

EFTA Surveillance Authority (ESA)
Avenue des Arts 19H
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Belgium

Your ref

Case No: 90137 Document No: 1360069

Our ref

23/17-

Date

28 April 2023

Information regarding the direct award of the public service contracts Østlandet 1 and 2

Dear Sir/Madam,

With reference to the letter from the Authority of 29 March, your case No 90137, the Norwegian Ministry of Transport would like to provide the following information to the questions raised:

1. With regard to the PSO Regulation, please clarify on what legal basis the direct award is foreseen.

According to Article 5(1) of Regulation (EC) No 1370/2007 (the PSO Regulation), public service contracts shall be awarded in accordance with the rules laid down in that Regulation. It follows from Article 5(3) that the competent authority shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 3a, 4, 4a, 4b, 5 and 6. Pursuant to Article 5(6), competent authorities may decide to make direct awards of public service contracts where they concern transport by rail.

Under Article 8(2) (iii) of the PSO Regulation, as amended by Regulation (EU) No 2016/23384, Article 5(6) and Article 7(3) shall cease to apply from 25 December 2023. Further, the second sub-section of Article 8(2) limits the duration of contracts awarded in accordance with Article 5(6) between 3 December 2019 and 24 December 2023 to 10 years.

The Ministry considers that the direct award of the two public service contracts Østlandet 1 and 2 is in line with the above provisions.

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2. Moreover, please clarify which is the competent authority for granting the concession, and what role the Ministry of Transport has played in terms of the negotiations and conclusions pertaining to the award process governed by that authority.

The competent authority for awarding public service contracts concerning passenger rail transport is Jernbanedirektoratet. This role is assigned to Jernbanedirektoratet by chapter 3.2 of the general directive.¹ In order for Jernbanedirektoratet to execute this role, the Ministry of Transport issued a mandate on 31 March 2022 for the award of the public service contracts in question (attachment 1). This mandate expresses the overall objectives and expected performance of those passenger rail services, within the letter of allocation from the Ministry and the budgetary framework decided by Parliament.

The Ministry's mandate was amended on 2 December 2022 and 20 February 2023 (attachments 2 and 3). On 16 January 2023, following a letter of 16 December 2022 from Vygruppen AS, the Ministry requested Jernbanedirektoratet to ask for a binding offer from Vygruppen AS on the complete passenger rail services covered by both Østlandet 1 and 2 (attachment 4).

Apart from the above, the Ministry of Transport has not played any role in the negotiations and conclusions of the contracts in question. When Jernbanedirektoratet informed the Ministry of its preferred choice of operator for the two contracts, the Ministry took note of this information, and Jernbanedirektoratet continued the procedure of concluding the negotiations with the chosen operator. The contracts will be signed by Jernbanedirektoratet.

3. With regard to Article 7(2) of the PSO Regulation, please describe the measures taken, if any, to publish information about the direct award of the railway network packages Østlandet 1 and 2 prior to the award.

Information about the direct award of the rail network packages Østlandet 1 and 2, as prescribed by Article 7(2) of the PSO Regulation, was published in Tenders Electronic Daily (TED) on 11 April 2022.²

Information about the direct awards was also published on Jernbanedirektoratet's webpage on 7 April 2022.³

4. With regard to the general principle of EEA Law, please clarify whether, before imposing public service obligations, a market analysis was carried out to establish to what degree railway passenger services could be provided on a commercial

¹ <https://lovdata.no/forskrift/2021-03-10-1311>

² For Østlandet 1, see [Services - 190935-2022 - TED Tenders Electronic Daily \(europa.eu\)](#). For Østlandet 2, see [Services - 190936-2022 - TED Tenders Electronic Daily \(europa.eu\)](#)

³ ["Jernbanedirektoratet skal forhandle med Vy og Flytoget om direktetildeling av togtilbudet på Austlandet"](#)

basis on (parts of) the Østlandet 1 and 2 networks and the genuine public service need. If affirmative, please provide the Directorate with this market analysis.

The public service obligations under Østlandet 1 and 2 are based on several analyses made by Jernbanedirektoratet (and previously, by Jernbaneverket) of so-called rail network development packages and other measures that will provide an overall benefit in the public interest (“effektpakker”). These analyses have been submitted to the Government and form the basis for the Government’s National Transport Plan in respect of passenger rail services. These analyses include the strategic timetable⁴ “Rutemodell 2027”⁵ and later, updated strategic timetables and rail network development packages for the “National Transport Plan 2022-2023”.⁶ The National Transport Plan, which is submitted to Parliament as a white paper, sets out the Government’s transport goals, strategies and priorities in a long-term perspective.

The analyses made by Jernbanedirektoratet contain cost/benefit analyses of the rail network, including transport analyses where the expected demand for travel on different rail routes have been quantified. These have resulted in the recommended strategic timetables for passenger rail services in the Oslo area, which in turn is the basis for the public service obligations under Østlandet 1 and 2. In effect, it follows from this that the public service obligations that will be imposed on the operator are based on ex ante assessments and reflect a genuine service need.

Since 2007, the rail infrastructure between Oslo Central Station and Skøyen station in Oslo has been declared as congested according to the criteria in Directive 2001/14/EC, now Article 47 of Directive 2012/34/EU. This means that the possibility of improving the passenger rail services in and around Oslo, to meet the expected demand in passenger travel by rail, is limited. In 2017, the Ministry, therefore, requested Jernbanedirektoratet to analyse an alternative use of the train paths currently used by Flytoget AS to operate the airport express rail service to and from Oslo Airport.⁷

The conclusions from Jernbanedirektoratet’s analyses in this respect were clear. From a socio-economic perspective, it is better to make use of the train paths currently used by the airport express rail service for the general passenger rail services included in Østlandet 2, provided that parts of the comfort elements of the airport express rail service can be maintained. This is documented in three reports of 8 February 2019, 15 October 2019 and 1 September 2020.⁸

⁴ A strategic timetable is an implementable timetable that details all regular services on the rail network (including, but not limited to, start and end stations, frequency, service timings, which passing loops services should use on single track section and turnaround times).

⁵ [Oppsummeringsrapport \(jernbanedirektoratet.no\)](#)

⁶ [Meld. St. 20 \(2020–2021\) - regjeringen.no](#)

⁷ Based on the first two reports, the Ministry requested a supplementary analysis in 2020.

⁸ [rapport-integrert-tilbringertjeneste-oslo-lufthavn-fase-1-versjon-2.1.pdf \(regjeringen.no\)](#)

[integrert-tilbringertjeneste-oslo-lufthavn-fase-2.pdf \(jernbanedirektoratet.no\)](#)

[Integrering av tilbringertransporten til Oslo Lufthavn, supplerende analyser \(jernbanedirektoratet.no\)](#)

To include the train paths currently used by the airport express rail service in the provision of the general passenger rail services will result in a more efficient use of the available infrastructure capacity. Further, this will more effectively meet the expected future increase in demand for passenger rail services, in particular for passengers other than those travelling to or from Oslo Airport. The current airport express service provided by Flytoget only caters for travellers to and from the airport. Accordingly, commuters in the greater Oslo area cannot use those trains today.

Prior to the tender procedure for passenger rail services in and around Oslo, Jernbanedirektoratet assessed different divisions of passenger rail services into public service obligation contracts (PSO-contracts). In this assessment, eight different divisions of passenger rail services were analysed according to eleven factors. These factors included, but were not limited to, the experiences drawn from previous tender procedures, the bidders/operators' freedom to organise and improve the rail services and the production of these in order to make their services attractive to customers, the strategic timetable "Rutemodell 2027", the market conditions, the rail network infrastructure, as well as the possible alternative use of the train paths currently used for by the airport express rail service. Emphasis was placed on the fact that contracts with a large production of different rail lines serving different marked segments (local and regional trains) in the same geographical area, would have a greater opportunity to influence the rail services and develop the market for rail passenger services over time. Jernbanedirektoratet's conclusion was that dividing rail passenger services according to type of service would result in a weaker performance in fulfilling the transport objectives than dividing rail passenger services according to geographical area.

Based on this assessment, Jernbanedirektoratet recommended two PSO-contracts for the Oslo area on 13 June 2019, Trafikkpakke 4 and 5 (now Østlandet 1 and 2).⁹ However, these PSO contracts did not include the use of the train paths currently used by the airport express rail service, as at that time, a decision in this respect was not yet made.

After the tender procedure for Trafikkpakke 4 and 5 was cancelled, Jernbanedirektoratet recommended that the level of services in Trafikkpakke 4 was continued in what is now PSO-contract Østlandet 1. For the PSO-contract that became Østlandet 2, Jernbanedirektoratet recommended to include the use of the train paths currently used by the airport express rail service. These recommendations are set out in Jernbanedirektoratet's memorandum of 3 January 2022, sent to the Ministry ([attachment 5](#)).

The Ministry endorsed these recommendations in its mandate of 31 March 2022 for the direct awards of Østlandet 1 and 2 ([attachment 1](#)). The inclusion of the train paths currently used by the airport express rail service was endorsed, as this will improve the local and regional rail services. It will also maintain a good rail service and high market share of public transport for journeys to and from Oslo Airport. Further details in this respect are set out in the answer to question 7 below.

⁹ [rapport--forslag-til-inndeling-konkurransepakker-ostlandet.pdf \(jernbanedirektoratet.no\)](#)

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 Trafikkkpakke 4.

In the cancelled tender procedure for Trafikkkpakke 4 (now Østlandet 1), Jernbanedirektoratet received offers from six operators. In none of these offers was the authority's consideration for the services below NOK 9,3 billion over a 12-year period. For 2021-2023, Jernbanedirektoratet has paid approximately NOK 3-3,5 billion per year for the combined rail passenger services included in Østlandet 1 and 2, currently provided by Vygruppen and Vy Gjøvikbanen.

Prior to the Covid-19 pandemic, Flytoget AS has had an annual profit of maximum NOK 400 million in respect of the airport express rail service. This is also prior to the introduction of more rolling stock and significant increases in infrastructure charges.

As set out in more detail in the answer to question 7 below, the public service obligations included in Østlandet 2 stipulates that rail fares for travel to and from Oslo Airport shall be the same as for other rail services.¹⁰ This reduces the profitability of operating the rail services considerably. On this basis, it is highly unlikely that the overall passenger rail services included in Østlandet 1 and 2 can be operated on commercial terms.

To summarise, there is a genuine public service need for the passenger rail services included in Østlandet 1 and 2. Those services cannot be provided by one or more operators on the same or similar conditions in the absence of the public service obligations set out in those contracts. As explained above, this conclusion is based on numerous assessments of the market conditions by Jernbanedirektoratet, as well as the experience drawn from previous PSO-contracts, for rail passengers services in and around Oslo.

5. With regard to any identified market failure for railway services in the geographical area of Østlandet 1 and 2, the Ministry is invited to describe the public service obligations which will be imposed on the operator and how, and by which public authority, those criteria have been established.

The Ministry's mandate in respect of the direct award of Østlandet 1 and 2 sets out the geographical area covered by those public service contracts and their main policy objectives.

¹⁰ This is partly due to the fact that pricing of rail journeys within the Oslo local public transport area is the responsibility of Ruter AS. In Østlandet 1 and Østlandet 2, Ruter AS pays the operator a calculated fee per passenger km travelled on Ruter-tickets. Changes to the pricing of these rail journeys must therefore be agreed with Ruter AS and its owners, Oslo and Viken county councils, for this to have an effect on the income of the rail operator.

It is for Jernbanedirektoratet, acting as the competent authority, to specify the public service obligations in more detail, according to the provisions of the PSO Regulation, in particular Article 2a, and to ensure that these obligations are clearly set out in the contract, according to Article 4(1).

The public service obligations that will be imposed on the operator are established by Jernbanedirektoratet on the basis of the analyses and recommendations described in the answer to question 4. As explained above, those include that the recommended level of services in Trafikkpakke 4 was continued in what is now rail network package Østlandet 1, and that the rail line capacity currently used for the airport express rail service should be included in what is now rail network package Østlandet 2 (attachments 12 to 14). Further, in a memorandum of 3 May 2022, sent to the Ministry on 19 May 2022, Jernbanedirektoratet recommended the policy goals for the development of the rail services in Østlandet 2 (attachment 6). This was endorsed by the Ministry in its letter of 7 June 2022 (attachment 7).

Based on the policy goals for the rail services covered by the public service obligations, Jernbanedirektoratet has specified the minimum requirements for rail services in Østlandet 1 and 2. These are set out in A-1 to A-3 of the draft contracts (attachments 8 to 13). The annexes describe the requirements in respect of the frequency of the services, the service provision for rail stations/destinations and the transport capacity.

As Jernbanedirektoratet is in negotiations regarding the abovementioned contracts, they have emphasized that they be treated confidentially.

Other requirements have been established by Jernbanedirektoratet. These requirements are in line with any stipulations made by the Ministry in its mandates to Jernbanedirektoratet.

Annex A also sets out other requirements in respect of the rail services. The most relevant documents are attached to this letter, see attachments 8 to 13.

Annex B and sub-annexes sets out e.g., requirements in respect of fare levels, the operator's freedom to determine different fares, as well as other financial provisions.

6. With regard to Article 4 of the PSO Regulation and taking also into account the interpretive guidelines concerning the PSO Regulation, please clarify whether rail substitute services, for instance by other modes of transport, are foreseen contractually required from the awarded operator, and if affirmative, whether those services are integrated in the award.

The contracts for Østlandet 1 and 2 will include provisions that stipulates the operator's obligations to organise and provide alternative modes of transport for passengers if the services are cancelled, regardless of cause.

The operator has the commercial freedom to organise alternative modes of transport, either by providing the services himself or by concluding contracts with relevant sub-contractors for the provision of such services. Vygruppen states on its website that parts of the Vygruppen group are subject to the Norwegian Public Procurement Act and the Regulation on procurement by entities operating in the water, energy, transport and postal services sectors.¹¹ This legislation transposes Directive 2014/24/EU and Directive 2014/25/EU into Norwegian law.

7. Please clarify when the concession will be awarded, and when the operations will start. Moreover, with consideration to the existing public service contract with Flytoget for the route between the Oslo area and Oslo airport, please clarify whether the award in question includes future operations, and subsequently when operations on these and/or any new future routes will start. In relation to any future operations included in the award, please clarify to what extent a market analysis establishes the need for public service obligations for those routes.

Jernbanedirektoratet expects that the contracts for Østlandet 1 og 2 will be signed before July 2023, with planned start of traffic in accordance with the change to the new working timetable in December 2023.

The current public service contract with Flytoget AS for the rail passenger service to and from Oslo Airport will expire on 31 January 2028.¹² As explained in the answer to question 4, Jernbanedirektoratet has recommended that the train paths currently used by the airport express rail service should be used for the regional passenger rail services. This is considered the best solution for exploiting the available infrastructure capacity for all rail services in the most efficient way, in order to meet the transport policy objectives.

The contract for Østlandet 2, therefore, includes an increase in the regional passenger rail services between Drammen and Oslo Airport. This increase assumes the use of the train paths currently used by the airport express rail service.

The planned increase in the regional passenger rail services will serve the large number of passengers travelling to and from Oslo city centre and the junctions between Lillestrøm and Drammen. The number of regional passenger rail services per hour on this line section will increase from six¹³ to nine in each direction outside of rush hours. At the same time, this will provide a frequent train service for passengers travelling to and from Oslo Airport, including both airport employees and those travelling for flight departures/arrivals. The effective number of services¹⁴ to and from Oslo Airport will increase both for those passengers that use the airport express rail service today (from six to nine services per hour in each direction

¹¹ [Informasjon for Vys leverandører | Anskaffelser | vy.no](#)

¹² [Gjeldende avtaler \(jernbanedirektoratet.no\)](#)

¹³ Currently one of these only serves Asker – Drammen, however this is due to be extended to Drammen when the Drammen station upgrade is completed in 2025.

¹⁴ As Vygruppen and Flytoget have separate ticketing arrangements, the effective number of services to and from the airport depends on what company the passenger buys a ticket from.

to and from Oslo S), and for those that use regular regional passenger rail services today (from three to nine services per hour in each direction to and from Oslo S). This will cover the expected demand in passenger rail transport without the need for large infrastructure investments.

The increase in the regional passenger rail services between Drammen and Oslo Airport is planned from December 2027, at the latest. However, it is possible to bring forward the use of the train paths currently used by the airport express rail service for general regional passenger rail services at an earlier stage under certain circumstances. The Government has initiated a process in which the two state owned railway undertakings Vy and Flytoget could be merged. The outcome of this process might provide an earlier achievement of the policy objectives described above. On this basis, Jernbanedirektoratet may include a provision in the contract for Østlandet 2 for the use of the train paths currently used by the airport express rail service prior to December 2027, should these train paths become available at an earlier date.

Jernbanedirektoratet considers that the inclusion of the train paths used by the current airport express rail service is in line with the transitional provision in the new Article 8(2)(iii) of the PSO Regulation. In Jernbanedirektoratet's view, it is not appropriate to describe the award in question as including "future operations" or "new future routes". The inclusion of the train paths used by the current airport express rail service simply provides for an increase in the regional passenger rail service under as and when more rail infrastructure capacity becomes available. The earliest possible use of those train paths for the general regional passenger rail services under Østlandet 2, will ensure the most effective use of the scarce rail infrastructure capacity in the Oslo area.

As for the Authority's question concerning a market analysis, the Ministry refers to the answer to question 4, where it is explained that from a socio-economic perspective it is better to use the train paths currently used by the airport express rail service for general regional passenger rail services. The current airport express rail service will not be continued after the contract with Flytoget expires. Further, as set out above, the public service obligations under Østlandet 2 stipulate that the rail fares for rail travel to and from Oslo Airport shall be the same as for other rail services. This reduces the profitability of operating those rail services considerably. Whether it is possible to exploit the increased willingness to pay for rail travel to and from the airport, may be considered at a later stage. However, even if this should be the case, this would not eliminate the need for a public service contract for Østlandet 2. As the train paths currently used by the airport express rail service are/will be integrated in the general passenger rail services in and around Oslo, Jernbanedirektoratet considers it highly unlikely that there will be sufficient interest for an operator to use the train paths currently used by the airport express rail service on purely commercial terms. This assessment is independent of whether the airport express rail service train paths are included in Østlandet 2 or awarded in a different contract.

8. With regard to the provisions on market opening of the 4th railway package, in particular Article 11 of the Single Railway Market Directive, please clarify what is the policy of the Norwegian Government as regards access of other railway undertakings to the railway infrastructure concerned for the provision of rail passenger services.

As set out in the notification to the Authority of the Norwegian legislation transposing directive 2012/34/EU as amended by directive 2016/2338/EU¹⁵ (the “Single European Railway Area Directive”), the Ministry considers the national legislation to be fully in line with the EEA Agreement.

As prescribed by § 8 of the Norwegian Railway Act, any railway undertaking (with a licence and a single safety certificate issued according to other requirements in the Agreement) have access to perform rail passenger services on the national rail network, as prescribed by Article 10(2) of Single European Railway Area Directive. However, according to the second paragraph of § 8 of the Railway Act, this access right is limited if the exercise of this right would compromise the economic equilibrium of a public service contract or contracts covering the same or an alternative route. This is in line with Article 11(1) of the Single European Railway Area Directive. More detailed rules on the procedure and criteria for determining the economic equilibrium is provided by secondary legislation.¹⁶

Furthermore, the access rights established by Article 10(2) are “without prejudice to” the PSO Regulation. The right to establish new services under Article 10(2) of the Single European Railway Area Directive is therefore limited by exclusive rights awarded in accordance with the PSO Regulation. Furthermore, the Single European Railway Area Directive allows for national legislation on the prioritisation of capacity allocation in case of congested infrastructure, see Article 38(4) and 47.¹⁷

The main objective of the Norwegian government is to use the available rail infrastructure capacity in the most efficient way, with the highest possible benefit for society.

Jernbanedirektoratet has recently provided a report assessing the use of priority criteria in the capacity allocation processes, based on a mandate from the Ministry of Transport. Based on this report, the Ministry of Transport is considering potential regulatory measures in order to provide the most efficient use of the rail infrastructure capacity with the highest benefits for society.¹⁸

As the Authority rightly has observed, the Norwegian Government's policy is to award public service contracts directly. At the same time, it is not the Government's intention or policy to limit new entrants to the passenger rail markets by excluding railway undertakings other than

¹⁵ See our letter of xxx [sett inn referanse]

¹⁶ See jernbaneforskriften chapter 2 and <https://lovdata.no/forskrift/2021-07-08-2365>

¹⁷ See jernbaneforskriften chapter 8 and § 10-5.

¹⁸ See mission no. 2 in the letter of allocation: statsbudsjettet-2023-tildelingsbrev-til-jernbanedirektoratet-med-vedlegg.pdf (regjeringen.no)

those with a PSO-contract from establishing new rail services if the necessary framework conditions are present.

Yours sincerely

Cecilie Taule Fjordbakk
Deputy Director General

Erik Syvertsen
Assistant Director General

This document is signed electronically and has therefore no handwritten signature

Enclosed with this letter are the following documents:

1. Mandate of 31 March 2022 from the Ministry of Transport to Jernbanedirektoratet
2. Amended mandate of 2 December 2022 from the Ministry of Transport to Jernbanedirektoratet
3. Amended mandate of 20 February 2023 from the Ministry of Transport to Jernbanedirektoratet
4. Letter of 16 January 2023 from the Ministry of Transport to Jernbanedirektoratet
5. Memorandum of 3 January 2022 from Jernbanedirektoratet to the Ministry of Transport
6. Memorandum of 3 May 2022 from Jernbanedirektoratet to the Ministry of Transport
7. Letter of 7 June 2022 from the Ministry of Transport to Jernbanedirektoratet
8. Draft contract for rail services in Østlandet 1 – A1
9. Draft contract for rail services in Østlandet 1 – A2
10. Draft contract for rail services in Østlandet 1 – A3
11. Draft contract for rail services in Østlandet 2 – A1
12. Draft contract for rail services in Østlandet 2 – A2
13. Draft contract for rail services in Østlandet 2 – A3