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Ministry of Transport
Postboks 8010 Dep
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Norway

Dear Sir/Madam,

Subject: Supplementary Request for Information concerning the direct award pertaining to the railway network packages Østlandet 1 and 2

By letter dated 29 March 2023 (Doc No 1360069), the EFTA Surveillance Authority (“the Authority”) invited the Norwegian Government to submit information on the process leading to the abovementioned direct award, and the scope thereof. The Norwegian Government replied to the Authority by letter dated 28 April 2023 (Doc No 1370197, your ref. 23/17-).

The Internal Market Affairs Directorate (“the Directorate”) of the Authority has assessed the reply, and hereby request supplementary information from Norway on the issues addressed below.

1. Market analysis

While Member States have a large margin of discretion in establishing the characteristics of the rail services they wish to see provided to their citizens such services must be in compliance with the general principles of EEA law. In the context of Public Service Obligation (PSO), the genuine need for the service has to be established, e.g. by conducting a market analysis to establish a market failure before imposing PSOs.

The Norwegian Government has in its reply stipulated that several analyses have been carried out by Jernbanedirektoratet, including so-called rail network development packages, a strategic timetable and an assessment of alternative divisions of passenger rail services into PSO contracts (cf. page 4 second paragraph in the reply from Norway). Not all of these assessments have been provided to the Authority.

Based on the information provided in previous correspondence, the analyses carried out prior to the direct award appear to set out policies and strategies to meet the overall needs of the general public. However, the Directorate has not been able to identify anything that constitutes a market analysis¹ or a description of the relevant markets and the ability to provide services on those markets for the railway network packages Østlandet 1 and 2 or any assessment on (1) the first decision to bundle these routes into two separate bundles and (2) the subsequent decision to join the two bundles into one.

¹ The competent authority should assess the genuine need for the public transport services, and subsequently assess whether there are operators that are willing to offer the relevant services through open access services. For further guidance, see European Commission Notice on interpretive guidelines concerning Regulation (EC) No 1370/2007 on public transport services by rail and by road (2023/C 222/01), page 8 and 9.

The Directorate, therefore, invites the Norwegian Government to provide further information on how these decisions were taken on the basis of which analysis or factual information. The Directorate also invites Norway to provide further information on how consumer prices are set in the PSO contract and if that is considered by Norway to be part of the PSO obligation, how the prices were established and what assessment was carried out to establish those figures.

In your reply to the Directorate's previous RQI you state that:

In Jernbanedirektoratet's view, the genuine need for passenger rail services in and around Oslo cannot be addressed, even partly, by market operators in the absence of a public service contract. One or more operators would not, if they were to consider their own commercial interest, provide passenger rail services on the same or similar conditions as the public service obligations included in Østlandet 1 and 2 without compensation. This assessment is e.g., based on the economic balance in previous public service contracts, as well as the tenders received for Trafikkpakke 4.

The Directorate invites Norway to provide further clarification in this context, e.g. if the Jernbanedirektoratet's view was based on a factual assessment or only based on previous experiences and furthermore taking into consideration that for previous bundles, where Norway did tender out the services, the tender process seemed to result in reduction of costs.²

The Norwegian Government is invited to provide further information and documentation concerning the railway market pertaining to the railway network packages Østlandet 1 and 2, including an analysis of operator's availability to provide rail services on commercial basis on (parts of) that railway network. The Norwegian Government is requested to clarify whether there are some services, if any, that, if considered isolated, could be run on commercial terms. If Norwegian Government is of the view that some of the routes may be sustained on commercial basis but some overriding reasons justify the inclusion in the PSO bundle, Norway is invited to provide further information on those justifications and to identify which routes that applies to. The Directorate also requests documentation of the assessments carried out by Jernbanedirektoratet in which different divisions of passenger rail services into PSO-contracts have been explored (referenced above).

2. Scope of the concession in relation to future availability of capacity

The reply from the Norwegian Government indicates that the concession foresees an increase of services when railway infrastructure eventually becomes available between Oslo and Gardermoen from December 2027, at the latest.

Moreover, with reference to the current concession granted to Vy Gjøvikbanen valid until end of 2024, it is not clear whether the services provided under that PSO contract have been integrated into the concession, or, alternatively, if the concession foresees an increase on this part of the network once the capacity becomes available as of 2025.

² The so-called traffic packages 1-3 were tendered out, however the tender for traffic package 4 was cancelled following a letter from the Ministry of Transport to the Railway Directorate of 19 November 2021, asking that open tenders for railway passenger services be cancelled, and works be started to award directly the services that had not been subjected to competition by 25 December 2023.

The Directorate recalls that the competent authorities are bound by the principle of proportionality when specifying the public service obligations.³

Considering that the concession foresees additional future capacity, the Norwegian Government is invited to clarify the objective justification for including that capacity under the scope of public service obligations significantly ahead of the start of the actual services. The Norwegian Government is also invited to clarify whether there are other examples of increased capacity that are foreseen included in this concession.

The Directorate understands that the direct award has been finalised and that a PSO contract has been signed between the parties. The Norwegian Government is hereby invited to provide the Directorate with a copy of that contract and any annexes or attachments referred to in that contract.

The Norwegian Government is invited to submit the above information, as well as any other information it deems relevant to the case, so that it reaches the Authority by *31 August 2023*.

Yours faithfully,

Valgerður Guðmundsdóttir
Deputy Director
Internal Market Affairs Directorate

This document has been electronically authenticated by Valgerdur Gudmundsdottir.

³ See Article 2a(1) of Regulation (EC) No 1370/2007. For further guidance, see European Commission Notice on interpretive guidelines concerning Regulation (EC) No 1370/2007 on public transport services by rail and by road (2023/C 222/01).