

NON-CONFIDENTIAL VERSION

Complaint to the EFTA Surveillance Authority

Failure by the Kingdom of Norway to fulfil its obligations under the EEA Agreement

Part 2/2

10 November 2023

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1 Field and place(s) of activity

1. [Confidential]
2. [Confidential]
3. [Confidential]

2 EFTA State alleged by the Complainant not to have complied with the EEA Agreement

4. Norway has failed to fulfil its obligations under the Agreement on the European Economic Area (the “**EEA Agreement**”) by the decisions:
 - to abort the ongoing competitive tendering procedure for Trafikkpakke 4 and to abstain from initiating the previously decided competitive tendering procedure for Trafikkpakke 5;
 - that PSO contracts for Østlandet 1 (which corresponds to Trafikkpakke 4) and Østlandet 2 (which corresponds to Trafikkpakke 5) should be directly awarded to Vygruppen AS (“**Vy**”) and/or Flytoget AS (“**Flytoget**”);
 - to directly award Vy the PSO contracts for Østlandet 1, including the already competitively tendered Gjøvik line, and for Østlandet 2, including as of 1 February 2028 the operation of the airport express train between Oslo and Oslo airport (the “**Airport Express**”), currently operated by Flytoget.
5. By these decisions, Norway ceased and reversed the liberalisation of railway passenger services within Norway for the benefit of the state-owned incumbent Vy and to the detriment of other operators [Confidential].
6. Norway’s backward transition from competitively tendered PSO contracts to directly awarded PSO contracts to Vy is incompatible with Norway’s obligations under the EEA Agreement. Further, it is submitted that Norway has failed to fulfil its obligations under the EEA Agreement also by not having conducted an appropriate market analysis prior to the award of the PSO contracts for Østlandet 1 and 2 to Vy, with a view to ensuring that routes covered by the PSO contracts could not be operated without public compensation. As already observed by the EFTA Surveillance Authority (“**ESA**”), such a market analysis is a prerequisite for the award of a PSO contract for the provision of railway passenger services.¹

¹ See ESA’s Supplementary Request for Information concerning the direct award pertaining to the railway network packages Østlandet 1 and 2 to Norway dated 11 July 2023 in case no. 9037. See also Commissioner Valean’s letter to the Dutch Government concerning the direct re-award of the Main Rail Network concession to Nederlandse Spoorwegen, attached as **Annex 1**.

3 Facts giving rise to the complaint

7. The Norwegian railway reform, which entered into force on 1 January 2017, constituted an important step towards a liberalised railway passenger market in Norway. Competition was set to be gradually introduced into the market through the successive award of five competitively tendered PSO contracts, Trafikkpakke 1 – 5. Each traffic package conferred a right to operate on certain routes in Norway for around ten years. Trafikkpakke 4 and 5 were the economically and strategically most important traffic packages and clearly the largest in terms of numbers of passengers, turnover and remuneration. The competitive tenders for these packages were to be managed by the Norwegian Railway Directorate (*Jernbanedirektoratet*).
- Trafikkpakke 1 Sør (South) was awarded to Go Ahead Norge AS in October 2018,² with operation of the routes starting on 15 December 2019.
 - Trafikkpakke 2 Nord (North) was awarded to SJ Norge in June 2019,³ with operation of the routes starting on 8 June 2020.
 - Trafikkpakke 3 Vest (West) was awarded to Vy in December 2019,⁴ with operation of the routes starting on 13 December 2020.
 - Trafikkpakke 4 Øst (East) was announced by the Railway Directorate on 30 June 2020 to be awarded in 2021,⁵ but the tendering procedure was subsequently aborted, and the PSO contract was instead directly awarded to Vy (Østlandet 1).
 - Trafikkpakke 5 was planned to be awarded in 2024,⁶ but the tendering procedure was stopped and the PSO contract was instead directly awarded to Vy (Østlandet 2).
8. Following elections, a new Government was established in Norway on 14 October 2021. An explicit goal of the new Government was to reverse the ongoing liberalisation of the railway passenger market in Norway and to cease the opening of the Norwegian railway passenger market to competition.⁷

² Jernbanedirektoratet's press release dated 17 October 2018, available at [link](#).

³ Jernbanedirektoratet's press release dated 17 June 2019, available at [link](#).

⁴ Jernbanedirektoratet's press release dated 9 December 2019, available at [link](#).

⁵ Jernbanedirektoratet's press release dated 30 June 2020, available at [link](#).

⁶ Jernbanedirektoratet's press release dated 21 March, available at [link](#).

⁷ See e.g. Hurdalsplattformen 2021-2025, , p. 42, available at [link](#).

9. Accordingly, on 19 November 2021, the Government ordered the Railway Directorate to terminate the ongoing tendering procedure for Trafikkpakke 4 and to abstain from initiating the planned tendering procedure for Trafikkpakke 5.⁸
10. As publicly stated on several occasions by various representatives of the Government, including the Minister of Transport (*Samferdselsminister*), Mr. Jon-Ivar Nygård, a primary reason for reversing the liberalisation of the railway passenger market in Norway is the Government's desire to maintain Vy as a strong State-owned railway passenger operator.⁹ The Government has also expressed that it views a monopolisation of the railway sector as the best way to ensure its smooth and stable operation, since a large number of railway companies will lead to a fragmentation of the sector.¹⁰ Moreover, the Government publicly stated that its long-term ambition is to oust Go Ahead and SJ, which currently operate Trafikkpakke 1 and 2 respectively, from the Norwegian railway passenger market.¹¹
11. Following the abortion of the ongoing and prospective competitive tendering procedures for Trafikkpakke 4 and 5, the Government explained that future PSO contracts for railway passenger services would be directly awarded to Vy and/or Flytoget, the latter also being wholly owned by the Norwegian State.¹²
12. On 3 March 2023, the Railway Directorate awarded Vy the PSO contracts for Østlandet 1, including the already competitively tendered Gjøvik line, and Østlandet 2, including from 1 February 2028 the operation of the Airport Express currently operated by Flytoget.¹³ As noted above, Østlandet 1 and 2 correspond to the previous Trafikkpakke 4 and 5, respectively.

4 Legal context

13. The rules governing the provision of public railway passenger services in Norway are contained in EU Regulation 1370/2007 on the public passenger transport services by rail

⁸ Jernbanedirektoratet's press release dated 19 November 2021, available at [link](#); also the Government's press release dated 19 November 2021, available at [link](#).

⁹ See e.g. the Government's press releases dated 19 November 2021, available at [link](#); dated 28 Januari 2022, available at [link](#); and Minister Nygård's speech published 27 February 2022, available at [link](#).

¹⁰ See State Secretary Vasara's speech, published 23 September 2022, available at [link](#).

¹¹ See Aftenposten, 6 June 2022, for reference available at [link](#).

¹² See the Government's press releases dated 7 April 2022, see [link](#); and dated 31 August 2022, available at [link](#).

¹³ Jernbanedirektoratet's press releases dated 29 June 2023, available at [link](#).

and by road (“**Regulation 1370/2007**”). Regulation 1370/2007 entered into force in Norway on 1 January 2011.¹⁴

14. EU Regulation 2016/2338 (“**Regulation 2016/2338**”), which is part of the EU’s Fourth Railway Package, amended Regulation 1370/2007. It was inserted into the EEA Agreement by decision of the EEA Joint Committee of 24 September 2021 and the entry into force and compliance date in the EEA was 1 June 2022. Regulation 2016/2338 entered into force in Norway on 30 June 2021.¹⁵ Regulation 1370/2007 as amended by Regulation 2016/2338 is hereinafter referred to as “**Regulation 1370/2007, as amended**”.
15. Article 5(3) of Regulation 1370/2007 sets out the general rule for the award of public service contracts for public passenger transport services by rail, according to which “[a]ny 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 [...]”.
16. Article 5(3) of Regulation 1370/2007 as amended maintains that public service contracts shall be awarded on the basis of a competitive tendering procedure. The provision refers to a certain number of specific and well limited exceptions, which are set out in Article 5(3a), (4), (4a), (4b), (5) and (6).
17. The exception set out in Article 5(6), the only one relevant in the present case, states that: “*Unless prohibited by national law, competent authorities may decide to make direct awards of public service contracts where they concern transport by rail [...]*”. Such contracts shall not exceed 10 years (in derogation from the general rule of 15 years set out in Article 4(3)).
18. Article 8 of Regulation 1370/2007, as amended, contains transition rules. According to Article 8(2), first paragraph, (ii), and third paragraph, Member States shall gradually comply with Article 5 until 2 December 2019, after which date Article 5 shall apply to public passenger transport services by rail. According to Article 8(2), first paragraph, (iii), Article 5(6) shall cease to apply from 25 December 2023.
19. As stated above, the Norwegian railway reform entered into force on 1 January 2017. An overarching aim of the railway reform was to streamline the railway sector and to offer railway passengers better railway services at lower cost. Competition was to be gradually introduced into the railway passenger market through competitive tendering of PSO contracts. Once the duration of each such PSO contract expired, the contract was again

¹⁴ Regulation of 17.12.2010 No 1673 (*forskrift 17. desember 2010 nr. 2300*).

¹⁵ Regulation of 30.06.2021 No 2300 (*forskrift 30. juni 2021 nr 2300*).

to be exposed to a competitive tendering procedure and awarded to a (possibly new) winner.

20. In the preparation of the 2017 railway reform, the then Norwegian Government took into account the EU railway reforms, as set out in Regulation 1370/2007 and the proposed EU Fourth Railway Package.¹⁶ In its report to the Norwegian Parliament (*Stortinget*), “*On the right track - Reform of the railway sector*” (*På rett spor – Reform av jernbanesektoren*), the Government noted that the objective of the EU railway reform has been to prepare for competition on the European railway network and that present and future EU legislation will set a framework for the legal organisation of railway activities in the different European States. The Government pointed out that “[t]his framework has to be taken into account in the [Norwegian] reorganisation of the sector”.¹⁷ The Government further explained that if the proposal for the Fourth Railway Package were adopted, there would be “*obligatory use of competition with regard to the conclusion of contracts for public services regarding passenger transport by rail*”.¹⁸
21. Thus, the 2017 Norwegian railway reform had the pronounced aim of being in line with the EU railway reforms as set out in Regulation 1370/2007 and the Fourth Railway Package.¹⁹
22. In this regard, it should be noted that Recital 7 of Regulation 1370/2007 explains that “[s]tudies carried out and the experience of Member States where competition in the public transport sector has been in place for a number of years show that, with appropriate safeguards, the introduction of regulated competition between operators leads to more attractive and innovative services at lower cost and is not likely to obstruct the performance of the specific tasks assigned to public service operators. This approach has been endorsed by the European Council under the Lisbon Process of 28 March 2000 which called on the Commission, the Council and the Member States, each in accordance with their respective powers, to ‘speed up liberalisation in areas such as ... transport’”.

¹⁶ Det Kongelige Samferdselsdepartement; Meld. St. 27 (2014-2015) Melding til Stortinget; *På rett spor – Reform av jernbanesektoren*, Samferdselsdepartementet, 12 May 2015, p. 10, available at [link](#).

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ See also e.g. Høringsnotat, Endringer i jernbaneloven, jernbaneundersøkelsesloven og yrkestransportloven (fjerde jernbanepakke mv.) Samferdselsdepartementet 2.7.2018, page 33, Section 7.4: “*Current practice regarding the direct award of contracts and tendering of contracts as a result of the railway reform is in accordance with the provisions of [Regulation 2016/2338]*” (our emphasis), available at [link](#).

5 Norway's infringements of the EEA Agreement

5.1 Infringement of the principles of legal certainty and of the protection of legitimate expectations

23. The principles of legal certainty and of the protection of legitimate expectations must be respected not only by the EEA institutions but also by the EEA States when they exercise their powers under the EEA Agreement. As the EU Court of Justice (the “CJEU”) has emphasised:

“ [...] where Member States adopt measures by which they implement EU law, they are required to observe the general principles of that law, which include, inter alia, the principle of the protection of legitimate expectations”.²⁰

24. The CJEU has held that the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires that legislation with negative consequences for individuals should be clear and precise and that their application should be predictable for those subject to them, in particular if they may have negative consequences for individuals and undertakings.²¹ This requirement must be observed all the more strictly in the case of rules liable to entail financial consequences, so that those concerned may know precisely the extent of the obligations which those rules impose on them.²²
25. As regards the principle of the protection of legitimate expectations, the CJEU has explained that the right to rely on the principle extends to *“any person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise assurances provided to him”*. The CJEU has added that *“[i]n whatever form it is given, information which is precise, unconditional and consistent and comes from authorised and reliable sources constitutes assurances capable of giving rise to such expectations”*.²³
26. Government decisions, such as the decision of the Norwegian Government of 12 May 2015 to open up the entire Norwegian railway passenger market to competition²⁴ and the

²⁰ Judgment of 7 August 2018, *Administratīvā rajona tiesa*, C-120/17, EU:C:2018:638, para. 48 and the case-law cited, and e.g. judgment of 14 July 2022, *Sense Visuele Communicatie en Handel*, C-36/21, EU:C:2022:556, para. 26 and the case-law cited.

²¹ See e.g. judgment of 12 December 2013, *Test Claimants in the Franked Investment Income Group Litigation*, C-362/12, EU:C:2013:834, para. 44 and the case-law cited, and judgment of 11 July 2018, *Commission v. Belgium*, C-356/15, EU:C:2018:555, para. 95.

²² Judgment of 9 July 2015, *Salomie and Oltean*, C-183/14, EU:C:2015:454, para. 31.

²³ Judgment of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, para. 80 and the case-law cited.

²⁴ Det kongelige samferdselsdepartement, Meld. St. 27 (2014-2015), Melding till Stortinget, På rett spor – Reform av jernbanesektoren, 12 May 2015, available at [link](#).

Government Bill to Parliament of 10 June 2016,²⁵ as well as their approval by Parliament, such as the adoption by the Norwegian Parliament on 16 December 2016 of the package of legislation affected by the 2015 decision,²⁶ by themselves constitute assurances capable of giving rise to justified expectations.

27. Such assurances are confirmed and further reinforced when the reform, and its legislative package, is adopted with the explicit objective of complying with binding EEA legislation, such as the railway reforms set out in Regulation 1370/2007 and the Fourth Railway Package.
28. Railway passenger transport operators thus have had legitimate expectations that the 2017 Norwegian railway passenger transport reform would be implemented in accordance with the decision of the Norwegian Parliament of 16 December 2016.
29. Furthermore, in 2018, the Ministry of Transport stated that the practice regarding direct award of contracts and tendering of contracts as a result of the 2017 Norwegian railway passenger transport reform was already in accordance with the provisions of Regulation 2016/2338.²⁷ This was confirmed in the Government's proposal to Parliament, dated 7 May 2020, regarding the Fourth Railway Package.²⁸
30. The Ministry of Transport, in 2020, explicitly underlined that the implementation of Regulation 2016/2338 in Norwegian law "will establish greater legal certainty that future public service contracts will in principle be awarded through open competitions, and contribute to ensure competitive neutrality, and reduce any perception that national authorities will favour the incumbent provider through direct awards of contracts, or otherwise"²⁹ (our emphasis).
31. Regulation 2016/2338 was incorporated into Norwegian law by national regulation no. 2300 (amending national regulation 1673), which entered into force on 30 June 2021,

²⁵ Prop. 143 L (2015–2016), Proposisjon til Stortinget (forslag til lovvedtak), Endringer i jernbanelova og einskilde andre lover (reform av jernbanesektoren), 10 June 2016, available at [link](#).

²⁶ Ibid p. 5 and Parliament's Decision, Sanksjon og ikraftsetting av Stortingets vedtak nr. 13 av 6 desember 2016 til lov om endringer i jernbanelova og einskilde andre lover (reform av jernbanesektoren) Kongelig resolusjon, available at [link](#).

²⁷ Høringsnotat, Endringer i jernbaneloven, jernbaneundersøkelsesloven og yrkestransportloven (fjerde jernbanepakke mv.) Samferdselsdepartementet 2.7.2018, page 33, Section 7.4: "Current practice regarding the direct award of contracts and tendering of contracts as a result of the railway reform is accordance with the provisions of [Regulation 2016/2338]" (our emphasis), available at [link](#).

²⁸ Prop. 101 LS (2019-2020), Proposisjon til Stortinget (forslag til lovvedtak og stortingsvedtak), Endringer i jernbaneloven mv. (fjerde jernbanepakke) og samtykke til deltakelse i to beslutninger i EØS-komiteen om innlemmelse i EØS-avtalen av direktiv 2012/34/EU om et felles europeisk jernbaneområde og rettsaktene som utgjør fjerde jernbanepakke, 7 May 2020, page 65, Section 19.5, available at [link](#).

²⁹ HØRINGSNOTAT – Utkast til ny jernbaneforskrift og ny forskrift om sikkerhet og tekniske forhold ved jernbanen, og endringer i forskrift om gjennomføring av kollektivtransportforordningen, 26 June 2020, page 7, Original text in Norwegian, "etablere større rettslig trygghet for at fremtidige kontrakter om offentlig tjenesteyting i utgangspunktet vil tildeles gjennom åpne konkurranser, og bidra til å sikre konkurransenøytralitet og redusere en eventuell oppfatning av at nasjonale myndigheter vil favorisere den historiske leverandøren gjennom direktetildelinger av kontrakter, eller på annen måte." available at [link](#).

even before the EEA Joint Committee, on 24 September 2021, adopted Decision no. 248/2021, integrating Regulation 2016/2388 into Annex XIII to the EEA Agreement.

32. Moreover, the Norwegian authorities in 2018 and 2019 awarded Trafikkkpakke 1-3, in compliance with the transitional rules, through competitive tendering procedures and in 2019 and 2020 announced its plans and the pre-qualification schemes for the competitive tendering procedures for Trafikkkpakke 4 and 5, all fully in line with the Norwegian railway passenger transport reform. In its National Transport Plan for 2022-2033, the Norwegian Ministry of Transport, after a revision of the timeline due to Covid, confirmed that start of service for Trafikkkpakke 4 would be December 2023 and that of Trafikkkpakke 5 would be December 2025.³⁰ Further, in March 2021, the Norwegian authorities confirmed that the tender documents for Trafikkkpakke 4 had been sent to all pre-qualified operators. The deadline for submission of tenders was 31 August 2021.³¹
33. Accordingly, the expectations of the railway passenger transport operators that the Norwegian authorities would carry out all the competitive tendering procedures foreseen, fully implementing the 2017 Norwegian railway passenger transport reform as decided by the Norwegian Parliament and complying with Regulation 1370/2007 (including as amended), were both reasonable and legitimate.
34. Consequently, the Norwegian authorities infringed the principles of legal certainty and of the protection of legitimate expectations by the decisions to abort the competitive tendering procedures for Trafikkkpakke 4 and 5 and to subsequently award the PSO contracts for Østlandet 1 and 2 to Vy.

5.2 Infringement of Articles 5(3) and 8(2) of Regulation 1370/2007 as amended as well as Article 3 EEA

35. As noted above, Article 5(3) of Regulation 1370/2007 sets out that the main rule for the award of public service contracts for public passenger transport services by rail shall be the use of a competitive tendering procedure. Member States shall gradually comply with Article 5 until 2 December 2019, after which Article 5 shall apply to public passenger transport services by rail.³²

³⁰ See e.g. notice published in TED 30 October 2020, S212. Although both the tendering procedure for Trafikkkpakke 4 and that for Trafikkkpakke 5 were later delayed one year because of the Covid-pandemic and Det kongelige samferdselsdepartement, Meld. St. 20 (2020-2021), Melding till Stortinget, Nasjonal transportplan 2022-2023, 19 March 2021, available at [link](#).

³¹ See Jernbanedirektoratet's communication 5 March 2021, available at [link](#).

³² See also Recital 31 and the first sentence of Recital 32 of Regulation 1370/2007.

36. As an exception, provided for in Article 5(6), competent authorities may decide to make direct awards of public service contracts for transport by rail. Nevertheless, as recalled above, constituting an exception, Article 5(6) must be applied in a restrictive manner.³³
37. Moreover, according to Article 8(2), first paragraph, (iii), of Regulation 1370/2007 as amended, Article 5(6) shall cease to apply from 25 December 2023. As pointed out by the Commission in its 2023 Interpretative Guidelines, this provision enshrines “*the phasing-out of unconditional direct awards*”.³⁴
38. The objective of the transitional provision in Article 8(2) is the abolition of direct awards of public service contracts for public passenger transport services by rail under Article 5(6). Such direct awards are only allowed under the transitional period, until 25 December 2023. Importantly, as for all transitional periods, the principle is that during that period EEA States shall gradually comply with the main rule in Article 5(3), according to which such contracts shall be awarded on the basis of competitive tendering procedures, phasing out the use of direct awards.
39. EEA States may implement the main rule in advance, and indeed should strive to do that, but they are not obliged to do so.³⁵ However, if the main rule is implemented in advance, whereby PSO contracts gradually start to be awarded on the basis of competitive tendering, as Norway did through the comprehensive 2017 Railway Reform, it is prohibited to revert back to directly awarding such PSO contracts, since that would be contrary to the objective of Article 8(2), i.e. the abolition of the direct award of PSO contracts under Article 5(6).³⁶
40. Proceeding in such a way is also contrary to Article 3 of the EEA Agreement (the “EEA”), setting out the principle of sincere cooperation, according to which the Contracting Parties shall abstain from any measure which could jeopardize the attainment of the objectives of the EEA Agreement.
41. This is particularly the case when a railway line has already been competitively tendered, as the Gjøvik line. The PSO contract for that line was competitively tendered in 2005 and awarded to Vy for a 10-year period ending on 31 December 2017.³⁷ The contract was

³³ See e.g. judgment of 28 October 2022, *Generalstaatsanwaltschaft München*, C-435/22 PPU, EU:C:2022:852, para. 120 and the case-law cited.

³⁴ 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 (“**Commission 2023 Interpretative Guidelines**”), page 11.

³⁵ See, to this effect, also judgment of 21 March 2019, *Mobit*, C-350/17 and C-351/17, EU:C:2019:237, para. 46.

³⁶ See, to that effect, judgments of 8 January 2002, *Metropol and Stadler*, C-409/99, EU:C:2002:2, paras. 44–46, and of 14 June 2001, *Commission v France*, C-345/99, EU:C:2001:334, paras. 21–22.

³⁷ See e.g. Connex’s letter to Semferdselsdepartementet on 27 January 2006, available at [link](#); see also Ot.prp. nr. 54 page 18, available at [link](#).

prolonged by two directly awarded contracts for the sole reason of covering the transition period until Trafikkpakke 4, including the Gjøvik line, was awarded under a competitive tendering procedure. Reverting to the direct award of the Gjøvik line, through its inclusion in the PSO contract for Østlandet 1, is in direct contradiction with the objective of Article 8(2) of Regulation 1370/2007 and with Article 3 EEA.

5.3 Infringement of Article 3 EEA in conjunction with Article 7 EEA and Regulation 1370/2007, as amended

42. According to the settled case-law of the CJEU, it follows from the third paragraph of Article 4(3) of the Treaty of the European Union (the “TEU”) (corresponding to the second paragraph of Article 3 EEA) in conjunction with the third paragraph of Article 288 of the Treaty on the functioning of the European Union (the “TFEU”) (corresponding to Article 7(a) EEA) that during the period prescribed for transposition of a directive, the Member States “*must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by it*”.³⁸
43. There can be no doubt that this obligation also applies to transition periods set out in EU regulations. It follows from the third paragraph of Article 4(3) TEU, and the second paragraph of Article 3 EEA, setting out the EU Member States’ and the EFTA States’ duty of sincere cooperation, in conjunction with the second paragraph of Article 288 TFEU and Article 7(a) EEA, and Regulation 1370/2007, as amended, that, just as is the case with transposition periods for directives, during the transition period set out therein, the EEA States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by it.³⁹
44. The decisions of the Norwegian authorities to reverse the ongoing liberalization of the Norwegian railway passenger market and to award the PSO contracts concerned to the incumbent State-owned railway company were adopted close to the end of the transition period by which the right to directly award PSO contracts under Article 5(6) is abolished.
45. Thereby, these decisions infringe the second paragraph of Article 3 EEA in conjunction with Article 7(a) EEA and Regulation 1370/2007 as amended. Indeed, ending the award of PSO contracts for railway passenger services on the basis of competitive tendering, which was to be the norm under the comprehensive 2017 Railway Reform, and instead

³⁸ See e.g. judgments of 4 July 2006, *Adeneler*, C-212/04, EU:C:2005:654, para. 121 and case-law cited, and of 27 October 2016, *Milev*, C-439/16 PPU, EU:C:2016:760, para. 31 and case-law cited. See also judgment of 25 January 2022, *VYSOČINA WIND*, C-181/20, EU:C:2021:619, paras. 74-75.

³⁹ Cf. also Article 18 of the Vienna Convention on the Law of Treaties of 23 May 1969 (United Nations Treaty Series, Vol. 788, p. 354), according to which “*A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when [...] it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed*” and judgment of 22 January 1997, *Opel Austria v Council*, T-115/94, EU:T:1997:3, paras. 89-91.

reverting to directly awarding PSO contracts to the incumbent Norwegian State-owned railway company is liable to seriously compromise the achievement of the result prescribed by Regulation 1370/2007 as amended.

46. In this context, it should also be noted that with regard to the already tendered and concluded PSO contracts for Trafikkpakke 1-3, the Norwegian Government's pronounced aim is that Go-Ahead and SJ – the two non-Norwegian railway companies having won Trafikkpakke 1 and 2, respectively – should leave the Norwegian market for railway passenger services.⁴⁰ The Minister of Transport has expressly stated that the Government will not prematurely terminate the already concluded PSO contracts, but when the present competitively tendered contracts expire, the new contracts shall not be given to foreign and private companies, but to Norwegian State-owned railway companies.⁴¹ The intention of the Government is evidently not that this should solely be the case in situations which meet the strict conditions of one of the limited exceptions set out in Article 5(3a), (4), (4a), (4b) and (5) of Regulation 1370/2007, as amended.

5.4 Infringement of Article 5(3) of Regulation 1370/2007

5.4.1 *The abortion of the competitive tendering procedure for Trafikkpakke 4 and the award of the PSO contract for Østlandet 1 to Vy*

47. Article 5(3) of Regulation 1370/2007 stipulates that if a competent authority has recourse to a third party other than an internal operator, it “*shall award public service contracts on the basis of a competitive tendering procedure*”. This rule is maintained in Article 5(3) of Regulation 1370/2007, as amended.
48. In accordance with this provision, the Norwegian Railway Directorate announced the competitive tendering procedure under Regulation 1370/2007 for Trafikkpakke 4 on 3 September 2019, on 2 March 2020 and on 30 October 2020. The deadline for submitting bids for Trafikkpakke 4 was 31 August 2021.
49. Consequently, the Railway Directorate had decided to have recourse to a third party other than an internal operator. It had thus, in line with Article 5(3) of Regulation 1370/2007 initiated the competitive tendering procedure and the deadline for submitting tenders had expired.
50. Article 5(3) sets out that 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*”. The provision does allow negotiations to take place after the deadline

⁴⁰ See Aftenposten, *Målet er å kutte antall jernbaneselskaper*, 6 June 2022, available at [link](#).

⁴¹ See Verdens Gang, *Starter utredning av sammenslåing av Vy og Flytoget*, 9 September 2022, available at [link](#).

for submitting tenders has expired, in order to determine how best to meet specific or complex requirements, under the condition that the principles of transparency and non-discrimination are respected, but it does not allow the abortion of an ongoing competitive tendering procedure and the direct award of the corresponding PSO contract to the incumbent operator.

51. It follows from Recital 20 of Regulation 1370/2007 that “[w]here a public authority chooses to entrust a general interest service to a third party, it must select the public service operator in accordance with [EEA] law on public contracts and concessions, as established by Articles [31 to 36] of the [EEA Agreement], and the principles of transparency and equal treatment”.
52. However, the abortion of the competitive tendering procedure and the direct award of the corresponding contract to the incumbent operator (or more precisely the award of the contract after a new procedure limited to the two national State-owned operators) is not in accordance with the EEA law of public procurement, and, as it excludes tenderers from other EEA States, is in breach of the principle of equal treatment (as also set out in Article 36 EEA as well as in Article 4 EEA).
53. In fact, there can be no doubt that the Norwegian authorities, in breach of the latter principle, acted with the intention “*of unduly favouring or disadvantaging certain economic operators*” and “*to undermine the interests of one or more economic operators and, therefore, to distort competition*”.⁴² The intention was to favour Vy, or Vy and Flytoget, the Norwegian State-owned railway companies, and to disadvantage tenderers from other EEA States.
54. This has also been confirmed, *inter alia*, by the State Secretary, Norwegian Ministry of Transport:

“*With a continuation of the Solberg government's railway reform, we could have risked that our two state-owned train companies would only run passenger trains on the Bergen Line [Trafikpakke 3] and Flytoget to Oslo Airport. The Government's solution ensures continued State operation of the railway services in Eastern Norway.*”
55. *In other words, this is not a continuation of the previous Government's competitive tendering. The Government is guaranteeing that the community will continue to have*

⁴² Cf. Article 3(1), second paragraph, of Directive 2014/23 of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, under the heading “*Principle of equal treatment, non-discrimination and transparency*”, and judgment of 10 November 2022, *SHARENGO*, C-486/21, EU:C:2022:868, para. 73.

ownership of the train companies that operate on our railway network in the future.”
(emphasis added)⁴³

56. In this regard, [Confidential] notes that none of the two Norwegian State-owned railway companies had submitted the lowest bid for Trafikkkpakke 4. After having aborted the competitive tendering procedure, which complied with Article 5(3) of Regulation 1370/2007, the Norwegian authorities awarded the corresponding PSO contract for Østlandet 1 to the incumbent, Vy, at a price which was much higher than the offer Vy had made in the aborted competitive tender, following a procedure in which only the two Norwegian State-owned railway companies were allowed to participate.
57. Admittedly, Article 5(3) of Regulation 1370/2007 provides for certain exceptions from the application of the main rule of competitive tendering, among which the only one that might be relevant in the present case is Article 5(6), which allows competent authorities to make direct awards of public service contracts.
58. However, neither that provision, nor any other provision of Regulation 1370/2007, allows for the abortion of an ongoing competitive tendering procedure unless there are objective grounds recognized by the EEA procurement law, something which has not even been claimed by the Norwegian authorities.
59. In this regard it is important to recall that, as emphasized by the European Commission in its 2023 Interpretative Guidelines, Article 5(3) of Regulation 1370/2007 “*clearly establishes that the competitive tendering procedure [...] is the principle*”, while (inter alia) Article 5(6) provides for an exception to that rule and that “[a]ccording to the case law, any derogation from or exception to a general rule should be interpreted narrowly”.⁴⁴

⁴³ Opinion piece by State Secretary Vasara, 29 August 2022 in Fri Fagbevegelse – The Government's railway policy is on the right track, published on the web page of Ministry of Transport on 31 August 2022: Original text in Norwegian: “Med en videreføring av Solberg-regjeringens jernbanereform kunne vi risikert at våre to statlige togselskaper bare ville kjørt persontogene på Bergensbanen og Flytoget til Oslo Lufthavn. Regjeringens løsning sikrer fortsatt statlig drift av togtilbudet på Østlandet. Dette er altså ikke en fortsettelse av den forrige regjeringens konkurranseutsetting. Regjeringen er garantist for at fellelskapet også i fremtiden vil ha eierskap til togselskapene som kjører på jernbanenettet vårt. Direktetildeling innebærer også en annen prosess enn anbud.” available at [link](#); further e.g. press release from the Ministry of Transport of 7 April 2022, available at [link](#); and in particular, see Reply to written question in the Norwegian Parliament to the Minister of Transport of 16 March 2023, especially the following passage: “The previous Government’s competitive tendering of the of the railway services in Eastern Norway could have ended with Vy only being left with train services on the Bergen Line and the Vosse Line [Trafikkkpakke 3]. The previous government had not decided how Flytoget’s capacity should be included in the competition for traffic package 5 or whether it should be put out to tendering as a new traffic package 6. Flytoget had not been assured of winning the competition [...]”, original text in Norwegian: “Den forrige regjeringens konkurranseutsetting av togtilbudet på Østlandet kunne endt med at Vy kun stod igjen med togtilbudet på Bergensbanen og Vossebanen. Den forrige regjeringen hadde ikke tatt stilling til hvordan Flytogets kapasitet skulle inngå i konkurransen om trafikkkpakke 5 eller om den skulle bli konkurranseutsatt som en ny trafikkkpakke 6. Flytoget hadde ikke vært sikret å nå opp i den konkurransen”, available at [link](#).

⁴⁴ Commission 2023 Interpretative Guidelines, Section 2.5.2, page 15. See also Section 2.5.3.5, page 20: “The exception to the general rule of a competitive award procedure must also be applied restrictively”.

60. Consequently, the Norwegian authorities infringed Article 5(3) of Regulation 1370/2007 by the decisions to abort the ongoing competitive tendering procedure for Trafikkpakke 4 and to award Vy the corresponding PSO contract for Østlandet 1.

5.4.2 *The award of the PSO contracts for Østlandet 1 and Østlandet 2 to Vy*

61. As recalled above, Article 5(3) of Regulation 1370/2007 establishes that the competitive tendering procedure is the principle. It is only under the exceptions referred to in that provision that a disapplication of that rule is possible and, according to the case-law, those exceptions should be interpreted narrowly.
62. The provision stipulates that the competitive tendering procedure shall be open, fair, transparent and non-discriminatory. It further follows from Recital 20 of Regulation 1370/2007 that the public service operator must be selected in accordance with EEA law on public contracts and concessions, as established by Articles 31 to 36 of the EEA Agreement, and the principles of transparency and equal treatment.
63. The award of the PSO contracts for Østlandet 1 and 2 through a procedure only open to the two Norwegian State-owned train companies, violates Article 5(3) of Regulation 1370/2007.
64. As no other operators, whether Norwegian or from other EEA States, were allowed to participate in the tendering procedure, it was neither open, nor fair, nor non-discriminatory. Further, as the mandate and instructions from the Government to the Norwegian Railway Directorate on the organization of the tendering procedure were changed several times, with limited publicity, and including orders indicating the outcome wished by the Government (changing during the procedure), the procedure was clearly not transparent and fair.
65. The design of the tendering procedure was “*made with the intention of [...] unduly favouring or disadvantaging certain economic operators*” and “*to undermine the interests of one or more economic operators and, therefore, to distort competition*”.⁴⁵ Only the two Norwegian State-owned railway companies were allowed to submit tenders while all railway companies from other EEA States were excluded. This intention of the Norwegian Government, to ensure “*continued State operation of the railway services in Eastern Norway*”, has been expressly confirmed on several occasions.⁴⁶

⁴⁵ Cf. Article 3(1), second paragraph, of Directive 2014/23 of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, under the heading “*Principle of equal treatment, non-discrimination and transparency*”, and judgment of 10 November 2022, *SHARENGO*, C-486/21, EU:C:2022:868, para. 73.

⁴⁶ See e.g. references in footnote 57, above.

66. The wish of a government to reverse a national passenger railway reform since long under way and complying with the EEA passenger railway reform as set out in Regulation 1370/2007, as amended, going back to reserving the award of PSO contracts to its national railway companies, in direct conflict with the EEA reform, is not a valid reason for applying the exception set out in Article 5(6), and even less so barely six months before the end of the transitional period. Article 5(6) is hence not applicable.
67. Consequently, the Norwegian authorities infringed Article 5(3) of Regulation 1370/2007 also by the award of the PSO contracts for Østlandet 1 and 2 to Vy through a tendering procedure in which only the two Norwegian State-owned railway companies were allowed to participate.

5.5 Infringement of Article 8(2) of Regulation 1370/2007 as amended

68. As observed above, Article 8(2), first paragraph, (iii), of Regulation 1370/2007, as amended, provides that Article 5(6) shall cease to apply from 25 December 2023.
69. The PSO contract for Østlandet 2 includes as of 1 February 2028 the operation of the Airport Express, currently operated by Flytoget.⁴⁷ The PSO contract for Østlandet 2 was awarded to Vy on 3 March 2023, but Flytoget's PSO contract for the Airport Express does not expire until 31 January 2028.⁴⁸
70. Thus, Vy's operation of the Airport Express will not start until 1 February 2028, i.e. more than 4 years after the end of the transitional period set out in Regulation 1370/2007, as amended, and more than 4.5 years after the award of the PSO contract for Østlandet 2.
71. In the 2023 Interpretative Guidelines, the European Commission has explained that:
- “The timing of the award in relation to the start of operations should not result in circumvention of the provisions of Regulation (EC) No 1370/2007 on the phasing-out of unconditional direct awards, enshrined in Article 8(2)(iii). This may be the case where a public service contract is directly re-awarded to an incumbent operator in close proximity of the cut-off date of 25 December 2023 concerning direct awards and publicity requirements, while operations under the new contract are scheduled to start significantly after that date in the absence of an objective justification for the duration of the mobilisation period.”*
72. It is clear that the award, to the former State-owned monopolist, of a PSO contract, previously awarded to another State-owned operator, in close proximity to the cut-off date of 25 December 2023, while operations under the new contract are only scheduled

⁴⁷ See Agreement *Trafikkavtale Østlandet 2*, published on Jernbanedirektoratet's website 19 April 2023, page. 132, available at [link](#).

⁴⁸ See Innst. 386 S (2014–2015), page 8, available at [link](#).

to start more than 4 years after that date, absent an open competitive tendering procedure, constitutes a circumvention of Article 8(2), first paragraph, (iii), of Regulation 1370/2007, as amended.⁴⁹

73. There is no objective justification for this. The Norwegian authorities could have respected Regulation 1370/2007 as amended by awarding the PSO contract for the Airport Express as of 1 February 2028 in accordance with Article 5(3) of the Regulation through a competitive tendering procedure, possibly in combination with a competitive tendering procedure for the rest of Østlandet 2, much closer to the expiry of the contract for the airport shuttle. Suffice it to note that new entrants on the Norwegian railway passenger market were afforded a mobilisation period of around 12 months.⁵⁰ Furthermore, the Norwegian Railway Directorate, in 2020, in its response to the Ministry of Transport's request to conduct an investigation on integrating delivery services to Oslo Airport expressly concluded that:⁵¹

*"The future choice of solution for the shuttle service will have very little impact on the package categorisation and progress plan for the competitive tendering. The shuttle service can be continued as a separate rail service or included in the traffic package for the 10-minute system in the Oslo corridor (Trafikpakke 5). Flytoget AS has a concession to operate the airport trains until 2028 and if the concession period is to be completed, Trafikpakke 5 can be expanded at a later date to include these routes."*⁵²

74. [Confidential], even if it were to be decided that the train paths currently used by the Airport Express should be used for the regional railway passenger services, allegedly creating the best solution for exploiting the available infrastructure capacity for all rail services in the most efficient way, this does not require that the contract for those services be awarded outside of a competitive tendering procedure as set out in Article 5(3) of Regulation 1370/2007, nor, in particular, does it require that such a contract is awarded more than 4.5 years before the current PSO contract for the Airport Express expires in 2028.

⁴⁹ Cf. also Commissioner Valean's letter to the Dutch Government concerning the direct re-award of the Main Rail Network concession to Nederlandse Spoorwegen, attached as **Annex 1**.

⁵⁰ This is also what the Norwegian Railway Directorate indicated in its Action Plan 2018-2029, page 40: *"The Norwegian Railway Directorate initially assumes a start-up phase from the signing of the agreement with the new train operator to the start of traffic of approximately 12 months"*, available at [link](#).

⁵¹ See Jernbanedirektoratet's letter of 28 May 2020, page 4, available at [link](#).

⁵² Original Norwegian version: *"Fremtidig valg av løsning for tilbringertjenesten vil i svært liten grad påvirke pakkeinndeling og fremdriftsplan for konkurranseutsetting. Tilbringertjenesten kan videreføres som eget togprodukt eller inngå i trafikpakken for 10-minutters systemet i Oslokorridoren (pakke 5). Flytoget AS har konsesjon for kjøring av flytog frem til 2028 og dersom konsesjonsperioden skal fullføres, kan pakke 5 utvides på et senere tidspunkt til å omfatte disse rutene."*

75. The only reason to include the operation of the Airport Express as of 1 February 2028 in the PSO contract for Østlandet 2 is to be able to pretend that the exception set out in Article 5(6) of Regulation 1370/2007, as amended, may be used as a basis for the award, circumventing Article 8(2), first paragraph, (iii), so that the Norwegian authorities could award the PSO contract to one of the State-owned railway companies (in the end, to Vy).⁵³
76. Consequently, the Norwegian authorities infringed Article 8(2), first paragraph, (iii), of Regulation 1370/2007, as amended, by including the operation of the Airport Express as of 1 February 2028 in the PSO contract for Østlandet 2, awarded to Vy on 3 March 2023.

6 Conclusion

77. By the adoption of the decisions set out in paragraph 4 above, Norway has failed to fulfil its obligations under the EEA Agreement, in particular under:
- the principles of legal certainty and of the protection of legitimate expectations;
 - Articles 5(3) and 8(2), first subparagraph, (iii), of Regulation 1370/2007, as amended, as well as Article 3 EEA;
 - Article 3, second paragraph, EEA, in conjunction with Article 7(a) EEA and Regulation 1370/2007, as amended; and
 - Article 5(3) and Article 8, first paragraph, (iii), of Regulation 1370/2007, as amended.

[Confidential]

⁵³ See e.g. Reply to written question in the Norwegian Parliament to the Minister of Transport of 16 March 2023, especially the following passage: *“The previous Government’s competitive tendering of the of the railway services in Eastern Norway could have ended with Vy only being left with train services on the Bergen Line and the Vosse Line [Trafikpakke 3]. The previous government had not decided how Flytoget’s capacity should be included in the competition for Trafikpakke 5 or whether it should be put out to tendering as a new Trafikpakke 6. Flytoget had not been assured of winning the competition [...]”* (our emphasis), available at [link](#).

Annexes

1. Commissioner Vaele's letter to the Dutch Government concerning the direct re-award of the Main Rail Network concession to Nederlandse Spoorwegen, 18.07.22.