



ROYAL NORWEGIAN MINISTRY OF
TRADE, INDUSTRY AND FISHERIES

EFTA Surveillance Authority
Rue Belliard 35
B-1040 BRUSSELS
BELGIUM

Your ref
84262

Our ref
19/6536-2

Date
11 December 2019

Dear Madam,

Regarding request for information concerning restrictions on subcontracting in the field of public procurement in Norway

Further to your letter dated 13 November 2019, where the Norwegian Government is requested to provide an assessment concerning restrictions on the number of contractors in the supply chain in Norway;

The letter refers to the recent ruling from the Court of Justice of the European Union ("CJEU") in Case C-63/18, *Vitali*¹ and, in light of this ruling, the EFTA Surveillance Authority ("the Authority") informs that it has undertaken to examine the compatibility of the applicable Norwegian public procurement legislation.

1. The question put forward by the Authority

The Authority requests the Norwegian Government, by the Norwegian Ministry of Trade, Industry and Fisheries, to provide an assessment of the compatibility of (i) section 19-3 of the Norwegian Regulation dated 12 August 2016 No. 974 on Public Procurement ("the Procurement Regulation") with Directive 2014/24/EU ("the Procurement Directive") and (ii) section 7-8 of the Norwegian Regulation dated 12 August 2016 No. 975 on Procurement in the Utility Sectors ("the Utility Regulation") with Directive 2014/25/EU ("the Utilities Directive"). The Authority explicitly requests the Norwegian Government to explain the justification for the respective provisions with reference to the CJEU's judgement in *Vitali*, in particular the matters considered by the CJEU in paragraphs 40 and 44.

¹ Judgement of the Court of Justice of 26 September 2019, *Vitali SpA v Autostrade per l'Italia SpA*, C-63/18, EU:C:2019:787

Postal address
Postboks 8090 Dep
0032 Oslo
postmottak@nfd.dep.no

Office address
Kongens gate 8
www.nfd.dep.no

Telephone
+47 22 24 90 90
Org. nr.
912 660 680

Department
Department of
Competition Policy,
Company Law and
Economic Analysis

Reference
Lars Hallvard
Kvarsnes
+47 22 24 66 27

2. EEA-law in light of the CJEU's judgement in *Vitali*

In the *Vitali* judgement, the CJEU points out that the Procurement Directive explicitly allows for Member States to provide rules in their national legislation that in some respects are more stringent than those provided for by the directive as regards to subcontracting, provided that the rules are compatible with EU law, as stated in paragraph 33 of the judgement.

Furthermore, the CJEU refers to recital 41 in the Procurement Directive, which states that nothing in the directive should prevent the imposition or enforcement of measures necessary to protect for instance public policy, provided that those measures are in conformity with the Treaty on the Functioning of the European Union ("TFEU").²

The CJEU also refers to Case C-425/14, *Impresa Edilux and SICEF*³, which states that the Members States must be recognized as having a certain discretion for the purpose of adopting measures intended to ensure observance of the principle of transparency, which is binding on contracting authorities in any procedure for the award of a public contract. Moreover, the CJEU in *Impresa Edilux and SICEF* finds that combatting the phenomenon of infiltration of the public procurement sector by organized crime constitutes a legitimate objective capable of justifying a restriction on the fundamental rules and principles of the TFEU which apply in public procurement procedures. However, the CJEU, in *Vitali*, concludes that the restriction, as adopted by Italy, goes beyond what is necessary to achieve said objective.

The question under EEA-law is therefore whether a restriction imposed by an EEA Member State, aiming to combat, for instance, work related crime, is appropriate, necessary and proportional in order to achieve the intended policy objective.

3. Background for the Norwegian regulations

The Norwegian provisions on limitations on the maximum number of links in the supply chain is, as was the case in Italy, based on the objective of combating work related crime. As this was accepted by the CJEU in *Vitali*, we therefore consider combating work related crime to be a legitimate policy objective justifying a restriction on the fundamental freedoms of the TFEU and of the EEA-agreement. Nevertheless, the Norwegian Government would like to underline that the relevant sections in the Norwegian regulations are substantively different from the one adopted by Italy, with respect to the structure of the provisions, the scope and the effectiveness in achieving the intended policy objective.

The Italian regulation in question in *Vitali*, as understood by the Norwegian Government, imposes a quantitative limit on the use of subcontracting in any contract, regardless of sector, awarded through a public procurement procedure. The Norwegian regulations do not set a quantitative limit on the use of subcontractors, but rather imposes a restriction on the number of links in the supply chain. The provisions aim to increase transparency and make it

² This was also the case prior to the 2014 directives, as confirmed by the CJEU in the judgement of the Court of Justice 27 November 2019, *Tedeschi et Consorzio Stabile Istant Service*, C-402/18 paragraph 42.

³ Judgement of the Court of Justice 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:2015:721, paragraph 26 and the case law cited, and paragraphs 27 and 28.

possible for contracting entities to have effective means of control in order to combat work related crime.

In recent years, The Norwegian Government has increased its attention towards combating work related crime. Prior to the transposition of the Directives, the Norwegian Government launched a strategy for combating this type of criminal activity.⁴ The strategy has since been revised several times, at the latest in 2019. The consequences of work related crime have a serious negative impact on the individuals being affected, for economic entities and for the respective sectors, and for society as a whole. The revised 2019 strategy refers to a study carried out on behalf of the Norwegian Tax Authority, which estimated that tax evasion connected to work related crime amounted to approximately 12 to 60 billion NOK in 2015.⁵ The adoption of limitation on the maximum number of links in the supply chain, was one of a select few key points in the 2015-2016 strategy.

Work related crime has been, and still is, an issue that needs addressing in the Norwegian labour market. In the Norwegian official report, NOU 2014:4, on the simplification of rules relating to public procurement under the EEA-thresholds,⁶ a limitation on the number of links in the supply chain was suggested by a minority of the members of the government appointed committee. In the hearing of the report, the suggestion received support from, amongst others, the Norwegian Union of Municipal and General Employees, LO, which backed its support for the suggestion by a research paper from the independent social science research foundation, Fafo.⁷

In this paper, the researchers pointed out that the shorter the supply chain, the easier it was to control. Information from the Norwegian Tax Authority stated that criminal organizations, especially in the construction sector, have a wide reaching influence and are able to issue fictitious invoices on a large scale.⁸ The profits from criminal activity is often distributed through subcontractors in the lowest level of the supply chain. A limitation in the number of links can therefore enable detection of work related crime and facilitate an effective surveillance of the economic operators in the supply chain. Limiting the number of links in the supply chain can therefore contribute to a more level playing field for economic operators who operate within the law, in the most exposed sectors. The measure must be seen in connection with other measures in this area, such as strengthened operative cooperation between the Norwegian Labour Inspection Authority, the Police, the Norwegian Tax Authority, the Norwegian Labour and Welfare Administration and other relevant public authorities in order to detect criminal activities.

⁴ The Norwegian Government's strategy for combating work related crime 2015-2016 is available on [the Government's home page](#).

⁵ See the Norwegian Government's revised strategy for combating work related crime 2019, page 6. The revised 2019 strategy is available on [the Government's home page](#).

⁶ The Norwegian official report, NOU 2014:4, is available on [the Government's home page](#).

⁷ The Fafo paper, *Kortere kjeder – mindre sosial dumping? Om begrensninger i antall ledd i kontraktskjedene i bygg og anlegg*, Fafo-notat 2014:09, is available on [Fafo's home page](#).

⁸ Ibid., page 17.

In other words, the restriction imposed in the Norwegian regulations should be considered as appropriate and necessary for achieving the intended policy objective. Furthermore, it constitutes an important part of the Norwegian initiative to tackle work related crime. We will now go on to assess whether the restriction is proportional.

4. The proportionality of the provisions in the Norwegian regulations

In assessing the proportionality of the limitation on the number of links in the supply chain, the Norwegian Government would like to emphasize three specific points that separate Norwegian provisions from the Italian provision considered in *Vitali*.

First of all, the Norwegian provisions do not limit the number of subcontractors as such, they only put a restriction on the length of the supply chain. Secondly, the Norwegian provisions are limited to certain sectors where work related crime is a considerable issue. And thirdly, there are certain exemptions from the Norwegian provisions allowing for a case-by-case assessment related to effective competition and unforeseen circumstances. We will elaborate on these points in the paragraphs below.

The Norwegian provisions in question allow for three links in the supply chain; the main contractor and an additional two links of subcontractors. Moreover, the Norwegian regulations do not limit the number of horizontal links in each level of the supply chain. This means that, for instance, the subcontractor at the second level of the supply chain can enter into contracts with as many subcontractors as needed to fulfil its contractual obligations, as long as they are arranged in a horizontal structure. Consequently, the Norwegian Government is of the opinion that the provisions do not substantially affect, for instance, the access for small and medium-size enterprises to obtain work on contracts in the public sector. By allowing for three links in the supply chain, small and medium-sized enterprises have ample opportunity to participate in the fulfilment of these contracts. The Norwegian provisions therefore appear less restrictive and less burdensome than the Italian provision considered by the CJEU in *Vitali*.

The Norwegian provisions are also limited to two specific sectors, i.e. public works contracts and contracts related to cleaning services. In these sectors the Norwegian Labour Inspection Authority has uncovered a substantial and considerable challenge with work related crime.⁹ This shows that the restriction is limited to address a specific issue in specific sectors. As we understand it, this was not the case with the Italian provision.¹⁰

⁹ For documentation, please see the Norwegian Labor Inspection's annual reports from 2012 to 2019, available on [the Norwegian Labour Inspection's home page](#). This finding is shared by the findings in the joint report from the Norwegian Labour Inspection, the Norwegian Tax Directorate, Norwegian Labour and Welfare Administration, the Norwegian Food Safety Authority, the Norwegian Directorate of Immigration, the Directorate of Norwegian Customs, the Norwegian National Police Immigration Service, the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime, *Arbeidslivskriminalitet i Norge – Situasjonsbeskrivelse 2014*, available on the [home page of the Norwegian Police](#). As stated in these reports, work related crime is a challenge in other sectors besides public works and cleaning services. However, it is in these sectors that there is a corresponding issue related to the length of the supply chains.

¹⁰ As discussed by the CJEU in *Vitali* paragraph 44.

Lastly, the Norwegian provision includes two important exemptions; the first of which stating that the contracting entity may accept additional links in the supply chain, if it is necessary in order to ensure adequate competition. Competition is one of the most effective measures to ensure the best quality to price ratio for public buyers, as well as a functioning private market. The exemption is therefore essential in order to maintain an effective procurement regime, stimulating competition between economic operators.

The second exemption states that contracting authorities can accept additional links in the supply chain, after entering into a contract, due to unforeseen circumstances, if it is necessary in order to complete the contract. This exemption allows for an appropriate execution of the contract.

The Italian provisions implemented a quantitative restriction on the use of subcontractors. The CJEU found that the objective of this restriction could be achieved by applying the various rules provided for in the Directive related to subcontractors. Amongst other things, the Directive allows for control and surveillance of subcontractors in order to apply the rules on exclusion grounds.¹¹ The aim of the provision in the Norwegian regulations in question, is to make it possible, in practice, for the contracting entity to control and surveillance economic operators acting as subcontractors, and through this control and detect work related crime. The detection of criminal activity is often very difficult, however it can be exceedingly difficult when the contracting entity and the Labour Inspection Authority is faced with long and complicated supply chains. Shorter supply chains are easier to follow, more readily understood and the subcontractors are closer to the main contractor, which in turn makes communication between an entity in the supply chain and the contracting entity easier.

Furthermore, the CJEU highlights that the Italian provision does not allow for any assessment on a case-by-case basis by the contracting entity.¹² As shown above, the Norwegian provisions do allow for a case-by-case assessment related to the competition aspect of the procurement and to ensure appropriate execution of the contract due to unforeseen circumstances.

Had the Norwegian provisions allowed for a case-by-case assessment of either the risk related to work related crime or the nature and complexity of the proposed supply chain, the regulation would not necessarily be effective in reaching the intended policy objective. The Norwegian Government is of the opinion that such an assessment would be difficult to carry out, and it would also be burdensome on both the economic operator and the contracting entity. The assessment would have to show with a certain degree of probability that the entities in the proposed supply chain would be easy to control and surveil. It must be kept in mind that, judging from experience, a number of entities in these sectors intend to carry out criminal activities related to, for instance, social dumping and tax evasion.

¹¹ For instance in connection with the exclusion grounds in Article 57 of the Procurement Directive, which are referred to in Article 71 (6)(b) concerning subcontractors.

¹² As discussed by the CJEU in *Vitali*, paragraph 40.

On this background, it is likely that some entities will make an effort to appear forthcoming and transparent, even though there may be a number of irregularities in their business conduct. The assessment would therefore have to be carried out with a certain intensity. The public authorities consulted in connection with the revised 2019 strategy, stated that the criminal entities have become more adaptable in order to avoid detection, and better at hiding their criminal conduct behind apparently legal fronts. Thus, the detection and combatting of work related crime has become increasingly difficult compared to previous years.¹³

5. Conclusion

The Norwegian Government is of the opinion that section 19-3 of the Procurement Regulation and section 7-8 of the Utility Regulation constitutes restrictions with a legitimate policy objective in relation to the EEA-agreement, that the respective provisions are appropriate, and that they do not go further than what is necessary and proportionate in order to achieve the pursued policy objective. The Norwegian Government is also of the opinion that the EEA Member States should be given a certain margin of appreciation when tackling matters related to the prevention of crime. Otherwise the discretion as stated in recital 41 of the Procurement Directive and 56 of the Utilities Directive would essentially be rendered void and without content.

If the Authority has any further questions, please do not hesitate to contact us.

Yours sincerely,

Monica Elisabeth Auberg
Deputy Director General

Lars Hallvard Kvarsnes
Senior Adviser

This document is signed electronically and has therefore no handwritten signature

¹³ See the Norwegian Government's revised strategy for combating work related crime 2019, page 3. The revised 2019 strategy is available on [the Government's home page](#).