to be issued for the award of Traffic Package 1 South, which the Directorate preliminary finds to be in violation of EEA law, as will be further elaborated in section 5.3.

The award decision was manifested in a mandate from the Ministry of Transport to the Railway Directorate instructing the Directorate to directly award the contract in question.¹⁹ The reasoning for the decision is stipulated in the mandate, which states the following:

“Changes in EEA legislation entail stricter requirements than before for the award of public service agreements on railways. This creates a need to reassess the scope and division of traffic agreements. Such an assessment is time-consuming, and the Norwegian Railway Directorate shall therefore ensure the functioning of passenger services covered by Traffic Package 1 South, which expires first, until the assessment is completed and a new long-term traffic agreement(s) can be concluded.”

The mandate foresees a structural change in the traffic packages due to the entering into force of the 4th Railway Package. The Ministry expresses that those changes in the legislation constitute *exceptional circumstances* that justify a direct award based on Article 5(3a) of the Land PSO Regulation. In particular, the land PSO Regulation, as amended, places stricter requirements on EEA States in assessing the need and scope for public service contracts. This entails conducting a market analysis and correctly establishing market failure in order to justify state intervention. If the market is willing to provide the given services commercially, according to the Ministry, then there is no need for a PSO.

In its reply letter of 27 November 2024, the Norwegian Government explains that there is a need to reconsider the scope of Traffic Package 1 South. This conclusion was based on the fact that two railway operators expressed an interest in offering certain lines in Traffic Package 1 South on commercial terms.

More specifically, the Railway Directorate has been instructed to perform market analyses to assess the need and scope of public service railway contracts prior to awarding new ones. As such, the Railway Directorate assessed the market for a new Traffic Package 1 South from 2027, following the anticipated expiry of the contract with Go Ahead. The Norwegian Government explains that the Railway Directorate published a Request for information (“RFI”) and received a reply from Flytoget and Vy.²⁰ Flytoget expressed an interest to commercially operate railway services between Kristiansand and Oslo, while Vy expressed an interest in operating the Kristiansand–Oslo and Jær line partially on commercial terms.

¹⁹ Mandate from Ministry of Transport to the Railway Directorate of 2024, [*mandat-tp1.pdf](#). According to the reply letter from the Norwegian Government of 27 November 2024, the mandate was requested and drafted by the Railway Directorate.

²⁰ Annex 3 to reply letter of 27 November 2024, “Flytoget’s answer to The Railway Directorate’s RFI for Traffic Package 1 South” and Annex 4, “Vy’s answer to The Railway Directorate’s RFI for Traffic Package 1 South”.

The Norwegian Government holds that there is an increasing interest to commercially operate more railway lines in Norway. Therefore, it is considered to be necessary to reassess the structure of all the Traffic Packages, and whether or not some lines should be moved to another Traffic Package. On this basis, the Norwegian Government argues that it is necessary to postpone the award of a new long-term agreement for Traffic Package 1 South. In addition, the Railway Directorate found competitive tendering of the temporary contract to be unrealistic, due to the short duration of the agreement.

Furthermore, the Norwegian Government provides that the Railway Directorate assessed the conditions under Article 5(3a) prior to announcing the decision to directly award the contract, see section 5.3.1 below. Specifically, the Norwegian Government points to two sets of assessments conducted by the Railway Directorate. The first one is a general assessment of the exceptions in the Land PSO Regulation justifying a direct award. This assessment was done in mid-2023.²¹ The second assessment was conducted specifically for Traffic Package 1 South and consists of an internal memorandum from the Railway Directorate to the Ministry of Transport.

In the assessment specific to Traffic Package 1 South, the Railway Directorate points to the second indent of Article 5(3a), where changing the scope of agreements in order to optimize the services is an exceptional circumstance justifying a direct award. It argues that if:

“[The Railway Directorate] must take into account the interests of Flytoget or other commercial actors in the market, and as a consequence must change the composition of the future traffic agreements, we believe that we have good arguments for a short-term direct-awarded agreement”.²²

The Norwegian Government also elaborated on why it is of the opinion that the agreement with Go Ahead cannot be extended. The Norwegian Government argues that the option provided in the contract cannot be triggered unless the operator has positive forecasts for the extension period.²³

4 The Directorate's assessment

4.1 The general principle of competitive tendering of public service contracts

Article 5(3a) of the Land PSO Regulation provides that under certain *exceptional circumstances*, EEA States may decide to directly award a public service contract. That provision is an exception from Article 5(3), which provides that the general principle is that railway passenger public service contracts are to be awarded on the basis of a competitive award.²⁴

Article 5(3a) makes it clear that a contract can only be directly awarded if it can be justified by *exceptional circumstances*. While the situations provided for in the provision are not exhaustive, it is settled case-law that exceptions must be interpreted strictly.²⁵

²¹ Annex 1 to reply letter of 27 November 2024, “Response to Assignment 5 in The Railway Directorate's allocation letter 2023”.

²² The Authority's translation of Annex 9 to reply letter of 27 November 2024, “The Railway Directorate's note 28 August 2024”.

²³ Annex 10 to reply letter of 27 November 2024, “Renegotiated traffic agreement between The Railway Directorate and GAN”, section 3.5 (b).

²⁴ In addition, the Regulation includes other provisions permitting derogation from that principle, such as Article 5(4) and 5(4a), which are not relevant in this case.

²⁵ Judgement of 13 December 2007 in case C-337/06 *Bayerischer Rundfunk and Others*, paragraph 64.

It is also settled case law that the party relying on an exception must prove that the conditions for doing so are fulfilled.²⁶ In other words, it is for the Norwegian government to demonstrate that the conditions in Article 5(3a) are met.²⁷ The EFTA Court has established that this entails the following:

“It is settled case law that it is for the competent national authorities, where they adopt a measure derogating from a principle enshrined in EEA law, to show in each individual case that the measure is appropriate to attain the objective relied upon and does not go beyond what is necessary to attain it. It must also be pointed out that reasons invoked by an EEA State as justification *must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments ...*”²⁸ (Our emphasis).

4.2 Preliminary observation: The decision to directly award a contract on the basis of Article 5(3a) results in a breach

The Directorate notes that a temporary contract on the basis of Article 5(3a) of the Land PSO Regulation has not yet been awarded for the Traffic Package 1 South. In addition, the Directorate notes that the Railway Directorate is still assessing the scope of the temporary contract. Furthermore, the Norwegian Government informed the Directorate by email on 27 January 2025 that the Railway Directorate intended to publish a notification in the Official Journal in accordance with Article 7(2) of the Land PSO Regulation at least one year before entry into force of the contract.²⁹ The Norwegian Government informed that the notice could be issued as late as December 2025 or early January 2026.

While a contract is yet to be awarded and a notice in accordance with Article 7(2) of the Land PSO Regulation has not been published in the Official Journal, the Norwegian authorities have already decided to directly award the contract pursuant to Article 5(3a) of the Land PSO Regulation. More specifically, the Railway Directorate seems to have requested that it should be instructed to carry out an award under Article 5(3a)³⁰ and the responsible Ministry has issued such binding instructions, stipulating the procedure to be used and provided for other specifics such as by when such contract shall be awarded. The press release is unequivocal and clearly states that the contract is to be directly awarded to Vy for up to five years from 2027.

In settled case law, the Court of Justice of European Union (“the CJEU”) focuses on the moment the public authorities choose the type of procedure to be followed and definitely 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.³¹ In this context, the CJEU has referred to “the decision which is alleged to have infringed

²⁶ Judgement of 2 June 2005 in case C-394/02 *Commission v Greece*, paragraph 33.

²⁷ See, for example, judgement of the CJEU of 11 January 2005 in case C-26/03, *Stadt Halle*, paragraph 46.

²⁸ Judgement of 5 May 2021 in case E-8/20 *Criminal proceedings against N*, paragraph 95.

²⁹ Doc No 1521624.

³⁰ Email 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 Doc No 1501664).

³¹ Judgement of 3 October 2019 in case C-285/18 *Irgita*, paragraph 31; judgement of 5 October in case C-337/98 *Commission v France*, paragraphs 36 and 37; judgement of 11 July 2013 in case C-576/10 *Commission v Netherlands*, paragraph 52.

EU law”,³² thereby acknowledging that a decision taken prior to the award of a contract may breach EEA law, notwithstanding that the contract itself has not yet been awarded.

The mandate from the Ministry of Transport provides a clear instruction to use the procedure set out in Article 5(3a) and directly award the contract for Traffic Package 1 South. As such, the procedure for the award is already decided in a binding form.

4.3 The existence of exceptional circumstance

The EFTA Court has confirmed that exceptions must be interpreted strictly, and their scope must be determined with regard in particular the aims pursued by that act.³³ Therefore, a provision allowing for a derogation from the general principle cannot be interpreted in such a way to extend its effects beyond what is necessary to safeguard the interests which it seeks to secure.³⁴

The European Commission has stressed the same principle in its interpretive guidelines on the application of the Land PSO Regulation.³⁵ In the guidelines, the Commission states that Article 5(3a) gives the competent authorities some discretion to directly award public service contracts for rail transport under *exceptional circumstances*. Furthermore, the Commission describes situations which might qualify, such as when a competitive tendering procedure would not ensure the most effective and cost-efficient provision of services. Specifically, these circumstances may include situations where multiple competitive tendering procedures are already ongoing within the jurisdiction, thereby potentially limiting the number and quality of bids received. Additionally, *exceptional circumstances* may exist where modifications to the scope of one or more public service contracts are required to optimize the provision of public transport services, such as aligning the expiration dates of multiple existing contracts to facilitate future integration and operational efficiency.

The notion of *exceptional circumstances* under Article 5(3a) of the Land PSO Regulation is, therefore, to be interpreted strictly, as outlined in recital 21 of the amending regulation and in accordance with the general principles of the Court referred to above.

Moreover, the competent authority must comply with transparency obligations by promptly notifying the Authority of the decision to award a contract under this provision, including a substantiated decision.³⁶

These safeguards ensure that the use of direct awards remains an exception rather than a rule, thereby preserving the integrity of the general principle of competitive tendering under the Land PSO Regulation.

³² Judgement of 11 July 2013 in case C-576/10 *Commission v Netherlands*, 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 capable of review), must be interpreted broadly (see, for example, judgement of 7 September 2021 in case C-927/19, *Klaipėdos*, paragraph 105).

³³ Judgement of 18 June 2021 in case E-10/20 *ADCADA Immobilien AG PCC in Konkurs v Finanzmarktaufsicht*, paragraph 47.

³⁴ Judgement of 7 July 2022 in Case C-13/21 *Pricoforest SRL v. ISCTR*, paragraph 30 and caselaw cited.

³⁵ 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.

³⁶ It should also be noted that the Authority has not received any substantiated decision from the Norwegian Government, “with undue delay”, as referred to in the second subparagraph of Article 5(3a).

The Directorate's preliminary view is that the Norwegian Government has failed to demonstrate the existence of an exceptional circumstance in the present case which would justify the use Article 5(3a).

The Norwegian Government refers to the introduction of new legislation, i.e. the entering into force of the 4th Railway Package in the EEA, and the subsequent need to reconsider the PSO obligations as an exceptional circumstance. More specifically, the Norwegian Government relies on the fact that there is commercial interest to operate the Oslo–Kristiansand and Jær lines in Traffic Package 1 South. The Norwegian government argues that this finding prompts the Railway Directorate to reconsider the genuine need for a public service contract for the named lines, and therefore to reconsider the scope of Traffic Package 1 South.

The Directorate is not convinced by these arguments. Firstly, the Directorate finds that the introduction of a new legislation *as such*, and the subsequent need for adjusting the national system, cannot be characterized as an exceptional circumstance in the context of the Land PSO Regulation. In particular as the changes referred to have been applicable to Norway as of 1 June 2022.

The Land PSO Regulation establishes competitive tendering as the general principle for awarding public service contracts as is stated in Recital 19 of the Amending Regulation. An extensive interpretation of “exceptional circumstances” in Article 5(3a) will render the risk of the Regulation becoming ineffective in pursuing that objective. As the Directorate has already stated in this letter, it is well established case law of the European Courts that derogations from the main rule must be interpreted strictly.³⁷ Furthermore, the obligation to properly assess the need for a PSO was further emphasised in the Amending Regulation but did not expand on the already existing obligation, as established in the SNCM case.³⁸

Therefore, it cannot be maintained that the 4th Railway Package was an unforeseeable circumstance for the Norwegian Government, and it cannot be considered to constitute a circumstance which can be characterized as “exceptional”.

In its reply letter from 27 November 2024, the Norwegian Government holds that changing the scope of Traffic Package 1 South is required to comply with the requirement introduced by the Amending Regulation.

While EEA States have a certain discretion when specifying PSOs, they must always do so in accordance with the applicable legal framework. In the railway passenger transport sector they must respect, *inter alia*, the general principles of EEA law as well as Article 2a(l) and the definition of PSO in Article 2(e) of the Land PSO Regulation.

As has already been stated by the Directorate in this letter, the obligation to assess the willingness of the market to provide the services in question had been established by the CJEU prior to that the entry into force of the 4th Railway Package.³⁹ Therefore, the obligation to do so was not introduced by the revision of the Land PSO Regulation. Therefore, the Norwegian Government had ample time to comply with the alleged new requirements.

The application of the Land PSO Regulation as such presupposes that the public transport in question is correctly identified as a service of general interest. If there is no market failure and any need for a PSO, then the market shall be free to provide the services in question

³⁷ Judgement of 13 December 2007 in case C-337/06 *Bayerischer Rundfunk and Others*, paragraph 64.

³⁸ Judgments in Case T-366/13 *France v Commission* and T-454/13 *SNCM v Commission*, in particular paragraph 134.

³⁹ Judgement of 13 December 2007 in case C-337/06 *Bayerischer Rundfunk and Others*, paragraph 64.

without intervention from the State. That process is part of the ordinary application of the Land PSO Regulation and cannot constitute an exceptional circumstance.

By relying on the argument that a temporary direct award is justified when the scope of the contracts must be changed to comply with the Land PSO Regulation, the EEA States would be able to circumvent the obligation to award contracts following a competitive tender whenever there is any need to revise the scope of a PSO. While the Land PSO Regulation foresees that, in very specific circumstances, temporary awards can be justified, the fact that the state is under an obligation to properly assess the need for the PSO or that the scope of the PSO might have to be revised cannot be used as a justification for directly awarding a PSO contract with the aim of reconsidering the structure of PSO bundles in question.⁴⁰

Finally, in its reply letter, the Norwegian Government holds that it is “time consuming” to assess the need of changing the scope of Traffic Package 1 South. Furthermore, the Norwegian Government provides that it takes three years to plan, tender and conclude a new agreement. When the temporary award was announced by the Norwegian Government more than two years remained of the current PSO contract and none of these arguments are supported with evidence or any substantiation. As such, they cannot be relied upon as exceptional circumstances in the context of Article 5(3a).

In light of the above, the Norwegian Government is invited to submit its observations on the content of this letter by 24 April 2024. After that date, the Authority will consider, in light of any observations received from the Norwegian Government, whether to initiate infringement proceedings in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice.

Yours faithfully,

Jónína S. Lárusdóttir
Director
Internal Market Affairs Directorate

This document has been electronically authenticated by Jonina S. Larusdottir.

⁴⁰ The Authority notes that the Norwegian Government is currently assessing the scope of the temporary contract, and whether or not the Kristiansand–Oslo and Jær lines should be included in the agreement. The Norwegian Government informed that the assessment will be finished by February 2025. This seems to contradict the mandate to the Railway Directorate, as the mandate instructs the Directorate that the scope of the PSO should be identical to the current contract. The Authority has no information on whether the mandate has been amended or the outcome of that revision.