

Case No: 69548 and 69656
Event No: 620449
Dec.No.: 243/12/COL

EFTA SURVEILLANCE
AUTHORITY

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 the principle of non-discrimination laid down in Article 4 and
Article 48 of the EEA Agreement**

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 the principle of non-discrimination laid down in Article 4 and Article 48 of the EEA Agreement

1 Introduction

By a letter dated 15 March 2011 (Event No 590357), the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had opened an investigation into contracts awarded by the County of Aust-Agder (*Aust Agder Fylkeskommune*, hereafter "Aust-Agder County") for the supply of passenger transport services by bus. In that letter, the Authority invited the Norwegian Government to provide information concerning the most recently awarded contracts for bus transport services by Aust-Agder County, including information on the total value of these contracts, the form of remuneration, publications, prolongations and copies of the contracts.

By letter dated 25 March 2011 (Event No 592012), the Authority informed the Norwegian Government that it had received a complaint about the aforementioned issue and that, for the purpose of efficient case-handling, the complaint case and the Authority's own-initiative case would be handled jointly. By letter dated 14 April 2011 (ref. 11/991), the Norwegian Government replied to the Authority's letter of 15 March 2011, providing partly the information requested by the Authority.

On 12 October 2011, the Authority sent a letter of formal notice to Norway (Event No 607316) concluding that, by allowing Aust-Agder County to award concessions for passenger transport services by bus without any form of publication, and to prolong these concessions without any form of publication, the Kingdom of Norway has failed to comply with the principles of non-discrimination and transparency arising from Article 4 and Article 48 of the EEA Agreement. The case was also discussed at the package meeting in Oslo on 11 November 2011.

By letter dated 19 December 2011 (ref. 11/1708), the Norwegian Government replied to the Authority's letter of formal notice. The Norwegian Government extensively referred to arguments and conclusions expressed by Aust-Agder County, enclosed in the reply, and invited the Authority to consider the County's arguments.

In the letter of 19 December 2011, the Norwegian Government expressed the view that, contrary to the conclusion of the letter of formal notice, the award of the concessions and the subsequent prolongations were not in breach of the non-discrimination principle laid down in Article 4 and Article 48 of the EEA Agreement. According to the Norwegian Government, the concessions were awarded in accordance with the EEA Agreement because:

- (1) They were awarded in accordance with the transitional rules of Regulation No.1370/2007¹ and the decision-making practice of the European Commission;

¹ Regulation (EC) No. 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (hereafter "Regulation 1370/2007").

- (2) They were awarded in a transparent manner;
- (3) Several of the relevant contracts lack cross-border interest.²

Furthermore, the Norwegian Government applied for the Authority's approval under Article 8(3) of Regulation 1370/2007 in case the Authority maintained the conclusion expressed in the letter of formal notice. This provision allows public service contracts covered by Regulation 1370/2007 to continue until they expire where their termination would entail undue legal or economic consequences and provided that the Authority has given its approval.

Finally, the Norwegian Government referred to the Authority's press release dated 18 July 2011³ on a new policy in procurement cases, stating that it should reasonably be expected that the Authority would apply the new policy only in relation to procurements that took place after the notification of the change in policy.

2 Relevant EEA law

2.1 The EEA Agreement

Article 4 reads as follows:

Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

Article 48 reads as follows:

The provisions of an EC Member State or an EFTA State, relative to transport by rail, road and inland waterway and not covered by Annex XIII, shall not be made less favourable in their direct or indirect effect on carriers of other States as compared with carriers who are nationals of that State.

2.2 The Act referred to in point 2 of Annex XVI to the EEA Agreement (*Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, hereafter "Directive 2004/18"*)

Article 1(2)(a) reads as follows:

'Public contracts' are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

Article 1(4) reads as follows:

² See point 3.4.1 of the letter by the Norwegian Government dated 19 December 2011.

³ PR(11)54.

'Service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

Article 17 reads as follows:

Without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4).

2.3 The Act referred to in point 4a of Annex XIII to the EEA Agreement (Regulation 1370/2007/EC of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, hereafter "Regulation 1370/2007")

Recital 20 reads as follows:

Where a public authority chooses to entrust a general interest service to a third party, it must select the public service operator in accordance with Community law on public contracts and concessions, as established by Articles 43 to 49 of the Treaty, and the principles of transparency and equal treatment.

Article 2(h) reads as follows:

'direct award' means the award of a public service contract to a given public service operator without any prior competitive tendering procedure;

Article 5 reads as follows:

Award of Public Service Contracts

1. 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.

(...)

3. 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 4, 5 and 6. (...)

4. Unless prohibited by national law, the competent authorities may decide to award public service contracts directly either where their average annual value is estimated at less than EUR 1 000 000 or where they concern the annual provision of less than 300 000 kilometres of public passenger transport services.

In the case of a public service contract directly awarded to a small or medium-sized enterprise operating not more than 23 vehicles, these thresholds may be increased to either an average annual value estimated at less than EUR 2 000 000 or where they concern the annual provision of less than 600 000 kilometres of public passenger transport services.

Article 8 reads as follows:

Transition

1. 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 Directive 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 4 of this Article shall not apply.

2. Without prejudice to paragraph 3, the award of public service contracts by rail and by road shall comply with Article 5 as from 3 December 2019. During this transitional period Member States shall take measures to gradually comply with Article 5 in order to avoid serious structural problems in particular relating to transport capacity. (...)

3. In the application of paragraph 2, no account shall be taken of public service contracts awarded in accordance with Community and national law:

- (a) before 26 July 2000 on the basis of a fair competitive tendering procedure;*
- (b) before 26 July 2000 on the basis of a procedure other than a fair competitive tendering procedure;*
- (c) as from 26 July 2000 and before 3 December 2009 on the basis of a fair competitive tendering procedure;*
- (d) as from 26 July 2000 and before 3 December 2009 on the basis of a procedure other than a fair competitive tendering procedure.*

The contracts referred to in (a) may continue until they expire. The contracts referred to in (b) and (c) may continue until they expire, but for no longer than 30 years. The contracts referred to in (d) may continue until they expire, provided they are of limited duration comparable to the durations specified in Article 4.

Public service contracts may continue until they expire where their termination would entail undue legal or economic consequences and provided that the Commission has given its approval.

3 The Authority's Assessment

3.1 Factual background

By Decisions 2007/18 of 12 June 2007 and 2008/33 of 9 December 2008, Aust-Agder County decided to award seven contracts for passenger transport services by bus within the boundaries of the county for the period 1 January 2009 – 31 December 2012, with an option for an extension of maximum four years. These contracts were concluded with seven different companies (Birkeland Busser AS, Frolandsruta Frode Oland AS, Nettbuss Sør AS, Høyvågruta AS, Risør og Tvedestrand Bilruter AS, Setesdal Bilruter L/L and Telemark Bilruter AS), being the operators that were providing the service under existing contracts that expired at the end of 2008. The contracts were concluded without any competitive tendering or publication. The contracts were effectively signed in the course of 2009.

The contracts covered the provision of (1) collective transport services on the local network (*ruteproduksjon*) and (2) school transport services (*skoleskyss*).

By Decisions 2010/28 of 15 June and 2010/57 of 14 December 2010, the County decided to make use of the prolongation clause in the contracts and to extend the contracts by another four years until 31 December 2016 (for Nettbuss Sør AS, the contract was extended only by another 2 years, until 31 December 2014). This decision was taken without any competitive tendering or publication. The prolongation agreement was signed by the parties in the course of 2011.⁴ In the meantime, however, the companies Høyvågruta AS, Risør og Tvedestrand Bilruter AS and Nettbuss Sør AS had merged and continued operations under the name Nettbus Sør AS.⁵ As a result, the County signed five prolongation agreements instead of seven.

The estimated total values of the contracts are as follows⁶:

1. Birkeland Busser AS: NOK 82.824.000
2. Frolandsruta Frode Oland AS: NOK 22.232.000
3. Nettbuss Sør AS: NOK 1.251.960.000
4. Telemark Bilruter AS: NOK 57.152.000
5. Setesdal Bilruter L/L: NOK 286.832.000

⁴ The prolongation clause is laid down in Annex C to each contract. The County signed the clause with Frolandsruta Frode Oland AS, Nettbuss Sør AS, Telemark Bilruter AS, Setesdal Bilruter L/L and Birkeland Busser AS on 30 March 2011.

⁵ According to the information from the Norwegian Government, the merger was notified to the Norwegian company registry on 10 and 11 June 2009 and the companies Høyvågruta AS and Risør og Tvedestrand Bilruter AS were removed from the registry on 3 and 5 September 2009.

⁶ The estimated total values of the contracts cover the entire duration of the contract period and are based on the figures provided by the Norwegian Government for the year 2010, multiplied by the duration of the contracts, including the options (i.e. 8 years in total). The total value of the contract with Nettbuss Sør AS includes the total value of the contracts with Høyvågruta AS and Risør og Tvedestrand Bilruter AS, as these companies have merged with Nettbuss Sør AS, and no separate figures are available.

3.2 The contracts are service concessions within the meaning of Directive 2004/18

It follows from Article 17 of Directive 2004/18 that service concessions are in principle excluded from the scope of Directive 2004/18. This has been confirmed by the Court of Justice of the European Union (hereafter “Court of Justice”).⁷ A service concession is defined as a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment (Article 1(4) of Directive 2004/18).

Based on the available information, the Authority takes the view that the present contracts involve a substantial commercial risk for the service providers and, therefore, concludes that the contracts in question should be regarded as public service concessions.

The difference between a public service contract and a public service concession and the reasons why the Authority considered the above contracts to be public service concessions, were extensively addressed in the letter of formal notice. The Authority’s conclusion, as well as the figures and arguments on which this conclusion was based, have not been disputed by the Norwegian Government in the letter of 19 December 2011, nor in any other correspondence. Therefore, the Authority does not consider it necessary to address this issue further and refers to the letter of formal notice in this respect.

3.3 Compliance with the requirement of transparency and non-discrimination

Although public service concessions are excluded from the scope of Directive 2004/18, it follows from the case-law of the Court of Justice that their award is nevertheless subject to the fundamental rules of EEA law, including the freedom of establishment (Article 31 EEA), the freedom to provide services (Article 36 EEA) and the general principle of non-discrimination (Article 4 EEA).⁸ It follows from Article 38 EEA that the general principle of freedom to provide services laid down in Article 36 EEA is not applicable to the transport sector. However, economic activity in the transport sector is still subject to the general principle of non-discrimination⁹, which is referred to in Article 4 EEA and, specifically for transport by rail, road and inland waterways, in Article 48 EEA.

Compliance with the principle of non-discrimination, as laid down in the aforementioned EEA provisions, implies a duty of transparency for the contracting authority which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procedure to be reviewed.¹⁰ The obligation of transparency applies where the service concession in question may be of interest to an undertaking located in an

⁷ See e.g. Case C-382/05 *Commission v Italy* [2007] ECR I-6657, paragraph 29, Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 9, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 42.

⁸ Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60, Case C-231/03 *Coname*, cited above, paragraph 16, and Case C-458/03 *Parking Brixen*, cited above, paragraph 46. See also the Commission Interpretative Communication on concessions under Community law COM 2000 (121) and Commission Communication on public-private partnerships and Community law on public procurement and concessions COM (2005) 569 final.

⁹ See Case C-410/04 *ANAV* [2006] ECR I-3303, paragraphs 16-21 and Case C-382/08 *Neukirchinger*, not yet published, paragraphs 21-22 and 28-30.

¹⁰ Case C-324/98 *Telaustria and Telefonadress*, cited above, paragraphs 61 and 62, and Case C-458/03 *Parking Brixen*, cited above, paragraph 49.

EEA State other than that in which the concession is awarded.¹¹ Hence, the award of the concessions in the present case should be assessed in light of the requirement of transparency and non-discrimination, provided that they are of cross-border interest.

As a starting point, the Authority observes that in the letter dated 19 December 2011, the Norwegian Government recognises the existence of a duty of transparency and non-discrimination for contracting authorities when awarding public service concessions of cross-border interest. However, the Norwegian Government argues that the concessions have not been awarded in breach of EEA law for the following reasons:

- (1) they were awarded in accordance with the transitional rules of Regulation 1370/2007 and decision-making practice of the European Commission (pt 3.3 and 3.4.2);
- (2) both the original award of the concessions in 2007 and the prolongations in 2010 took place by way of an open and transparent award process (point 2.3.3 and point 3.4.3); and
- (3) at least some of the concessions lack cross-border interest (point 3.4.4).

3.3.1 The argument that the contracts have been awarded in accordance with the transitional rules of Regulation 1370/2007 and decision-making practice of the European Commission

Regulation 1370/2007 establishes a framework defining how competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest, in accordance with the rules of EU law. Regulation 1370/2007 introduces the principal obligation for EU Member States to award public service concessions, exclusive rights and compensation for public passenger transport services by rail and road on the basis of competitive tendering (Articles 3 and 5). The Regulation, however, does not affect public service contracts within the meaning of Directives 2004/18 and 2004/17, which remain subject to the latter directives (Articles 5(1) and 8(1)).

The Regulation provides that public service contracts falling outside the scope of Directive 2004/17 or 2004/18 (e.g. public service concessions) shall be awarded on the basis of a competitive tendering procedure as from 3 December 2019 (Article 8(2)).

Contracting authorities are not, therefore, yet under the obligation to award contracts falling within its scope on the basis of a competitive tendering procedure. Moreover, Regulation 1370/2007 entered into force in the EEA on 3 December 2009, which means that the obligations deriving therefrom may only apply to the award of the extensions of the contract (which took place on 15 June 2010), and not to the original award of the contract (which took place on 12 June 2007). Notwithstanding this, the lack of an obligation to award contracts on the basis of a competitive tendering procedure pursuant to Regulation 1370/2007 does not prejudice the application of the general principles of non-discrimination and transparency (cf. recital 20 of Regulation 1370/2007).

In points 3.2 and 3.3 of the letter of 19 December 2011, the Norwegian Government addressed the scope and content of Regulation 1370/2007 to argue that concessions for public passenger transport services by rail and road may be awarded directly, without any competitive tendering. It observed that the transport sector has not been fully liberalised

¹¹ Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraph 40 and Case C-91/08 *Wall* [2010] ECR I-2815, paragraph 34.

and that the aim of Regulation 1370/2007 is to speed up the liberalisation process in the field of transport. It emphasised that the organisation of public transport traditionally varies considerably between and even within EEA States and that direct awards are as common as competitive tendering in the sector. Reference is made to a study by DLA Piper, ordered by the European Commission, to illustrate that.¹² Indeed, the study seems to indicate that the practice of awarding contracts/concessions directly without any transparency still occurs in some of the EU Member States. However, as the Norwegian Government has recognised in its letter of 19 December 2011, this does not address the issue of compatibility with EU/EEA law.

Although Regulation 1370/2007 has been adopted in view of liberalisation and increased competitiveness in the sector it contains, according to the Norwegian Government, rules which allow for direct awards without competitive tendering (point 3.3.2.1). First, reference is made to the standard framework introduced by Regulation 1370/2007 which, as a rule, obliges competitive tendering pursuant to Article 5(3) but allows, by way of exemption, direct awards in the situations provided for in Article 5(4)-(6). Second, according to the Norwegian Government, direct awards are also allowed under the transitional rules provided for in Article 8 of Regulation 1370/2007. Third, the Norwegian Government refers to decision-making practice by the European Commission in the field of state aid to support the view that direct awards in the sector of rail and road transport are widely accepted, including under the transitional rules of Regulation 1370/2007 (point 3.3.3).

The Authority is of the opinion, however, that the transitional rules laid down in Article 8 of Regulation 1370/2007 cannot be interpreted in a way that allows direct awards without respecting with the principles of transparency and non-discrimination.¹³

At the outset, the Authority underlines that the obligation for competitive tendering pursuant to Article 5(3) is different from the requirement to respect the principle of transparency. While the former requires a formal invitation to tender by the contracting authority, which can be waived under the transitional rules, the latter requires a simple announcement with a description of the contract and an invitation to contact the contracting authority in case an operator is interested in the contract. Although it follows from Article 8 that the obligation to apply a competitive tendering procedure is not applicable during the transitional period, it is nowhere stated that the principles of transparency and non-discrimination do not apply. On the contrary, recital 20 of Regulation 1370/2007 provides that:

“Where a public authority chooses to entrust a general interest service to a third party, it must select the public service operator in accordance with Community law

¹² Study by DLA piper on the implementation of Regulation (EC) N° 1370/2007 on public passenger transport services by rail and by road, 31 October 2012, available on <http://ec.europa.eu/transport/rail/studies/doc/2010-pso.pdf>.

¹³ This interpretation is also reflected in the study by DLA Piper relied upon by the Norwegian Government, which states that “(...) where PSC are directly awarded (...) the competent authorities have often considered that transparency/publication requirements were not applicable in their case. They appeared to believe that the direct award of PSC to a public transport operator at present does not involve any particular transparency/publication requirements, whereas it is specifically the objective of Regulation 1370/2007 to allow direct awards, provided that sufficient transparency is ensured as to comply with the Treaty principles.” (point 2.1.5, p. 39). Furthermore, the study repeatedly refers to the fact that the principle of transparency has not always been respected in the award of public service contracts falling within the scope of Regulation 1370/2007 and that this is a problematic issue (see, for example, at pages 8, 15 and 37).

on public contracts and concessions, as established by Articles 43 to 49 of the Treaty, and the principles of transparency and equal treatment.”

Moreover, Article 8(3) provides that, in light of the transitional arrangement of gradually complying with the obligation to award contracts by way of a competitive tendering procedure, no account shall be taken of certain types of public service contracts “awarded in accordance with EU and national law”. Hence, in the view of the Authority, Regulation 1370/2007 cannot be regarded as a *lex specialis* for the sector of public passenger transport services by rail and road which excludes this sector from the obligations of transparency and non-discrimination, not even during the transitional period.

The Norwegian Government argues in point 3.3.3 of its letter of 19 December 2011 that the European Commission concluded in its Decision of 24 February 2010 concerning state aid to the Danish railway company (DSB) that the direct award of the contract was to be considered in accordance with the transitional arrangement laid down in Article 8 of Regulation 1370/2007, and with paragraphs 2 and 3 in particular.¹⁴ It further stated that a similar line of reasoning could be found in several EU Commission decisions, such as the decisions regarding bus services.

At the outset, the Authority underlines that it is well-established that it is not bound by any previous decision-making practice either of the Authority or the European Commission.¹⁵ Second, no indication is given in the decision as to the extent to which the principles of transparency or non-discrimination were respected in that case, therefore no guidance on this point can be derived from *DSB*. Third, the Authority notes that, in any event, the facts of the *DSB* decision were very different to those of the present case. The *DSB* case concerned a contract between the Danish State and a wholly-owned subsidiary of that state (*DSB*). Hence, the award was potentially covered by the exemption on in-house procurement and in compliance with EU law, as required by the transitional provisions of Article 8(3). As regards the *Lienz Postbus* and *Southern Moravia* decisions, the Authority cannot see that the Commission expressed any views on the compliance of the awards with Regulation 1370/2007 in those decisions.¹⁶

As regards the applicability of the principles of transparency and non-discrimination in light of Regulation 1370/2007, the Norwegian Government expressed the following view:

“As long as the fundamental principles of transparency and non-discrimination are complied with, there is no general prohibition of direct awards of contracts in the transport sector (...)

The ECJ has introduced a requirement of transparency and non-discrimination when public authorities enter into public concession contracts. However, the Court

¹⁴ Commission Decision of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08)) OJ L7 of 11.1.2011, p.1, recitals 323 and 324.

¹⁵ See, by way of example, Case C-57/00 P and C-61/00 P *Freistaat Sachsen v Commission* [2003] ECR I-9975, paras. 52-53. “In any event, whatever the interpretation given by the Commission to Article 92(2)(c) of the Treaty in the past, that cannot affect the correctness of the Commission's interpretation of that provision in the contested decision and hence its validity. (...) It is only in the context of Article 92(2)(c) of the Treaty that the validity of the contested decision must be examined, not by reference to an alleged earlier practice.”

¹⁶ Commission Decision of 26 November 2008 on state aid granted by Austria to the company Postbus in the Linz district C 16/07, OJ L 306 of 20.11.2009, p.26 and Commission Decision of 26 November 2008 on state aid C 3/08 – Czech republic concerning public service compensations for Southern Moravia Bus Companies, OJ L97 of 16.4.2009, p. 14.

has not introduced an absolute ban on the possibility to grant concessions directly. The case law requires that there has to be a sufficient degree of transparency in the awarding of contracts, be it in the context of a tendering procedure or in the context of a direct award.” (point 3.3.1)

Although the Norwegian Government seems to recognise the need for contracting authorities to respect the principles of transparency and non-discrimination when awarding public service concessions in the sectors covered by Regulation 1370/2007, even in the case of direct awards under the transitional rules, it does not explain how this obligation can be complied with otherwise than by making a sufficiently wide publication. Since the concessions, and their prolongations, in the present case were awarded without any prior publication, the Authority cannot agree with the Norwegian Government’s view that they were awarded in accordance with the transitional rules laid down in Regulation 1370/2007.

3.3.2 The argument that the award of the concessions and their prolongations took place by way of a transparent award process

Concerning its argument that the award of the concessions and their prolongations were entered into in full transparency, the Norwegian Government observes that the content of the obligation of transparency is not fully established by the Court of Justice. Nevertheless, in its view, contracting authorities are at least required to ensure transparency “*in a way that is sufficient to give interested companies a reasonable possibility to identify the planned concession award through their own market research*” (point 3.1). In support of this interpretation, the Norwegian Government refers to a Guidance note on public procurement by the Scottish Government.

The Norwegian Government submits that in the present case:

- (i) all case documents for the council meetings were published at the County's website several weeks before the meetings took place,
- (ii) the relevant council meetings were broadcasted live through the internet and were also accessible as downloads for an extended period of time after,
- (iii) following the meetings, the decisions to enter into the contracts were published at the County's website,
- (iv) the County submitted a newsletter/press service to local newspapers and TV stations together with links to the abovementioned case documents,
- (v) information about the expiry of existing contracts was submitted to the transport unit of the Confederation of Norwegian Enterprises (NHO Transport), and
- (vi) the process of entering into the agreements and the question of whether to announce competition for the contracts appeared in numerous newspaper articles.

Although the Authority agrees with the Norwegian Government that the content of the obligation of transparency is not fully established by the Court of Justice, to the extent that the required level of publication has to be determined on a case-by-case basis, it does not share the Norwegian Government’s interpretation of the scope and content of the obligation.

In the view of the Authority, it follows from the case-law that the obligation of transparency requires an active approach from the contracting authority to make a

publication whereby, at least, it gives a short description of the essential details of the contract to be awarded and the award method together with an invitation to contact the contracting authority.¹⁷ Reference is also made to the publication requirements under Article 7(2) of Regulation 1370/2007. Hence, the fact that information concerning the County's general intention to award and prolong concessions for bus transport services in Aust-Agder was available does not in itself fulfil the obligation of transparency and non-discrimination derived from Article 4 and Article 48 of the EEA Agreement, and fundamental to Regulation 1370/2007.

This interpretation seems to be shared by the European Commission, as reflected in the Interpretative Communication at point 2.1.1:

"The obligation of transparency requires that an undertaking located in another Member State has access to appropriate information regarding the contract before it is awarded, so that, if it so wishes, it would be in a position to express its interest in obtaining that contract (Case C-231/03, Coname, paragraph 21).

The Commission is of the view that the practice of contacting a number of potential tenderers would not be sufficient in this respect (...). The same applies to all forms of 'passive' publicity where a contracting entity abstains from active advertising but replies to requests for information from applicants who found out by their own means about the intended contract award. A simple reference to media reports, parliamentary or political debates or events such as congresses for information would likewise not constitute adequate advertising."(underline added)

Therefore, communication concerning the planned award done by third parties, such as media reports, cannot be considered relevant for the purpose of assessing the fulfilment of the transparency obligation. This is particularly true in this case, where some of the publicity appears to have been done *ex post*, i.e. after the decisions to award (or prolong) the contracts were taken.

Moreover, even though the contracting authority may have communicated publicly about the planned awards and, subsequently, about the intended prolongations, the nature of the advertising in this case would not have been sufficient to enable the market to be opened up to competition. Nor would the above means of advertising in this case have allowed an undertaking outside Norway to have access to appropriate information regarding the concessions before they were awarded (or prolonged) so that, if it so wished, it would be in a position to express its interest in obtaining one or more of the concessions.¹⁸ On the contrary, the lack of a clear statement in that sense and the fact that concessions were traditionally awarded to the same undertakings would rather have created the impression that any potentially interested parties would not be eligible to obtain the concessions.

3.3.3 *The argument that at least some of the concessions lack cross-border interest*

The obligations of transparency and non-discrimination only apply when a concession may be of interest to operators established in another EEA State. In point 3.4.4 of the letter dated 19 December 2011, the Norwegian Government argues that the concessions

¹⁷ See also the *Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives* ("the Interpretative Communication"), point 2.1.3, page 6. See also, judgment of the Court of Justice of 16 February 2012 in Joined Cases C-72/10 and C-77/10 *Mercello Costa and Ugo Cifone*, unpublished, paragraph 73.

¹⁸ See the Interpretative Communication, point 2.1.1.

awarded to Frolandsruta Frode Oland AS, Telemark Bilruter AS and possibly also Birkeland Busser AS cannot be considered to be of cross-border interest. The Norwegian Government refers to the benchmarks referred to in Regulation 1370/2007 and argues that, although the concessions were awarded before the entry into force of Regulation 1370/2007, the thresholds in the Regulation should serve as guidance for the purpose of assessing whether a concession has sufficient interest to operators located in other EEA States.

The Norwegian Government observes that:

- Frolandsruta Frode Oland AS provides services for a total amount of 120.000 kilometers per year for a total value of NOK 2.779.000 in 2010;
- Telemark Bilruter AS provides services for a total amount of 220.000 kilometers per year for a total value of NOK 7.144.000 in 2010;
- Birkeland Busser AS provides services for a total amount of 390.000 kilometers per year for a total value of NOK 10.353.000 in 2010.

In addition to that, the Norwegian Government states that Frolandsruta Frode Oland AS and Birkeland Busser AS operate less than 23 vehicles (point 2.2).

Article 5(4) of Regulation 1370/2007 provides that:

“Unless prohibited by national law, the competent authorities may decide to award public service contracts directly either where their average annual value is estimated at less than EUR 1 000 000 or where they concern the annual provision of less than 300 000 kilometres of public passenger transport services.

In the case of a public service contract directly awarded to a small or medium-sized enterprise operating not more than 23 vehicles, these thresholds may be increased to either an average annual value estimated at less than EUR 2 000 000 or where they concern the annual provision of less than 600 000 kilometres of public passenger transport services.”

According to the Norwegian Government, as concerns Frolandsruta Frode Oland AS and Telemark Bilruter AS, the low contract value, limited number of kilometres driven and short duration of the contracts means they have no interest to undertakings situated in other EEA States, and meet the requirements of Article 5(4), first paragraph, of Regulation 1370/2007.

As concerns Birkeland Busser AS, it is argued that both the size of the contract and the distance to neighbouring EEA States makes the likelihood of any cross-border interest marginal. It is argued that if Birkeland Busser AS can be considered to be a Small or Medium-sized Enterprise (SME), it meets the requirements of Article 5(4), second paragraph, of Regulation 1370/2007.

The Authority observes that it follows from the case-law of the Court of Justice that a contract should be considered to lack cross-border interest if, in individual cases, it would be of no interest to economic operators located in other Member States because of special circumstances, such as a very modest economic interest at stake. In such a case, the effects on the fundamental freedoms are to be regarded as too uncertain and indirect to warrant

the application of standards derived from primary EU law.¹⁹ Hence, the cross-border interest has to be assessed in light of the specific circumstances of the case and, in case the lack of such interest is allegedly due to the contract's economic value, that value must be very modest.

In light of the arguments brought forward by the Norwegian Government, the Authority observes, first of all, that the Norwegian Government has not provided any documents showing that the County has actually made an assessment of the potential cross-border value of the concessions, either individually or jointly, prior to the award of the concessions. On the contrary, it appears from articles in the press that, prior to the awards, there was a concern at County level that other companies, such as Veolia Transport Norge AS, owned by the French Veolia Group, could be a threat to the local bus companies.²⁰ In the view of the Authority, this is an indication that the concessions are indeed of cross-border interest.

Second, although the Authority acknowledges that the thresholds referred to in Article 5(4) of Regulation 1370/2007 could be considered relevant in assessing the compliance of the concession awards and prolongations with the procurement rules in this case, these thresholds have an indicative value and should not be considered decisive. Indeed, two of the three companies (Frolandsruta Frode Oland AS and Telemark Bilruter AS) operated in 2010 below the thresholds in terms of distance and annual value referred to in Article 5(4), first paragraph, of Regulation 1370/2007. However, the Authority takes the view that, in light of the circumstances of the case, the concessions need not necessarily be assessed individually since they were awarded simultaneously with other concessions for the same type of services within the same geographical county. This means that the smaller concessions could have been of interest for companies established in other EEA States as these companies could have been interested in tendering for more than one of the concessions simultaneously. The Authority is not aware of any reason that would have prevented one undertaking from bidding for more than one of the concessions.

Third, the Authority takes account of the duration of the contracts (8 years including the options for prolongation)²¹ and their total value (roughly estimated between NOK 20 million and NOK 1.3 billion, depending on each individual contract)²² to conclude that the contracts are of cross-border interest and that an EEA-wide publication would have been appropriate in order to give potential tenderers established in other EEA States the opportunity to express interest in the contract(s).

Finally, and in subsidiary order, the Authority observes that in case the smaller concessions could nevertheless be considered to lack cross-border interest, the breach of EEA law remains for the award of the other concessions.

3.4 Application for approval under Article 8(3) in fine of Regulation 1370/2007

In its letter of 19 December 2011, the Norwegian Government states that in case the Authority maintains the view that the concessions are awarded in breach of EEA law, the

¹⁹ Case C-231/03, *Coname* [2005] ECR I-07287, paragraph 21.

²⁰ See the Article in Agderposten of 21 May 2007, provided by the Norwegian Government in annex 8 to its letter of 19 December 2011.

²¹ 6 years for Nettbuss Sør AS.

²² The total value of the contracts is based on the information provided in the letter dated 14 April 2011 (Annex 5), as confirmed by the letter dated 19 December 2011 (point 2.2). See also point 1.3 and footnote 6.

County of Aust-Agder applies for the Authority's approval under Article 8(3) in fine of Regulation 1370/2007. Article 8(3) reads:

"Public service contracts may continue until they expire where their termination would entail undue legal or economic consequences and provided that the Commission [the Authority, added] has given its approval. "

With regard to this request, the Authority observes that, so far, the Norwegian Government and the County have not submitted any information showing that the termination of the concessions would entail undue legal or economic consequences. The Norwegian Government stated that such information would be submitted in case the Authority maintains the preliminary view in the letter of formal notice that the concessions are awarded in breach of EEA law. The Authority maintains its preliminary view in the present reasoned opinion.

As a result, in the event that the Norwegian Government seeks the approval of the Authority in application of Article 8(3) in fine of Regulation 1370/2007, it is invited to submit the necessary information thereto in reply to the present reasoned opinion. The Authority underlines, in this respect, the deadline by which Norway must have taken the measures necessary to comply with this reasoned opinion.

3.5 The Authority's action in light of its current policy on public procurement matters

Finally, in its letter of 19 December 2011, the Norwegian Government refers to the Authority's press release dated 18 July 2011, in which the Authority announced a new policy in public procurement cases. It argued that the change of policy was announced after the concessions were awarded, and that the Authority would be expected to apply the new policy only to concessions granted after the notification of the change of policy.

The Authority observes, first of all, that it follows from the case-law of the Court of Justice that an infringement of EEA law in the field of public procurement exists as long as the contract continues to produce effects and the State has not taken measures to remedy the effects of the breach.²³ Hence, there are grounds for the Authority to pursue an infringement and to require rectifying measures from the State concerned as long as the contract continues to produce effects. This is the situation in the present case. Secondly, the Authority observes that the case-law on which its change in policy is founded already existed before the present concessions were awarded. Thirdly, the letter of formal notice setting out the Authority's preliminary views on the infringement was adopted after the Authority announced its new policy. Fourthly, and lastly, the Authority can legitimately determine its policy with regard to pursuing infringements and to make changes to that policy when required, for example in light of developments in the jurisprudence of the EFTA Court or the Court of Justice.²⁴ The Authority's announcement of the change in

²³ Joined Cases C-20/01 and C-28/01, *Commission v Germany* [2003] ECR I-3609, para. 36.

²⁴ See Joined Cases C-465/09 P and C-470/09 P *Territorio Histórico de Vizcaya and others v Commission* [2011] ECR, not yet reported (English version not yet available), "la modification d'une politique (...) peut avoir des incidences au regard du principe de non-retroactivité. A cet égard, il importe de constater que l'application des lignes directrices de 1998 à l'encontre des régimes fiscaux litigieux adoptés en 1993 ... relève d'une situation en cours qui, bien que née avant l'entrée en vigueur de celles-ci, est régie par lesdites lignes directrices à compter de leur entrée en vigueur, conformément au principe selon lequel les règles nouvelles s'appliquent immédiatement aux situations en cours... L'application efficace des règles de l'Union exige que la Commission puisse à tout moment adapter son appréciation aux besoins de cette politique", paras 124-126.

policy by way of a press release was done in pursuit of good administrative practice; and in order to put the EFTA States on notice that this policy would be applied by the Authority.

4 Conclusion

Accordingly, the Authority considers that by allowing the County of Aust-Agder to award concessions for passenger transport services by bus without any form of publication, and to prolong these concessions without any form of publication, the Kingdom of Norway has failed to comply with the principles of non-discrimination and transparency in breach of Article 4 and Article 48 of the EEA Agreement.

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,

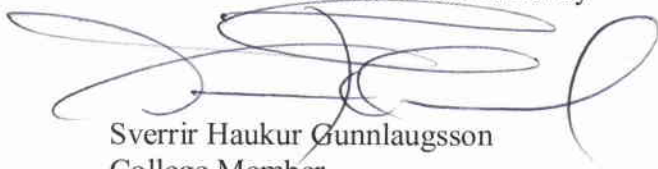
HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by allowing the County of Aust-Agder to award concessions for passenger transport services by bus without any form of publication, and to prolong these concessions without any form of publication, the Kingdom of Norway has failed to comply with the principles of non-discrimination and transparency in breach of Article 4 and Article 48 of the EEA Agreement.

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, including suitable corrective measures to rectify the breach, within *two months* following notification thereof.

Done at Brussels, 27 June 2012

For the EFTA Surveillance Authority



Sverrir Haukur Gunnlaugsson
College Member



Florence Simonetti
Acting-Director