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***“With a continuation of the Solberg-government's railway reform, we could have risked that our two state-owned rail companies would only operate passenger trains on the Bergen-line and Flytoget to Oslo airport.***

***This government's solution ensures continued state operation of the rail services in Eastern Norway. Therefore, this is not a continuation of the last government's tendering process.***

***This government is a guarantor that the State will also in the future have ownership of the rail companies that run our railway network”.***<sup>1</sup>

\* \* \* \* \*

## EXECUTIVE SUMMARY

- (1) The complainant has taken note of ESA’s decision to open an *ex officio* investigation into the same matter on 14 March 2023 after the Norwegian authorities on 3 March 2023 announced the awards of East 1 and 2 to VY.<sup>2</sup> We have also taken note of the information request (“**RFI**”) on 29 March 2023 and of the reply from the Norwegian authorities on 28 April 2023.
- (2) The following events have, nevertheless, made it necessary for the complainant to file this complaint, to make sure that the investigation becomes fully informed of the facts.
- (3) In parallel with ESA, on 21 March 2023, the Standing Committee on Scrutiny and Constitutional Affairs in the Norwegian Parliament also started an enquiry into the announced awards of East 1 and 2. Under Articles 14 and 15 of the Rules of Procedure of the Parliament, the committee is empowered to initiate own enquiries into the public administration to check whether the government has acted in accordance with the decisions and intentions of the Parliament. The committee sent its first enquiry on 21 March 2023, which the Minister of transport answered on 28 March 2023. This led to a second enquiry on 25 April 2023, which the minister answered, in part, on 3 May 2023 and, finally, on 10 May 2023.
- (4) The Minister of transport was compelled to surrender to the committee comprehensive evidence that included internal emails, minutes, presentations, notes, and other internal communications that otherwise could have been suppressed from the public eye.

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<sup>1</sup> Official statement of 31 August 2022 on the webpage of the Ministry of transport (last accessed 31 July 2023): <https://www.regjeringen.no/no/aktuelt/debattinnlegg-av-statssekretar-vasara-regjeringens-jernbanepolitikk-er-pa-riktig-spor/id2926118/>.

<sup>2</sup> ESA Case no. 90137.

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- (5) On 31 May 2023, ESA informed the Norwegian authorities of its decision to also open a state aid investigation into possible overcompensation of VY concerning the passenger rail contracts for 2018-2023 that VY was awarded in 2018.<sup>3</sup> The state aid case concerns potentially more than NOK 8 billion (EUR 800 million) in unlawful and incompatible aid.
- (6) The contractual “ex-post mechanism” is a focal point in that investigation. It is notable that the East 1 and 2 contracts have likely been based on the 2018-contracts, including the contentious ex-post mechanism. Minutes from a meeting between VY and the Railway directorate as late as on 13 March 2023 state regarding the finalization of the East 1 and 2 contracts:
- “Ex post.
- [The directorate] has asked VY to state which level the company used as a basis for its offers, as this is unclear to [the directorate]. At the same time, [the directorate] will make a final assessment on whether the proposed ex-post mechanism is in line with current rules and laws. If we find something that should be looked into more closely, VY will be contacted”.<sup>4</sup>
- (7) On 5 June 2023, the Norwegian authorities were eventually compelled also to release to the public *all* documents that the committee had requested. Then, on 13 June 2023, after becoming aware of ESA’s parallel investigation, the committee decided to end its own enquiries.
- (8) On 29 June 2023, the Norwegian authorities decided, nevertheless, to sign the contracts, leaving no time for ESA to consider the comprehensive body of evidence just released. Notably, the Railway directorate was as late as on 13 March 2023 authorized to sign the contracts, if need be, as late as on 24 December 2023.<sup>5</sup>
- (9) The evidence demonstrates that the Norwegian authorities likely committed additional and more serious infringements than the scope of ESA’s investigation appears to include at present. This complaint will therefore lay out a chronological walk-through of the key events that led to the awards of East 1 and 2 to VY on 29 June 2023.
- (10) In sum, the Norwegian authorities have, to ESA and to the outside world, presented East 1 and 2 as regular direct awards, allowed for in the transition period before 25 December 2023 under Regulation 1370/2007.
- (11) By contrast, the evidence now released demonstrates that East 1 and 2, instead, were the result of a deliberate *competitive process*, in which only the incumbent Norwegian state-owned operators were allowed to participate because the Norwegian authorities wanted to avoid the risk of having VY and Flytoget lose East 1 and 2 to cross-border operators with better prices and better quality of service.

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<sup>3</sup> ESA Decision no. 82/23/COL.

<sup>4</sup> See **Annex 133**, page 1.

<sup>5</sup> *Ibid.*

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- (12) This amounts to serious violations of the prohibition against discrimination on grounds of nationality in Article 4 EEA, and the principle of competitive tenders in Article 5(3) in Regulation 1370/2007.
- (13) The extent and deliberate nature of the discriminatory competitive process were concealed from the public eye until 5 June 2023. Consequently, after reviewing all the new evidence, and then seeing the questions in the RFI dated 29 March 2023, the complainant became alarmed that *the scope of the investigation may have been set too narrow*.
- (14) The complainant therefore respectfully asks for a complete and unbiased assessment of all the new evidence from the key events that led to the awards on 29 June 2023.
- (15) Regrettably, the fact that the Norwegian authorities decided to sign the contracts shortly after being formally notified of ESA's investigation, makes this case needlessly contentious. This head-strong stance does not appear entirely accidental. Nevertheless, it is the stated policy of ESA since 2011 "to pursue cases as long as the contract concerned continues to produce effects and the EFTA State concerned has not taken suitable corrective measures to rectify the breach".<sup>6</sup>
- (16) In this case, the only corrective measure to the egregious discrimination is a reopening of the market to lawful and non-discriminatory cross-border competition on the merits, as soon as possible.

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<sup>6</sup> See PR(11)54, dated 18 July 2011.

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**3. THE EFTA STATE AND THE PUBLIC BODY IN CHARGE**

- (39) The infringements have been committed by Norway.
- (40) The relevant public bodies are the Ministry of transport and the Railway directorate. The directorate is the contracting authority, subject to mandates and general and specific instructions decided by the ministry.

## 4. FACTUAL BACKGROUND

### 4.1 Norway decided in 2015 to open the market for passenger rail services

#### (a) The government decided to open the entire market on 12 May 2015

- (41) On 12 May 2015, the Norwegian government decided to liberalize the entire market for passenger rail services. The decision was laid out in white paper no. 27 (2014-2015), titled: “On the right track – reform of the railway sector”.<sup>16</sup>
- (42) On 15 June 2015, the Parliament endorsed the decision.
- (43) In the white paper, the government explained that competitive tenders would be phased in. Its own operator, VY (NSB until 2019), which at the time served the market under a contract set to expire on 31 December 2017, would be awarded a new transitional contract, starting on 1 January 2018, that would “take account of the fact that the traffic will gradually be subject to competition”. This meant that, after the transition phase, VY “will be exposed to competition in all its submarkets”.
- (44) The 2018-award was therefore stated to be the last directly awarded contract:

“The government will gradually introduce competition for passenger rail services. Competition will contribute to foster the best possible rail offering for the customers. The competition to run passenger rail services will therefore be arranged so that the rail companies have a vested interest in retaining and attracting new passengers. A rail company that wins a competitive tender should not only focus on running the traffic efficiently but should also want to develop the travel experience and the market so that the traffic grows over time. To accomplish this, the rail companies must have real influence on the product they offer and have a financial vested interest in increasing the volume of traffic. A contract form needs to be chosen that supports this consideration cf. section 4.5.3 below.<sup>17</sup> [...]

The current traffic agreement with NSB expires on 31 December 2017. ***This will be replaced by a new traffic agreement that takes account of the fact that the traffic will gradually be subject to competition.***<sup>18</sup> NSB will be able to compete to win competitive traffic packages in the same way as other rail companies.

***After a transition phase during which the passenger rail traffic is tendered out, the rail company, NSB, will be exposed to competition in all its submarkets***.<sup>19</sup>

- (45) This meant that the government’s 2015-decision started the process to gradually comply with Article 5, in line with Article 8(2) in Regulation 1370/2007, in the passenger rail

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<sup>16</sup> See Annex 2.

<sup>17</sup> See Annex 2, page 24.

<sup>18</sup> The negotiations with VY eventually became so demanding for the Railway directorate that four contracts for 2018-2023 had to be signed retroactively on 28 February 2018, see Section 4.1(d) below.

<sup>19</sup> See Annex 2, page 29.

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market.<sup>20</sup> The government thereby elected not to use the transition period beyond what has necessary to implement its liberalization decision.

(46) Indeed, the Norwegian government was well positioned to implement its 2015-decision because preparations for the liberalization of the passenger rail market had started more than 10 years earlier.

(47) Already on 11 March 2005, the government proposed to amend the 1993 Railway Act, to open the market, by adding a new Chapter IIA. The government then stated:

“In the proposal, the Ministry of transport proposes amendments to the Railway Act *which will allow for competition on contracts for passenger rail transport*. Opening the national rail network to competition means that other operators than NSB will be able to gain access where NSB now has an exclusive right.”<sup>21</sup>

(48) In doing so, the government implemented a policy decision that had earlier been set out in the National Transport Plan 2006-2015, which the Parliament had endorsed the year before, on 15 June 2004.<sup>22</sup> The Parliament therefore adopted the amendment of the 1993 Railway Act on 10 June 2005.<sup>23</sup>

(49) The 2005-amendment provided for the discretionary use of competitive tenders, which would be implemented through a wide-ranging delegation of powers to the Ministry of transport in a new article 8(a) in the 1993 Railway Act.

(50) The government afterwards also arranged a competitive tender on the Oslo-Gjøvik line, which VY won in competition against DSB and Connex. At the time, the Minister of transport explained in a press statement that the competitive tender had delivered a “far better” result when VY no longer could rely on a directly awarded contract:

“The passengers on the Gjøvik-line will receive a far better connection offer, with increased capacity, more departures, better services, accessibility, and comfort. These improvements will induce more people to travel by rail.

At the same time, the State will pay less for the operation of the rail service on the Gjøvik-line. Competition therefore leads to more and better transport services for less public funds! This must represent a sound point of departure for more liberalisation.”<sup>24</sup>

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<sup>20</sup> See sections 2.6.1 and 2.6.2 of the 2014 Commission notice and interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road, OJ C 92, 29.3.2014, p. 1-21.

<sup>21</sup> See **Annex 3**.

<sup>22</sup> See **Annex 4**.

<sup>23</sup> See **Annex 5**.

<sup>24</sup> See **Annex 6**.

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- (51) The 2005 tender on the Gjøvik-line was in 2010 evaluated by the Institute of Transport Economics (TØI).<sup>25</sup> In the words of the Ministry of transport, summarizing the report:

“The TØI-report concludes that many of the objectives of the public tendering were achieved. This includes the objectives of reduced costs, combined with a better rail offer and higher passenger numbers. The report states that employees' working conditions have not been weakened, while the potential for public control has been strengthened”.<sup>26</sup>

- (52) In its report, TØI also included a summary of all the preparations that had led up to the partial market opening in 2005<sup>27</sup>, and also highlighted that already by 1999 Norway was at the forefront in Europe “in making the necessary organizational preparations” for opening up its market to competition:

*“Norway was among the countries in Europe that had come the furthest in making the necessary organizational preparations for opening up the railway to competition”*.<sup>28</sup>

- (53) The 2005-contract was awarded for a period of 10-years from June 2006 to 2017.<sup>29</sup> This meant that the contract on the Oslo-Gjøvik line would expire during the implementation of the 2015-liberalization of the entire market. Only for that reason, did the Norwegian authorities in 2018 directly award a new transitional contract to VY and only until the liberalization had been completed in 2024.<sup>30</sup>

- (54) On 3 December 2009, Regulation 1370/2007 took effect in the EU and the EEA.

- (55) The incorporation of this Regulation into Norwegian law required that the government first obtain the consent of the Parliament, which the Parliament granted on 20 November 2008.<sup>31</sup>

- (56) Notably, this led the government, on 23 April 2010, to propose a new article 7(d) in the 1993 Railway Act which empowered the Ministry of transport to incorporate Regulation 1370/2007, *including later amendments*, through national regulations.<sup>32</sup>

- (57) In its proposal, the government acknowledged its obligation to gradually comply with Article 5 in the transition period until 3 December 2019 in Article 8(2):

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<sup>25</sup> See **Annex 7**.

<sup>26</sup> See **Annex 2**, page 35.

<sup>27</sup> See **Annex 7**, section 3.1, pages 16-18.

<sup>28</sup> *op.cit*, page 16.

<sup>29</sup> See subsection (d) below.

<sup>30</sup> The Oslo-Gjøvik line was therefore later included in Tender 4 (East 1), which the new government aborted on 19 November 2021, after the time limit to submit bids had expired on 31 August 2021 and VY had failed to submit the lowest bid. The Oslo-Gjøvik line is now part of the contested *new* award to VY, on 29 June 2023, for the East 1 contract in 2023-2033, in this case.

<sup>31</sup> See **Annex 51**.

<sup>32</sup> See **Annex 52**.

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“It is the States' responsibility to ensure that the rules on competitive tendering (Article 5 of the regulation) *are gradually implemented during this period*”.<sup>33</sup>

- (58) On 13 August 2010, the Parliament adopted the government's proposal. The new article 7(d) of the 1993 Railway Act provides:

“The Ministry can issue regulations on the implementation and completion of the EEA Agreement Annex XIII point 4a (Regulation (EC) No. 1370/2007 on public passenger transport by rail and road and on the repeal of Council Regulation (EEC) 1191/69 and 1107/70, *with subsequent amendments*”.<sup>34</sup>

- (59) On 17 December 2010, the Ministry of transport then adopted regulation no. 1673 to incorporate Regulation 1370/2007, which became effective on 1 November 2011.<sup>35</sup> To that end, article 1 of the new regulation no. 1673 stated:

“Annex XIII No. 4a to the EEA Agreement (Regulation (EC) No. 1370/2007) on public passenger transport by rail and by road and on the repeal of Council Regulation (EEC) No. 1191/69 and 1107/70, apply as regulations with the adaptations that follows from Annex XIII, Protocol 1 to the Agreement and the Agreement in general”.

- (60) Consequently, when the government later, on 12 May 2015, decided to open the entire market to competition, it was not starting from scratch but rather proceeding on the basis of and in accordance with a comprehensive reform plan that the Parliament also had endorsed, and in accordance with already existing national law and the EEA Agreement.

- (61) At the time of the 2015-decision, the rail sector was characterized by the following set-up in Norway:

- The Ministry of transport owned and controlled VY, which was and still is organized as a state limited liability company. VY ran passenger rail services under an exclusive contract directly negotiated and awarded by the Ministry of transport. At the time of the 2015-decision, VY held a six-year contract for 2012-2017 that the ministry had awarded on 21 December 2011. This was the longest contract period that VY had been awarded. Previously, VY had only received one- to four-year contracts.<sup>36</sup>
- The National Rail Administration (Jernbaneverket) was a hybrid administrative agency and supplier that both ran the rail infrastructure (operation, maintenance,

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<sup>33</sup> *Ibid*, page 3.

<sup>34</sup> See **Annex 5**.

<sup>35</sup> See **Annex 53**.

<sup>36</sup> The contested awards in this case concern the use of 10-year contracts for East 1 and 2, which have never been used in Norway before.

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and construction) as well provided strategic planning and coordination of the rail offering in Norway.<sup>37</sup> The agency was subordinated the Ministry of transport.

- The Ministry of trade owned and controlled the airport express operator, Flytoget, which was and is still organized as a state limited liability company. Flytoget was then restricted to only run a 15-year concession agreement, directly awarded on 12 February 2013, to provide a shuttle service between Oslo airport and Asker until 31 January 2028.<sup>38</sup> Notably, this service is run on a *commercial* basis and without public compensation.

(62) The 2015-decision meant that this set-up would be reorganized as follows:

- The National Rail Administration (Jernbaneverket) would be separated into two different entities to avoid conflicts of interest: an infrastructure company (Bane NOR) owned and controlled by the Ministry of transport and an administrative agency (Railway directorate) that would be subordinated the same ministry. The purpose was to separate the role as supplier of infrastructure to the competing rail operators from the role as an administrative agency that would be providing planning, analysis of capacity, development of routes, etc of the public rail offering, independently, of the rail operators.
- The new Railway directorate would be delegated the powers that until then had rested with the ministry to purchase passenger rail services. *This meant that the Railway directorate would become pivotal for the liberalization because it would be charged with the responsibility to implement the competitive tenders.*<sup>39</sup>
- VY would be reorganized to ensure competitors equal access to rolling stock and maintenance services. This meant that ownership of VY's subsidiary for maintenance services (Mantena) would be transferred to the Ministry of transport. In addition, the ownership of VY's real estate subsidiary (Rom Eiendom) and VY's ownership of properties used for repair and maintenance would be transferred to the new infrastructure company (Bane NOR). Moreover, VY's ownership of rolling stock for passenger rail would be transferred to the ministry. In addition, the ministry would also assess whether VY's sales- and ticketing platform, and strategic competence on public route planning should also be transferred to Bane NOR and the Railway directorate, respectively.<sup>40</sup>

(63) This meant that the new set-up would clearly differentiate between tasks that should be resolved by the state administration, state-owned companies, and market operators.

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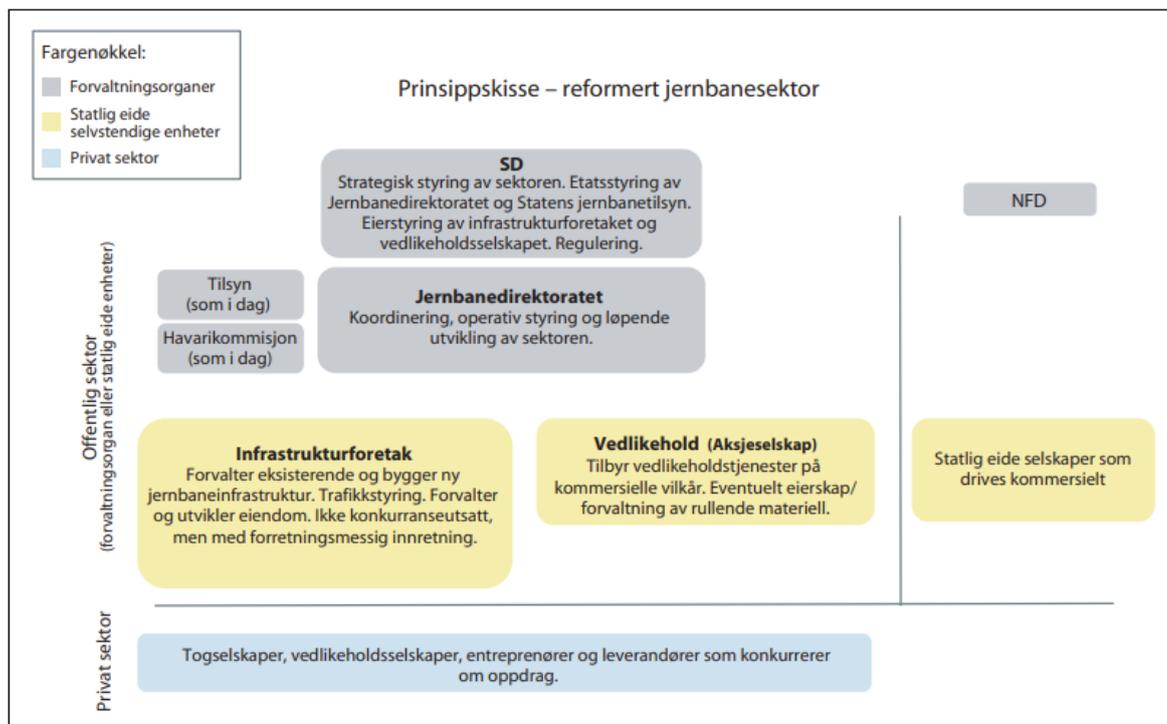
<sup>37</sup> Except for negotiating and awarding contracts for passenger rail services which rested with the Ministry of transport, as explained above.

<sup>38</sup> See **Annex 27**.

<sup>39</sup> See the summary in sections 1.4.2 and 1.4.3 in **Annex 75**.

<sup>40</sup> See the summary sections 1.4.5 and 1.4.7 in **Annex 75**.

- (64) To that end, the government provided the following figure to illustrate how the railway sector would be organized after these changes had been implemented:<sup>41</sup>



Figur 4.2 Prinsippskisse reformert jernbanesektor

- (65) On the timing of the implementation of the 2015-decision, the government stated that it would revert to the Parliament by spring 2016 with a package of legal amendments. Notably, the government stated that the liberalization should be implemented “fast” out of consideration for the operators, employees, and passengers.
- (66) The 2015-decision also contained certain principles for the implementation:
- The government expected to run as many as 6-8 competitive tenders, each “with sufficient volume to generate real competition”.
  - It was envisaged that the first tender, which the government expected already in 2016/2017, would be the Southern region, then the Northern region, and that part of the Eastern (largest) region also would be included in an early phase.
  - Whereas the Ministry of transport was expected to take the lead in the planning of the competitive tenders initially, the responsibility would later be transferred to the Railway directorate when it became operational (which it did on 1 January 2017).

41 See page 9 at Annex 75.

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- The public tenders would use net cost contracts to transfer the revenue risk on to the rail operators, and thereby create a stronger incentive to increase traffic and customer satisfaction.<sup>42</sup>
  - The airport shuttle service that Flytoget was serving under the directly awarded concession agreement would also be subjected to competition after its expiry in 2028. Notably, the government decided to unshackle Flytoget from its restriction to provide shuttle services and instead allow the company to compete also in the upcoming tenders for all the passenger rail contracts (which Flytoget later did).<sup>43</sup>
- (67) Subsections (b) to (g) below explain in more detail how the government implemented this 2015-decision in the period 2015-2021:
- (b) The Parliament approved the legal amendments in 2016
- (68) On 6 October 2016, the government reverted to the Parliament with a legal package of amendments for the Railway Act and other legislation affected by the 2015-decision.<sup>44</sup>
- (69) The package included a new article 6(d) in the 1993 Railway Act which delegated wide ranging powers to the Ministry of transport over the operators “to ensure the necessary social security and preparedness in extraordinary situations, crises and war”. ***The government stated that this amendment would ensure that the liberalization and the reorganizations did not weaken the necessary degree of state control over the railway.***<sup>45</sup>
- (70) On 16 December 2016, the Parliament approved all the amendments, which entered into force on 1 January 2017.
- (71) Notably, when the new minister on 19 November 2021 aborted Tenders 4 and 5, he sent out a press statement that made a general reference to the need for “clear state control” over the railway but without explaining, then or apparently later, what, if anything, was found insufficient with the 2016-amendment.<sup>46</sup>
- (72) This may be important to pursue because ***the minister under Norwegian administrative practice and policy is restricted from using the State’s ownership in VY to have the company accept terms offered in the passenger rail contracts.*** This is a matter that the Office of the Auditor General can and will strike down on.<sup>47</sup>

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<sup>42</sup> See the summary in section 1.4.4 in **Annex 75**.

<sup>43</sup> See the summary in section 1.4.8 in **Annex 75**.

<sup>44</sup> See **Annex 54**.

<sup>45</sup> See pages 6 and 27 of **Annex 54**.

<sup>46</sup> See Section 4.5(d) below.

<sup>47</sup> See **Annex 141**, page 182, as an example where the OAG on 3 October 2007 arrested the Ministry of transport for having compromised this administrative practice and policy: “***The Office of the Auditor General takes serious issue with the fact that the ministry, in connection with the negotiation process with NSB AS on the purchase of passenger transport services, mixed up its roles as buyer and owner.***”

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(73) Consequently, when the minister then and on later occasions has referred to “clear state control” as a reason for aborting the competitive tenders, it leaves a rather hollow sound.

(c) The administrative and corporate reorganizations were completed in 2016-2017

**i. The administrative reorganizations**

(74) On 5 February 2016, the government ordered the new Railway directorate and the new infrastructure company (Bane NOR) established by Royal decree.<sup>48</sup> In the motivation for the Royal decree on the Railway directorate, the Minister of transport emphasised that the Parliament had endorsed the 2015-decision:

“At the deliberation of White paper no. 27 (2014-2015)/Prop. 386 S 2014-2015), the Parliament endorsed the proposal for a new organization of the railway sector and the proposal to introduce competition for passenger rail services.

(75) The minister also stated that whereas the directorate would become operational only almost one year later, on 1 January 2017, the new directorate would in the interim, while it was preparing to become operational, focus on “preparations of the calls for tenders for passenger rail transport”. This underscored how committed the government was to implement the liberalization as fast as possible.<sup>49</sup>

(76) On 16 February 2016, the Ministry of transport then adopted an “Instruction for the Railway directorate”, which contained general instructions for the directorate. In section 2 of the instruction, a wide-ranging mandate of the directorate provided:

“The Railway directorate shall, on behalf of the state, *have full responsibility for the management and coordination of the railway sector*. Management and coordination must be in line with the overall guidelines set by the Ministry of transport. The Railway directorate will have overall responsibility for [...] purchasing passenger rail services from the rail companies”.<sup>50</sup>

(77) This instruction and mandate therefore formalized the pivotal role that the government assigned to the Railway directorate for the implementation of the 2015-decision. The instruction was amended on 10 March 2021 to provide that all passenger rail contracts “shall as a main rule” be subject to open competition:

“The Railway directorate shall enter into agreements with the rail companies on passenger rail services, i.e., the obligation to provide a public service on behalf of the state in accordance with current regulations and shall, as a main rule, be

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*This may have weakened NSB AS's negotiating position and created uncertainty with regard to the placement of responsibility for the company having accepted the contract”.*

48 See Annex 76 and Annex 77.

49 See Annex 78.

50 See Annex 80.

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announced open to competition. When necessary, the directorate shall carry out purchases that are negotiated as direct procurements with the rail operators”.<sup>51</sup>

- (78) In his rush to abort the two final tenders (Tenders 4 and 5) just three weeks after taking office on 14 October 2021 after the 2021 election, the new minister failed to amend this part of the instruction.<sup>52</sup> ***Formally, the main rule is therefore still that the directorate shall rely on open competition when awarding passenger rail contracts.***
- (79) In 2022, the Railway directorate had an operating budget of NOK 397 million (EUR 40 million) and 170 employees, overseeing the allocation of more than NOK 34 billion (EUR 3.4 billion) in grants over the state budget, including NOK 27.4 billion towards investments in and operations of the rail infrastructure and NOK 5.7 billion (EUR 570 million) in public compensation for the directly awarded and the tendered passenger rail contracts.<sup>53</sup>
- (80) On 10 February 2016, the infrastructure company, Bane NOR, was established as a state enterprise under the ownership and control of the Ministry of transport.<sup>54</sup> In 2022, Bane NOR had a budget of NOK 15.7 billion and NOK 3.321 employees.<sup>55</sup> Bane NOR runs the entire national grid which in 2022 consisted of 4.247 km of rail lines.<sup>56</sup>
- (81) On 1 January 2017 both the Railway directorate and Bane NOR became operational.

**ii. The corporate reorganizations of VY**

- (82) By April 2017, the government had also completed the corporate reorganizations of VY which it informed the Parliament of on 5 April 2017.<sup>57</sup> VY’s reorganizations included:

- Entur was established and transferred to the Ministry of transport

On 4 July 2016, VY established a new subsidiary, the limited liability company, Salg- og Billettering (later renamed Entur), into which VY transferred, on 15 October 2016, its sale- and ticketing platform for use also by its competitors after the liberalization.<sup>58</sup> The ownership to the new company was transferred to the

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<sup>51</sup> See section 3.2.1 at **Annex 82**.

<sup>52</sup> A detailed account of the events that led to the abortion of the two final tenders have been set out in Section 4.5 below.

<sup>53</sup> See page 43 at **Annex 81**.

<sup>54</sup> See **Annex 79**.

<sup>55</sup> See page 78 of **Annex 83**.

<sup>56</sup> See page 3 of **Annex 83**. It may be of interest that Sweden, which is VY considers the most important in the Nordic region apart from Norway, by comparison, has a national grid of 10.912 km run under similar regional and geographic conditions, and has maintained an open market for passenger rail services since early 1990, see also Section 4.7 below.

<sup>57</sup> See page page 55 of **Annex 58**.

<sup>58</sup> See **Annex 85**.

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Ministry of transport in April 2017. In 2021, Entur generated NOK 557 million (EUR 56 million) in turnover with 260 employees.<sup>59</sup>

- Norske Tog was established and transferred to the Ministry of transport

On 7 July 2016, VY also established another new subsidiary, the limited liability company, Materiellselskapet AS (later renamed Norske Tog), into which VY, on 15 October 2016, transferred its rolling stock for passenger rail for use also by its competitors after the liberalization.<sup>60</sup> The ownership to this subsidiary was also transferred to the Ministry of transport in April 2017. In 2022, Norske Tog generated NOK 1.3 billion (EUR 130 million) in turnover with 57 employees.<sup>61</sup>

- Mantena was transferred to the Ministry of transport

In April 2017, VY also transferred the ownership to its existing service and maintenance subsidiary, Mantena, to the Ministry of transport, for use also by its competitors after the liberalization. On 1 January 2020, the Ministry of transport transferred the ownership in Mantena to the *Ministry of trade*, which remains its present owner. In 2022, Mantena generated NOK 1.5 billion (EUR 150 million) in turnover with 792 employees.<sup>62</sup>

- Rom Eiendom was transferred to Bane NOR

On 1 May 2017, VY also transferred the ownership to its existing real estate subsidiary, Rom Eiendom, as well as properties used for repair and maintenance to the new infrastructure company (Bane NOR) that had been established in 2016 as a state enterprise under the ownership and control of the Ministry of transport. This would provide competitors of VY with equal access to that infrastructure after the liberalization. Rom Eiendom had 135 employees and generated NOK 938 million (EUR 94 million) in turnover in 2016.<sup>63</sup>

(83) The government provided the Parliament with the following overview of the rail sector after the completion of the administrative and corporate reorganizations<sup>64</sup>:

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<sup>59</sup> See pages 52 and 59 of **Annex 87**.

<sup>60</sup> See **Annex 85**.

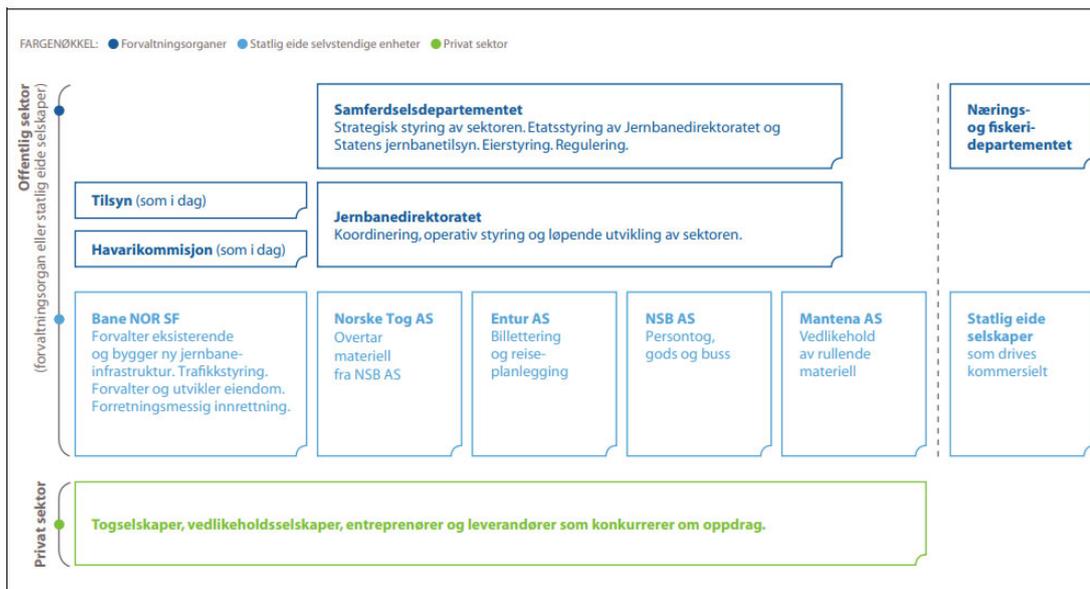
<sup>61</sup> See pages 62 and 118 of **Annex 86**.

<sup>62</sup> See pages 3, 53 and 57 of **Annex 88**.

<sup>63</sup> See pages 2, 8 and of **Annex 89**.

<sup>64</sup> See page 54 of **Annex 58**.

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Figur 4.2 Ny struktur i jernbanesektoren

- (84) Consequently, by May 2017 all administrative and corporate reorganizations had been completed and the implementation of the competitive tenders covering the entire market for passenger rail services could start.
- (d) The government endorsed the award to VY of time-limited transition contracts that would be phased out by the competitive tenders in 2018-2022/2024
- (85) As explained in subsection (a), in its 2015-decision the government endorsed the award of time-limited transition contracts to VY that would be phased out:
- “The current traffic agreement with NSB expires on 31 December 2017. This will be replaced by a new traffic agreement that takes account of the fact that the traffic will gradually be subject to competition. NSB will be able to compete to win competitive traffic packages in the same way as other rail companies.*
- After a transition phase during which the passenger rail traffic is tendered out, the rail company, NSB, will be exposed to competition in all its submarkets”.*<sup>65</sup>
- (86) This underscored that the government had already in 2015 endorsed that the transition to an open market would take place well within the 10-year period for directly awarded contracts under Article 5(6) of Regulation 1370/2007.
- (87) It fell on the newly established Railway directorate to award the transition contracts to VY in 2017/2018. Specifically, this included the negotiation of two contracts:

65 See Annex 2, page 29.

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- The first contract would cover almost the entire national grid, which VY at the time served under a time-limited “Traffic agreement” in the period 2012- 2017, that the ministry previously had directly awarded on 21 December 2011.
  - The second contract would cover exclusively the Gjøvik-line which VY was serving at the time under a *tendered* contract, as explained in subsection (a) above. This was the contract VY won in the only prior competitive tender in Norway. The tendered contract was signed on 23 June 2006 for the period 2006-2017. This meant that the tendered contract would now be directly re-awarded but on the premise that it would only serve as a *transition contract* until the line had been tendered out again as part of Tender 4 (East 1).<sup>66</sup>
- (88) The negotiations with VY proved challenging for the directorate which ended up signing four contracts (not two) on 28 February 2018. In fact, the directorate had to overrun the time allowed and was forced to give two of the contracts retroactive effect:
- i. A time-limited contract for 2018 (the main contract) on almost the entire national grid, which needed to be given retroactive effect to 1 January 2018. Section 4.1 stated that the contract was limited to only one year (2018) and contained an explicit clause to the effect that “cease of operations takes place on 31 December 2018 without notice.”<sup>67</sup>
  - ii. A time-limited, one-year, contract for 2018 on the Gjøvik-line which also needed to be given retroactive effect to 1 January 2018. Section 4.1 stated that the contract also was limited to only one year (2018) and contained a similar clause to the effect that “cease of operations takes place on 31 December 2018 without notice.”<sup>68</sup>
  - iii. A time-limited contract for 2019-2022 (the main contract) on almost the entire national grid.<sup>69</sup> Section 4.1 contained an explicit clause to the effect that cease of operations would take place “without notice” in December 2022, which reflected that the directorate planned to have awarded and even started up traffic under most of the competitive tenders by then.<sup>70</sup>
  - iv. A time-limited contract for 2019-2024 on the Gjøvik-line but with a 12-month early termination right for the directorate from 2021, which reflected that the directorate planned to have completed all competitive tenders and started up all traffic by 2024, at the latest.<sup>71</sup>
- (89) When the directorate, shortly afterwards, on 15 March 2018, presented its (first) annual report, the director found reason to highlight, at the very top of his opening statement, how “demanding” the negotiations with VY had been:

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<sup>66</sup> See subsection (e) below.

<sup>67</sup> See **Annex 114**.

<sup>68</sup> See **Annex 115**.

<sup>69</sup> See **Annex 116**.

<sup>70</sup> See subsection (e) below.

<sup>71</sup> See **Annex 117**.

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“An important activity in 2017 has been the Railway directorate’s work with public purchase agreements and tendering of traffic packages. The work on the purchase agreements with NSB and [its subsidiary] NSB Gjøvikbanen has been demanding, but an agreement was reached at the end of February 2018”.

- (90) That likely came as no surprise to the government. Indeed, in its 2015-decision to open the entire market, the government explained that the ministry had experienced, when directly awarding contracts to VY in the past, that the company has “*considerable power with regard to both content and price when the traffic agreements are negotiated*”.<sup>72</sup>
- (e) The government endorsed the timeline to award all competitively tendered contracts in 2017-2023
- (91) The 2015 decision set out principles for how the public tenders should be implemented. The design of the tenders was regarded as a central issue.
- (92) The government wanted the design of each competitive tender to be attractive and offer sufficient volume to generate interest from operators willing to consider competing against VY. Therefore, the government also wanted to provide predictability for when and in which order the competitive tenders would be arranged:
- “The packages must be composed so, and have a duration, that render them attractive for the rail companies to compete for and provide the basis for the best possible purchase for the State. The operators must be given predictability for when and in which order the traffic packages are put up for tender”.<sup>73</sup>
- (93) According to the government’s assessment, in the 2015-decision, the market should be split into 6-8 tenders “with sufficient volume to provide real competition”.<sup>74</sup>
- (94) Notably, this showed that *the government considered it possible for the national grid to accommodate for, at least, 6-8 different operators after the liberalization*, in addition to Flytoget which held the commercial concession agreement on the airport shuttle until 2028, and, on top, the cargo rail traffic that came in addition to the passenger rail traffic on the same tracks.
- (95) Moreover, the government explicitly acknowledged that its long practice of awarding contracts directly to VY had created a situation whereby the State had not been able to

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<sup>72</sup> This ghost was awoken again after the minister on 19 November 2021 had aborted the two final tenders and embarked on the process that resulted in the awards to VY of both contracts on 29 June 2023, in this case. *As the facts in Section 4.6 demonstrate, the directorate would later, repeatedly, warn the ministry of the risk of overcompensation in the new contracts.* Notably, the four contracts that were awarded in 2018 have already been brought before ESA, in three separate state aid complaints in 2020-2023, submitting that VY received unlawful and incompatible aid of more than NOK 8 billion (EUR 800 million) in overcompensation and pension subsidies. On 31 May 2023, after two years of preliminary investigations, ESA announced its decision to open a formal state aid investigation to that end.

<sup>73</sup> See **Annex 2**, page 26.

<sup>74</sup> *Ibid.*

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“market test the costs”. In the government’s own words, as emphasised above, this had afforded VY “great power” over the directly awarded contracts:

“Because the State only buys services directly from one provider, *it has not been possible to market test the costs of the rail purchases*. This bias in available information between the State as purchaser and NSB as supplier, affords NSB *great power* regarding content and price when the traffic agreements are negotiated”.<sup>75</sup>

- (96) Notably, despite this acknowledgement and the fact that the government had relied on directly awarded contracts to VY for more than 20 years at that time, the 2015 decision did still not discuss the need for a market analysis in order to illuminate which parts of the market could be served on a commercial basis, as a precursor to how the public service obligations in the traffic packages should be designed.
- (97) The 2015-decision was based on the premise that the new Railway directorate would be charged with the responsibility of implementing the tenders. Nevertheless, showing its commitment to ensure a fast implementation of the 2015-decision and open the market, the ministry decided to front run the directorate by planning, designing, and issuing the pre-qualification call, and the calls for both Tender 1 (South) and Tender 2 (North) in 2016, already.
- (98) Consequently, already on 5 February 2016, the ministry announced Tender 1 (South)<sup>76</sup> and Tender 2 (North).<sup>77</sup> The tender notices confirmed that:
- “The contracting authority is announcing the competition in accordance with the European Parliament and Council Regulation (EEC) no. 1370/2007”.***
- (99) On 4 April 2016, the ministry then announced a pre-qualification scheme for interested operators.<sup>78</sup>
- (100) On 1 January 2017, the Railway directorate was established and formally assumed the responsibility for running the public tenders from the Ministry of transport.
- (101) On 5 April 2017, the government adopted National Transport Plan 2018-2029, in which it updated on the progress with the liberalization. The government confirmed that the Railway directorate had been established on 1 January 2017 and now also stated for the first time that that the liberalization would take place gradually *over six years* (i.e., by 2023). Tender 1 (South) was expected to become operational already in 2018.<sup>79</sup>
- (102) Notably, again the government did not discuss whether a market analysis had been made to inform the design of the tenders.

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<sup>75</sup> *Ibid*, page 13.

<sup>76</sup> See **Annex 59**.

<sup>77</sup> See **Annex 56**.

<sup>78</sup> See **Annex 60**.

<sup>79</sup> See **Annex 58**, page 53.

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- (103) On 14 October 2017, the Railway directorate announced Tender 3 (West) with a tender deadline set for 31 December 2018 (later extended to 1 August 2019)<sup>80</sup>. Once more, the notice confirmed that:

***“The contracting authority is announcing the competition in accordance with the European Parliament and Council Regulation (EC) no. 1370/2007”.***

- (104) On 4 July 2018, the Railway directorate adopted “Action plan 2018-2029”.<sup>81</sup> The plan sought to implement the government’s National Transport Plan 2018-2029, described above, and the 2015 decision. The directorate adopted the plan after public consultation:

“The Railway directorate herewith determines the action plan for the railway sector until 2029. This is an important milestone for the entire sector and for the Railway directorate. Implementation of this action plan will provide significant strengthening of the railways as the backbone of the transport system. [...]

*This action plan is the first to be adopted after the government's railway reform (White paper no. 27 - On the right track) entered into force on 1 January 2017.”*

- (105) The directorate formulated seven success criteria for the competitive tenders:

“To get the most out of government resources and introduce greater dynamics, innovation and customer orientation in the passenger rail market, competition is being introduced to operate passenger transport for the State. In order to succeed with the public tender, the Railway directorate has adopted seven success criteria for its coming efforts:

- ***Ensure enough operators to obtain market price for the purchase of rail services.***
- Facilitate competition on equal terms [...].
- Facilitate predictable distribution of risk and responsibility.
- Design attractive traffic packages.
- Facilitate interaction between the railway and local public transport.
- A realistic timetable.
- Ensure that the chosen operators have the prerequisites to look after employees.”<sup>82</sup>

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<sup>80</sup> See **Annex 61**.

<sup>81</sup> See **Annex 57**.

<sup>82</sup> *Ibid*, page 42.

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- (106) Furthermore, the directorate confirmed “about 12 months” as the ordinary mobilization (start-up) phase for a new operator, from the time of the contract award until the start of service.<sup>83</sup>
- (107) Notably, the directorate did not discuss the need for a market analysis as a precursor to decide on the scope and content of the public service obligations included in the tenders, even at that time.
- (108) The directorate then, for the purposes of driving the progress of the tenders, laid out its proposal to separate the timeline into two phases. The first phase included long-distance services and connected regional- and local services: Tender 1 (South), Tender 2 (North) and Tender 3 (West). The second phase included regional- and local services in region East (the capital region), which concerned the dominant part of the market.
- (109) The directorate explained its reasoning for the separation into two phases:

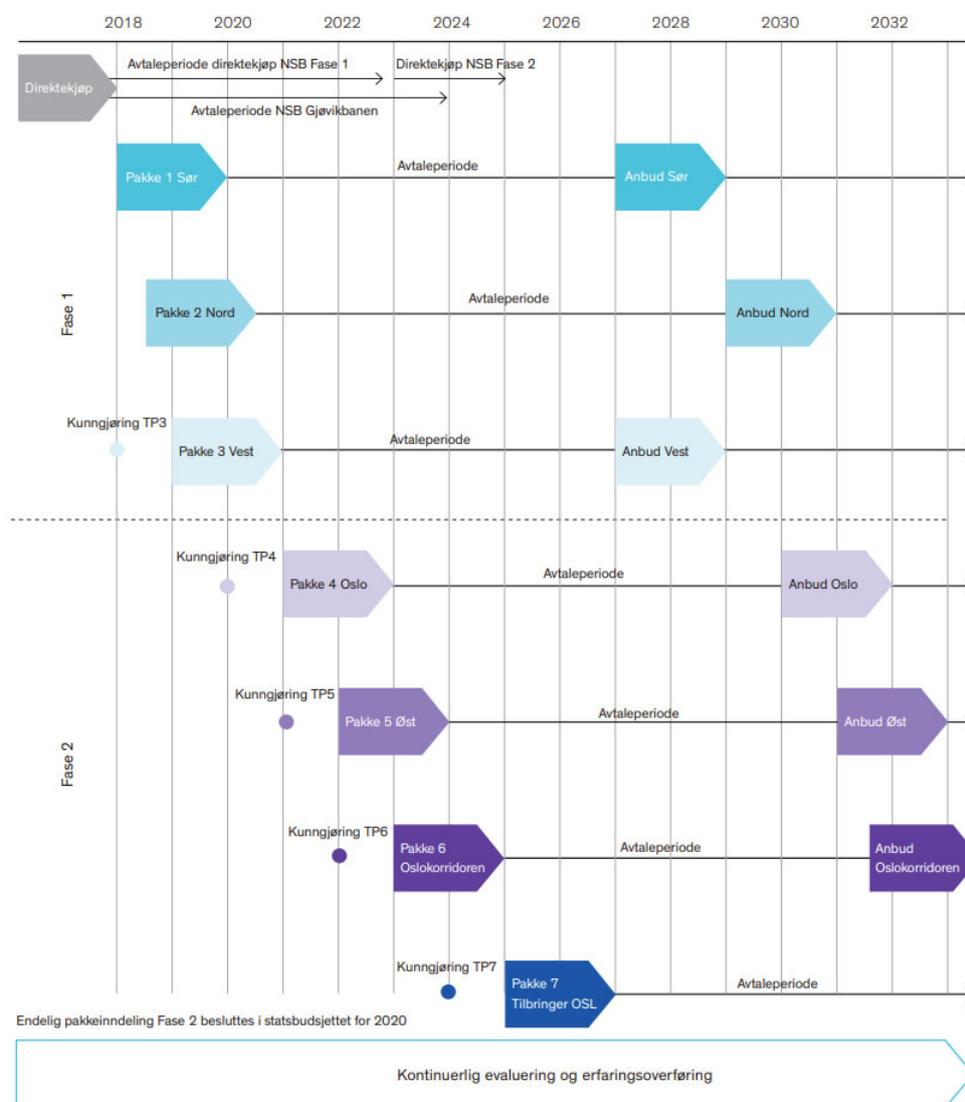
“To ensure sufficient time for evaluation and exchange of experience gained in phase 1, it has been decided that the final design of the packages for the Eastern region and the progress of phase 2 of the public tenders will be set in conjunction with the Railway directorate’s input to the State budget in the autumn of 2019. Then, Tender 4 will be announced with expected start of service in December 2022. The consideration for the implementation of a new route model for Eastern Norway, choice of contract for the tenders in the region, future concept for the shuttle service to Oslo Airport Gardermoen, as well as regulatory changes as a result of the EU’s 4th Railway Package, indicate the need for sufficient planning time for tenders. The Railway directorate’s assessment of the shuttle service at Oslo Airport Gardermoen must be carried out before a decision on phase 2 is made.”<sup>84</sup>

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid*, page 44.

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Figur 4 Konkurransetsetningens to faser.  
 Pakkeinndelingen i fase 2 er ikke endelig fastsatt.  
 Fase 1 skal evalueres før implementering av fase 2.

- (110) Consequently, the directorate, at that time, assumed a total of *seven* public tenders, and that the Eastern region would be split into *four* tenders.
- (111) In other words, *the directorate concluded that the capacity on the national grid could sustain seven operators*, including four in the Eastern region: Tender 4 (Oslo), Tender 5 (East), Tender 6 (Oslo corridor) and the commercial airport shuttle (Tender 7), in addition to the freight traffic that would run on the same tracks.
- (112) As for the expected progress, all tenders were expected to be announced by 2022 (except Tender 7 on the shuttle service on which Flytoget had a contract until 1 February 2028). The figure above also stated:

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“Final design of packages in phase 2 will be decided in the 2020 State budget”.<sup>85</sup>

- (113) On 21 September 2018, the government presented its proposal for the 2019 State budget, in which it updated the Parliament on the progress of the liberalization:

“The competition for Tender 1 South was announced in October 2017. The Railway directorate aims to conclude an agreement on this tender in October 2018, with start of service in December 2019. The competition for Tender 2 North was announced in March 2018, with contract signing planned for summer 2019 and start of service in June 2020”.<sup>86</sup>

- (114) Furthermore, the government confirmed that the remaining tenders would be announced successively and that the final design and timeline for the tenders in the Eastern region would be decided in autumn 2019, by the directorate:

“The Railway directorate proposes that the tenders for the rest of the railway grid should be called successively, with the announcement of Tender 3 West around 2018/2019 with start of service in December 2020.

It is proposed that the Railway directorate determines the final design of the tenders in the Eastern region and progress of the final tenders in autumn 2019. This will ensure sufficient time for evaluation and exchange of experience from the first three tenders. Final design of tenders must be seen in conjunction with the choice of contract, implementation of a new route plan, the role of the shuttle service to Oslo Airport Gardermoen and regulatory changes as a result of the EU's 4th railway package.”<sup>87</sup>

- (115) On 17 October 2018, VY lost Tender 1, and the Railway directorate announced that the contract instead had been awarded to GoAhead.<sup>88</sup>

- (116) On 13 June 2019, the directorate confirmed the timeline for the entire process:<sup>89</sup>

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<sup>85</sup> *Ibid*, page 43.

<sup>86</sup> See **Annex 65**, page 169.

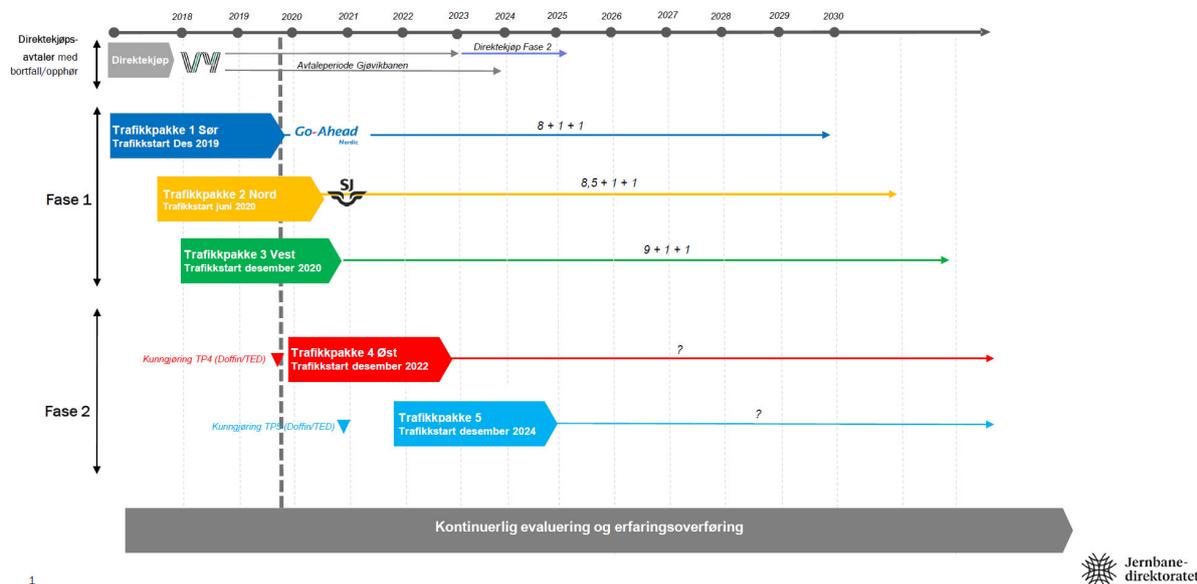
<sup>87</sup> *Ibid*.

<sup>88</sup> See **Annex 14**.

<sup>89</sup> See **Annexes 8-9**.

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## Strategi for konkurranseutsetting av trafikkpakker



- (117) On 17 June 2019, VY also lost Tender 2 (North) and the Railway directorate announced that the contract instead had been awarded to SJ.<sup>90</sup>
- (118) On 19 June 2019, the Railway directorate presented its detailed proposal for the design and progress of the final tenders in the Eastern region in its report titled: “Phase 2 of the purchase of passenger rail services”.<sup>91</sup>
- (119) The directorate concluded that the region should be divided into *two* tenders, which then would be the final tenders in Norway:

“The Railway directorate has considered eight alternative tender designs. Evaluated with regard to possible desired degrees of freedom for the operators, experiences from Tender 1 South, other tenders, route model 2027, market conditions, implementation of ERTMS, *infrastructure capacity*, available vehicles, reserve capacity, *the shuttle service to Oslo airport*, the on-board personnel, and interaction with public transport operators, the Railway directorate recommends the following tender design:

Tender 4: L1, L2, L21, L22, R20, L3 and R30 (Inner lines, the Follo-, Østfold- and Gjøvik-line)

Tender 5: L12, L13, L14, R10, R11 and L52 (Inlandet, Viken and Vestfold/ Telemark)

<sup>90</sup> See Annex 15.

<sup>91</sup> See Annex 65 (the press statement) and Annex 66 (the report).

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For the evaluation of the progress of the tenders, there are two factors that stand out as dimensioning, and that is the opening of the Follo-line and the reopening of Drammen station with six tracks.

Based on this and other assessments, the Railway directorate recommends the following progress:

Tender 4: start of service December 2022 (when the Follo-line opens)

Tender 5: start of service December 2024 (when Drammen station reopens with six tracks)".<sup>92</sup>

- (120) Notably, the directorate had at that time arrived at the final design of the last two tenders and the appropriate time for the start of service. ***Consequently, from their professional point of view as the authority in charge of the tenders, it was only a matter of technical implementation of the final tenders in time for start of service that remained before the entire national market was liberalized.*** The directorate recalled that it already transpired from the 2019 State budget that the final decision would be made in conjunction with the 2020 State budget.<sup>93</sup>
- (121) On 3 September 2019, the Railway directorate then announced its final plans for Tender 4 and 5:

“The Railway directorate has announced the preferred option for tendering the operation of passenger rail services around Oslo and South-East of Norway, consisting of Tender 4 and 5 within the national passenger rail tendering programme. The Government’s final plans for tendering the two contracts will be set along with the National budget, 7.10.2019.

In case of any change in information, content or timeline regarding the preferred options in the National budget, the Railway directorate will publish a rectification accordingly as soon as possible.

Tender 4, as recommended by the Railway directorate; description given in Section II.A.

Tender 5, as recommended by the Railway directorate: L12 Kongsberg-Eidsvoll, L13 Drammen-Dal, L14 Asker-Kongsvinger, R10 Drammen-Lillehammer, R11 Skien-Eidsvoll, L52 Notodden-Porsgrunn.

Inclusion of rail services between Oslo S and Oslo Airport is yet to be decided.

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<sup>92</sup> See **Annex 67**, page 2.

<sup>93</sup> *Ibid.*

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Potential tenderers need to be pre-qualified to access the tender documentation. The pre-qualification scheme, similar to the current scheme for Tenders 1-3, will be announced separately by the end of the 1st quarter of 2020”.<sup>94</sup>

- (122) On 20 September 2019, the government informed the Parliament in its proposal for the 2020 State budget that it endorsed the organization and timeline of the two final tenders in phase 2 of the liberalization:

“Phase 2 of the public tenders of the rail traffic covers all lines in Eastern Norway. The Railway directorate has assessed and recommended the design of the tenders in phase 2, *which the Ministry of transport has endorsed*”.<sup>95</sup>

- (123) Furthermore, based on experiences gained in the initial tenders, the government stated that the start-up period should be extended “to some extent” but that the award of Tender 4 would be announced in the fall of 2021.<sup>96</sup>

- (124) Moreover, regarding the shuttle service to Oslo airport, the government informed there was an ongoing study and that it would revert to the Parliament on this matter. However, the government also confirmed that the result of the study would not affect the design of Tenders 4 and 5, or the progress:

“The shuttle service to Oslo airport and the distribution of capacity in the Oslo area are now being investigated, and the government will revert to the Parliament on this matter. *The outcome of this assessment will not affect the design of Tenders 4 and 5, or the possible progress of the tendering*”.<sup>97</sup>

- (125) On 9 December 2019, the directorate decided to award Tender 3 (West) to VY.<sup>98</sup>

- (126) On 2 March 2020, the directorate announced a new pre-qualification scheme for the two final Tenders 4 and 5.<sup>99</sup>

- (f) The Railway directorate concluded in 2020 that the choice of solution for the shuttle service to Oslo airport “will have very little effect on the design and progress plan for the public tenders”

- (127) On 25 May 2020, the directorate reverted to the ministry with its 93-page assessment of how the shuttle service to Oslo airport could be integrated into the main rail service.<sup>100</sup>

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94 See **Annex 109** (TED-notice).

95 See **Annex 68**, page 161.

96 *Ibid.*

97 *Ibid.*

98 See **Annex 16**.

99 See **Annex 110** (TED-notice).

100 See **Annex 69**.

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- (128) Notably, the directorate concluded that the choice would only have negligible effect on the design and progress of the competitive tenders, which could be run *both with and without* an integration of the shuttle service:

***“A future choice of solution for the shuttle service will have very little effect on the design and progress plan for the public tenders. The shuttle service can be prolonged as a separate rail service or be included in the public tender for the 10-minute system in the Oslo corridor (Tender 5). Flytoget AS has a concession on the shuttle service until 2028 and if the concession period is to be completed, Tender 5 can be expanded later to include these routes. In the event of an integrated solution, the rail offerings in the Oslo corridor will change, and the new service offering will form a natural part of Tender 5”.***<sup>101</sup>

- (g) The two last tenders (Tenders 4 and 5) were delayed one year by Covid-19

- (129) On 30 June 2020, the Railway directorate announced its decision to delay Tender 4.<sup>102</sup> The award was moved six months from the fall of 2021 until early 2022, while the start of service was moved from December 2022 until December 2023.

- (130) The main reason was the pandemic (Covid-19) that struck in early 2020. Notably, the directorate assessed that the tender would likely become more successful by the limited delay because the operators would be better placed to assess the situation, including benefits of near-term improvements of the infrastructure.

- (131) On 5 March 2021, the directorate published the tender documentation for Tender 4.<sup>103</sup> In its press statement, the directorate explained that:

*“The Railway directorate decided in June 2020 to delay Tender 4, with start of service in December 2023 – a year after the original plan. The reason was mainly the uncertainty related to the Covid-19 pandemic and the progress of relevant infrastructure projects. The directorate believes that the overall uncertainty has now been well addressed in the tender documentation, and that we in accordance with the revised timeline can implement effective competition that will meet the objectives set”.*

- (132) Only three weeks later, the directorate *confirmed the timeline also for Tender 5*, which was the last before the entire market would be liberalized. In a press statement, on 23 March 2021, the directorate announced that the start of service for Tender 5 would be delayed by one year because of the Tender 4 delay, to ensure that the operators would receive sufficient time between the start of service in each contract, and avoid starting up in a period with infrastructure work specifically affecting with the Vestfold-line.<sup>104</sup>

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101 See **Annex 70**, page 4.

102 See **Annex 10**.

103 See **Annex 71** (the press statement) and **Annex 64** (the tender documentation).

104 See **Annex 72**.

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“In June 2020, it was decided that start of service for Tender 4 should be delayed a year to reduce the overall uncertainty for the operators and promote sound and just competition. The Railway directorate has decided to make a corresponding delay in the timeline for Tender 5.

This means that start of service for Tender 5 will be in December 2025. A revised timeline is necessary to provide greater interval between the tenders, so that pre-qualified providers avoid having to build up organizations on two larger tenders at the same time. Furthermore, significant improvements are being made to the infrastructure with a new dual-track on Drammen-Kobbervikdalen and the renovation of Drammen station. These works will be completed on time in 2025. It is not appropriate to change operators during a period where parts of the rail service will have to be replaced with alternative transport as a result of reduced infrastructure capacity”.

(133) In other words, the directorate confirmed in March 2021 that neither the pandemic nor the infrastructure projects gave reason for any further delays in implementing the last two tenders of the liberalization.

(134) On 19 March 2021, the government also confirmed the revised timeline in its National Transport Plan 2022-2033, which was submitted to the Parliament:

“Phase 2 of the liberalization covers the Eastern region, with the planned start of service in December 2023 for Tender 4, and December 2025 for Tender 5”.<sup>105</sup>

(135) In addition, the government noted that the completed tenders in phase 1 had produced a *significant reduction* in the public compensation and, *in addition, improvements of the service* compared to the existing and directly awarded contracts:

“Phase 1 of the liberalization covers Tenders 1-3 and has been completed with the start of service in 2019-2020. The tenders have contributed to a significant reduction in the compensation for the rail service, while the operators also have committed to offer improvements in the near-term future. This includes, among other things, the establishment of offers on the long-distance lines Oslo-Bergen/Trondheim/Stavanger, which leaves approximately every two hours. At the same time, the offer around Bergen, Trondheim and Stavanger has also been improved despite the fact that the capacity on the infrastructure is limited”.<sup>106</sup>

(136) On 15 June 2021, the Parliament endorsed the revised timeline for Tenders 4 and 5.

(137) On 24 September 2021, the government informed the Parliament in its proposal for the 2022 State budget about the status of the liberalization. First, the government noted that phase 1 of the liberalization had already been completed, which covered all lines outside of the Eastern (capital) region. Second, the principles on which phase 1 was based would largely be used also in phase 2:

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<sup>105</sup> See **Annex 73**, page 174.

<sup>106</sup> *Ibid.*

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“The Railway directorate defines minimum requirements to ensure at least as good quality and performance as in the current service and makes adaptations so that operators have incentives to develop the service on offer. In the evaluation, it will be significant that operators have an ambitious plan for the development of lines and service concepts”.<sup>107</sup>

- (138) Third, the government again confirmed the scope and timing of Tender 4, with start of service in December 2023 (the deadline for the tender had already expired on 31 August 2021). Fourth, the government also again confirmed the scope and timing of Tender 5, with start of service in December 2025.
- (139) Consequently, *up until the national election in September 2021, the implementation of the 2015 decision to liberalize the national market for passenger rail services had not encountered new obstacles or come across other reasons that required a longer transition period* which in the government’s assessment justified an abortion of the two final tenders from the timeline that both the government, the ministry and the directorate had confirmed, repeatedly.

#### **4.2 The government confirmed in July 2018 that Norway, in practice, already complied with Regulation 2016/2338**

- (140) In parallel to its already ongoing liberalization process, the government commenced the incorporation of the 4th Railway Package into national law. On 2 July 2018, the Ministry of transport started a public consultation on the envisaged legislative amendments that were needed to comply with the three new regulations and three new directives.
- (141) The ministry concluded that one of the regulations (Regulation 2016/2337) had already been incorporated into the EEA Agreement and national law, and because the remaining five directives and regulations amended EU-law that had already been incorporated into national law, these new amendments could “to a great extent” also be incorporated into national law under the existing powers delegated in the Railway Act, and thus without a need for any major legislative changes in Norway.<sup>108</sup>
- (142) Indeed, concerning Regulation 2016/2338, which was adopted on 14 December 2016 in the EU and had entered into force 24 December 2017, the ministry confirmed that no amendments of the Railway Act were necessary:

“Article 7(d) of the Railway Act empowers the ministry adopt an implementing regulation to incorporate [Regulation 1370/2007] and subsequent amendments into Norwegian law. *Regulation 2016/2338 is precisely such an amendment that is covered by Article 7(d) and there is no need to amend this provision.* The amending regulation [Regulation 2016/2338] can therefore be incorporated into

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<sup>107</sup> See **Annex 74**.

<sup>108</sup> See pages 7-8 of **Annex 90**.

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Norwegian law through a [national] regulation based on this provision [Article 7(d)].<sup>109</sup>

- (143) Notably, the ministry also presented its assessment of whether Regulation 2016/2338 would cause any financial or administrative consequences when it was incorporated in national law. *The ministry confirmed that the practice in Norway at the time (July 2018) was already compliant with Regulation 2016/2338*, so that the incorporation would not cause any significant financial or administrative consequences:

“Current practice regarding the direct award of contracts and public tenders as a consequence of the railway reform is compliant with the provisions in the amended regulation [Regulation 2016/2338]. *The incorporation of the regulation into Norwegian law will therefore not entail significant financial or administrative consequences*”.<sup>110</sup>

- (144) Consequently, according to the government’s own assessment, Norway had already at that time (July 2018), in practice, transitioned under Regulation 2016/2338 and was now only in the phase of implementing the competitive tenders that would open the market fully to competition by 2023.

- (145) Indeed, the public consultation did not identify any obstacles that could possibly warrant an abortion of the two final tenders.

- (146) Furthermore, an identical assessment was presented to the Parliament, two years later, on 7 May 2020, when the government submitted its proposals in conjunction with the 4th Railway Package. The ministry confirmed once again that the practice in Norway was already compliant with Regulation 2016/2338 and that the incorporation would not cause any significant financial or administrative consequences:

“Current practice regarding the direct award of contracts and public tenders as a consequence of the railway reform is compliant with the provisions in the amended regulation [Regulation 2016/2338]. *The incorporation of the regulation into Norwegian law will therefore not entail significant financial or administrative consequences*”.<sup>111</sup>

- (147) Again, the government also confirmed to the Parliament that, by virtue of article 7(d) of the Railway Act, no new legislation was needed to incorporate the amendments included in Regulation 2016/2338, which instead could be accomplished by regulation adopted by the Ministry of transport under the powers delegated already since 2010, as described above.<sup>112</sup> In the words of the government:

“According to article 7(d) of the Railway Act, the ministry has authority to issue an implementing regulation to incorporate [Regulation 1370/2007] and subse-

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<sup>109</sup> See page 33 (Section 7.3) of **Annex 90**.

<sup>110</sup> See page 33 (Section 7.4) of **Annex 90**.

<sup>111</sup> See page 65 (Section 19.5) of **Annex 55**.

<sup>112</sup> See Section 4.1(a) above.

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quent amendments to this into Norwegian law. Regulation (EU) 2016/2338 falls under the scope of this provision. In the ministry's assessment, the Regulation could therefore be incorporated into Norwegian law by regulation, without need for legislative amendments".<sup>113</sup>

(148) The Parliament adopted all the government's proposals on 17 December 2020.

**4.3 The government assured in June 2020 that an early incorporation of Regulation 2016/2338 "will establish greater legal certainty" and "mitigate any perception that national authorities will favour the incumbent supplier through the direct award of contracts, or in any other way"**

(149) On 26 June 2020, the Ministry of transport commenced a public consultation on various national regulations that the ministry sought to adopt to incorporate the 4th Railway Package.

(150) Notably, this meant that the public consultation started even before the Parliament had passed the legislative package set out in Section 4.2 above, which the Parliament only adopted on 17 December 2020. This was explicitly recognized by the ministry:

"The Ministry of transport has drafted a new railway regulation, a new regulation on safety and technical matters concerning the railway, and amendments in the regulation that incorporates the PSO Regulation into Norwegian law.

The draft regulations constitute part of the work to implement the legal acts in the EU's 4th Railway Package into Norwegian law, provided that the associated legislative amendments are adopted by the Parliament and that the Parliament gives its consent to include these legal acts in the EEA Agreement".<sup>114</sup>

(151) In fact, the government's initiative to seek an early incorporation of EU law was part of an explicit policy decision to provide the operators in the ongoing competitive tenders with "**greater legal certainty**" and to "**mitigate any perception that national authorities will favour the incumbent supplier through the direct award of contracts, or in any other way**". Indeed, this was explicitly recognized by the ministry in the public consultation:

"The incorporation into Norwegian law of [Regulation 2016/2338] will establish greater legal certainty that future contracts on public service provisions will initially be awarded through open competitions and help to ensure competitive neutrality and mitigate any perception that national authorities will favour the incumbent supplier through the direct award of contracts, or in any other way".<sup>115</sup>

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113 See **Annex 55**.

114 See page 1 at **Annex 93**.

115 See page 7 at **Annex 93**.

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- (152) At the time (June 2020), the only remaining competitive tenders before the market had been liberalization, were Tenders 4 and 5. *Consequently, the government sought to give those assurances in that context.*
- (153) On 30 June 2021, the Ministry of transport thereafter amended national regulation no. 1673 by national regulation no. 2300 to incorporate Regulation 2016/2338 into national law under its delegated powers in Article 7(d) of the Railway Act. To that end, article 1 of the new regulation stated:
- “Annex XIII No. 4a to the EEA Agreement (Regulation (EC) No. 1370/2007, as amended by Regulation (EU) 2016/2338) on public passenger transport by rail and by road and on the repeal of Council Regulations (EEC) No. 1191/69 and 1107/70, apply as regulations with the adaptations that follow from Annex XIII, Protocol 1 to the Agreement and the Agreement in general”.
- (154) The new national regulation entered into force the same day (30 June 2021).
- (155) On 24 September 2021, the EEA Joint Committee adopted Regulation 2016/2338 by Decision no. 248/2021. Article 3 ordered that it would “enter into force on 25 September 2021, provided that all the notifications under Article 103(1) of the EEA Agreement have been made, or on the day of the entry into force of Decision of the EEA Joint Committee No 247/2021 of 24 September 2021, whichever is the later”.
- (156) In Norway, the Parliament had already in 2008 provided constitutional consent to the incorporation of Regulation 1370/2007, and thereafter in 2010, empowered the Ministry of transport to incorporate any subsequent amendments by national regulations, as described above.
- (157) Thus, pursuant to the fundamental principle of sincere cooperation and duty of loyalty under Article 3 EEA, Norway came under an obligation from 25 September 2021, at the latest, to refrain from taking measures liable to seriously compromise that act.<sup>116</sup>
- (158) In fact, Norway incorporated Regulation 2016/2338, with effect from 30 June 2021, as described above, and thus before the abortions of Tender 4 and 5 were announced by the new minister, on 19 November 2021. Moreover, Decision no. 248/2021 entered into force on 1 June 2022, more than nine months before the awards to VY were announced, on 3 March 2023.

#### **4.4 Tenders 4 and 5 were announced as competitive tenders under Regulation 1370/2007 in 2019-2021**

- (159) This section expands on parts of the evidence presented in Section 4.1 regarding the two final tenders (Tenders 4 and 5) that lie at the heart of this case.
- (160) On 3 September 2019, the Railway directorate published a prior information notice in TED, in which it confirmed that Tender 4 and 5 would be competitive tenders, and that

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<sup>116</sup> See, by analogy, Judgment of 25 January 2022 (Grand Chamber), *Vysočina Wind*, C-181/20, EU:C:2022:51, paras. 74-75.

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a pre-qualification scheme “similar to the current scheme for Tenders 1-3” would also be announced in 2020. The TED-notice emphasised that the competitive tenders were announced in accordance with Regulation 1370/2007:

**“The contracting authority is announcing the competition in accordance with the regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23.10.2007 on public passenger transport services by rail and by road and repealing Council Regulation (EEC) Nos 1191/69 and 1107/10”.**<sup>117</sup>

(161) In the description of the procurement, the notice read:

“The Railway directorate have announced the preferred option for tendering the operation of passenger rail services around Oslo and South-East of Norway, consisting of Tender 4 and 5 within the national passenger rail tendering programme. *The Government’s final plans for tendering the two contracts will be set along with the National budget, 7.10.2019.*

In case of any change in information, content or timeline regarding the preferred options in the National budget, the Railway directorate will publish a rectification accordingly as soon as possible.

***Tender 4, as recommended by the Railway directorate;*** description given in Section II.A.

***Tender 5, as recommended by the Railway directorate:***

- L12 Kongsberg — Eidsvoll,
- L13 Drammen — Dal,
- L14 Asker — Kongsvinger,
- R10 Drammen — Lillehammer,
- R11 Skien — Eidsvoll,
- L52 Notodden — Porsgrunn.

Inclusion of rail services between Oslo S and Oslo Airport is yet to be decided.

Potential tenderers need to be pre-qualified to access the tender documentation. The pre-qualification scheme, similar to the current scheme for Tenders 1-3, will be announced separately by the end of the 1st quarter of 2020”.<sup>118</sup>

(162) As emphasised in Section 4.1(e), the government did, indeed, inform the Parliament of its “final plans” for both Tenders 4 and 5, on 20 September 2019:

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<sup>117</sup> See **Annex 62**.

<sup>118</sup> *op.cit*, page 2.

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“Phase 2 of the public tenders of the rail traffic covers *all lines in Eastern Norway*. The Railway directorate has assessed and recommended the design of the tenders in phase 2, *which the Ministry of transport has endorsed*”.<sup>119</sup>

- (163) On 2 March 2020, the Railway directorate published a contract notice in TED to invite tenderers to a new pre-qualification scheme for Tenders 4 and 5, on the back of its prior TED-notice on 3 September 2019. The contract notice read:

“The Railway directorate invites tenderers to a pre-qualification for participation in contests for passenger transport on the Norwegian railway network. The pre-qualification replaces previous schemes for pre-qualification.

The Railway directorate refers to the previous qualification: <https://eu.eu-supply.com/app/rfq/transactionprint.asp?TID=176356>. Furthermore, reference is made to the prior information notice on Traffic Packages 4 and 5: <https://www.doffin.no/Notice/Details/2019-310591>. To participate in future contests on passenger transport on railways, all tenderers must be pre-qualified under this scheme.

*The Railway directorate welcomes all previous and new tenderers to the pre-qualification.*

*The Government and a majority in the Norwegian Parliament have decided that there is to be competitive tendering for passenger train services. This is an important part of the Government's railway reform. A sector exposed to competition will ensure that the government procures train services at the correct price and can contribute to a better offer and higher quality for passengers.*

*There will be a gradual introduction of competition for passenger train services, which, in the end, will apply to all lines. So far, the Railway Directorate has held competitions for traffic packages 1 South, 2 North and 3 West. See <https://www.jernbanedirektoratet.no/no/togkonkurranse/> for further information on the completed and future competitions. The plan is to divide the market into a total of 5 to 6 packages, with a division that allows the train operators to have general market responsibility for their stretch/region. There will mainly be competitions for a monopoly to operate publicly procured passenger rail services on defined stretches.*

The Railway directorate is the contracting authority and is responsible for holding the competitions. The Railway directorate has been operative since 1.1.2017.

The train companies that have been awarded a contract for traffic packages 1, 2 and 3 are obliged to hire trains from Norske tog. Furthermore, there is an obligation to use the sales and ticketing systems from Entur. The system is built up of required modules and ensures simplicity for the customer. In future, the system can be built up by each individual operator. The train companies will be able to choose who they would like to use to maintain the trains. Net contracts

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<sup>119</sup> See Annex 68, page 161.

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with appropriate risk division will mainly be used. Gross contracts will be considered where it is appropriate. The contracting authority can negotiate contracts with local public transport”.<sup>120</sup>

(164) On 30 October 2020, the Railway directorate published an updated information notice in TED, in which it *confirmed again that Tenders 4 and 5 would be competitive*. In the description of the procurement, which addressed both Tenders 4 and 5, the notice read:

“The first traffic package for the Eastern Norway area, Traffic Package 4, tentative L1 (Spikkestad-Lillestrøm), L2 (Stabekk-Ski), L21 (Stabekk-Moss), L22 (Skøyen-Mysen-(Rakkestad)), R20 (Oslo S-Halden), L3 (Oslo S-Jaren) and R30 (Oslo S-Gjøvik).

Suggestions for the division of traffic packages in the central area of East Norway (Phase 2 of the tender contest), as well as a schedule thereof will be considered when the State Budget for 2020 is presented 7 October 2019. The Storting's consideration may lead to changes in which lines are included in Traffic Package 4. In event of such a change, the information in this notice will be revised.

The Railway directorate has proposed two traffic packages for competitive tendering of passenger train transport in the area of Eastern Norway with the following content:

***Traffic Package 4:*** see Part II.A.

***Traffic Package 5:***

- L12 Kongsberg – Eidsvoll
- L13 Drammen – Dal
- L14 Asker – Kongsvinger
- R10 Drammen – Lillehammer
- R11 Skien – Eidsvoll
- L52 Notodden — Porsgrunn.

A possible competitive tendering of the transport service to/from Oslo Airport Gardermoen will be clarified at a later date, at the latest in connection with the publication of Traffic Package 5.

Only pre-qualified tenderers will be invited to participate in the competition for Traffic Package 4 with associated tender documentation when this is public.

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<sup>120</sup> See **Annex 110**.

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A pre-qualification system shall be established, based on the previous system for traffic packages 1 — 3. The pre-qualification system will be published separately during the first quarter of 2020”.<sup>121</sup>

- (165) The TED-notice emphasised, again, that the tenders were announced in accordance with Regulation 1370/2007, in an updated paragraph:

***“The contracting authority is publishing the competition in accordance with the European Parliament and Council Regulation (EC) No 1370/2007 on public passenger transport services by railway and on roads and on the cancellation of the council regulation (EC) No 1191/69 and No 1107/10”.***<sup>122</sup>

- (166) On 5 March 2021, the Railway directorate issued a press statement to confirm that the tender documents for Tender 4 had been sent to all pre-qualified operators.<sup>123</sup> A copy of the 919-pages document package has been included at Annex 64.

- (167) The time limit for submitting bids for Tender 4 was 31 August 2021, with start of service in December 2023. The press statement read:

“Traffic Package 4 includes large parts of local and regional train traffic around Oslo. The traffic package will contribute to more and more satisfied customers through an attractive customer offer, improved customer service, cost-effective operation, as well as a conscious and targeted collaboration with other players in the railway and transport sector. Against this background, the following specific targets have been set for Traffic Package 4:

Objective 1 - More satisfied customers and more travellers choose the train, to contribute to an increased share of public transport.

Objective 2 - Better passenger transport by train for the overall resource effort.

Objective 3 - Passenger transport by train must be a coordinated part of an integrated transport system.

-Traffic Package 4 consists of many train departures and affects many travellers. The Railway directorate is therefore keen to connect with a rail operator who can help ensure a good and robust train service for travellers, says Hans Henrik Kristensen, director of passenger traffic agreements in the Railway directorate.

The Railway directorate decided in June 2020 to postpone the competition for Traffic Package 4, with the start of the traffic package in December 2023 - one year after the original plan. The justification was mainly uncertainty related to the Covid-19 pandemic and the progress of affected infrastructure projects. The directorate believes that the overall uncertainty has now been well taken care of in the basis for the competition, and that according to the revised timetable we

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121 See Annex 63.

122 *op.cit.*, pages 3 and 4.

123 See Annex 71.

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can carry out an effective competition that fulfils the objectives that have been set.

The Railway directorate has, based on an independent assessment of the scope and complexity of this traffic package, decided that quality and cost shall be weighted, respectively, 70 and 30 percent in line with the objectives of the competition. Quality includes i.a, better handling of deviations, more robust operation, extended transport offer at certain times and routes, better customer service, increased customer satisfaction and better coordination with other public transport.

The connections covered by Traffic Package 4 are part of an extensive route, price and ticket collaboration with the public transport companies where the aim is to provide travellers with a seamless public transport service. The start of traffic also occurs at the same time as the Follo-line gain full functionality from the route schedule amendments in December 2023.

-This is an extensive traffic package where we hope that the train operators see good solutions to exploit the potential for improvements, says Kristensen.

Facts about Traffic Package 4:

Includes local trains Spikkestad/Asker-Lillestrøm and Stabekk/Oslo S-Ski, regional trains Oslo S-Ski, Stabekk-Moss, Oslo S-Mysen/Rakkestad and Oslo S-Hakadal/Jaren as well as regional express trains Oslo S-Halden and Oslo S-Gjøvik (see map).

In 2019, 28.6 million journeys were made on the train departures included in the traffic package.

When traffic starts in 2023, the Follobanen will have full functionality, which will reduce in half the travel time from Ski to Oslo and enable more departures on the Østfold-line. The winning operator must therefore deal with a completely new route plan from the start of traffic.

The contract has a duration of ten years, with the option to extend by 1+1 years”.

- (168) Consequently, Tender 4 had been announced as a competitive tender under Regulation 1370/2007. Furthermore, as shown in Section 4.1(e) and (f) above, up until the election in September 2021, there is no evidence to suggest that the implementation of the 2015-decision to open the market had encountered obstacles or given rise to other reasons that necessitated a substantially longer transition period and even an abortion of the two final competitive tenders.
- (169) Notably, regarding the shuttle services to Oslo airport, the assessment in 2020 concluded that: “A future choice of solution for the shuttle service will have very little effect on the design and progress plan for the public tenders”, and that: “In the event of an

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integrated solution, the rail offerings in the Oslo corridor will change, and the new service offering will form a natural part of Tender 5”.<sup>124</sup>

**4.5 The events leading up to the late-stage instruction by the *new* minority government to abort and cancel Tenders 4 and 5 on 19 November 2021**

**(a) VY lost 2/3 of the initial tenders (Tenders 1-3)**

(170) The result after the initial tenders showed that VY had only won one: Tender 3 (West) in December 2019. VY had lost Tender 1 (South) in October 2018 to GoAhead and also Tender 2 (North) in June 2019 to SJ.

(171) Notably, these tenders revealed an exorbitant gap between what VY was then being paid under the contracts it had been directly awarded as late as 2018, and what VY now was willing to accept, when exposed to competing tenders for the same or even more onerous service loads:

**(i) Tender 1 (South)**

(172) In its press statement on 17 October 2018 announcing the results of Tender 1 (South), the Railway directorate confirmed that all three competing operators, including VY, had asked for less than *50 percent* of what VY was being paid for the corresponding traffic under its directly awarded 2018 contract, only eight months earlier:

“All the three operators submitted offers which mean that the compensation from the State is more than halved compared to the current situation. For 10 years, Go-Ahead will receive approximately NOK 1.5 billion in compensation. This represents an annual average of approximately NOK 150 million. [...] The current operator [VY] receives NOK 486 million for this traffic in 2018”.<sup>125</sup>

**(ii) Tender 2 (North)**

(173) In its press statement on 17 June 2019, announcing the results of Tender 2 (North), the Railway directorate confirmed an *even larger gap* than in Tender 1 (South).

(174) This time SJ, which won the contract, had only asked for *20 percent* of the compensation granted to VY less than 18 months earlier for the same traffic in the directly awarded contract in 2018. The directorate confirmed that VY had asked for “significantly lower” compensation than what it was then being paid under that directly awarded contract:

“The average annual compensation SJ will receive to operate the traffic included in this tender amount to approximately one fifth of what the traffic is operated for today. VY also submitted an offer that was significantly lower than what the

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<sup>124</sup> See Section 4.1(f) above.

<sup>125</sup> See **Annex 14**.

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traffic is operated for today [by VY], but significantly higher than the offer from SJ”.<sup>126</sup>

**(iii) Tender 3 (West)**

- (175) In its press statement on 9 December 2019, announcing the results of Tender 3 (West), the Railway directorate had staggering news to report.
- (176) The directorate could finally award a contract to VY after the company this time had not asked for any compensation at all for running the services. Instead, VY had offered to *pay the State* NOK 2.2 billion for the contract. By contrast, in 2019 alone, VY *was being paid* NOK 201 million by the State for the same traffic under the contract it had been directly awarded less than two years earlier:

“During the contract period, including two optional years, the State will receive a total remuneration of up to NOK 2.2 billion. In the current directly awarded contract with VY, the State will pay in 2019 approximately NOK 201 million for purchasing passenger rail services on the regional connection Bergen-Voss-Myrdal and the local connection Bergen-Arna, as well as on the long-distance connection Oslo S-Bergen (night train).

- (177) Notably, this meant that the results of Tender 3 not only once more showed that VY was being substantially overcompensated in the directly awarded 2018 transition contracts but also that the Norwegian authorities misclassified the service load as a public service obligation because the traffic could be operated without public compensation in the first place. The head of the directorate also expressed surprise to the media:

***“-It was a little surprising for us that we ended up with competitors who wanted to pay for running trains, even though we perhaps had some idea”.***<sup>127</sup>

- (178) Indeed, Tender 3 demonstrated that the Norwegian authorities, in the past, had failed to undertake a proper market analysis to assess that issue.

**(iv) The stakes if VY should also lose Tender 4 (East 1) and Tender 5 (East 2)**

- (179) On 31 August 2021, six operators bid for Tender 4, including GoAhead, SJ, Stagecoach, VR, Flytoget and VY. GoAhead, which had previously won Tender 1 (South) in 2018, had again submitted the lowest bid at NOK 9.3 billion (EUR 930 million) for a *12-year* contract period, and was therefore in pole position to win the contract.<sup>128</sup>

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<sup>126</sup> See **Annex 15**.

<sup>127</sup> See **Annex 13**, at page 4.

<sup>128</sup> See **Annex 18**.

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- (180) VY, by contrast, bid NOK 9.9 billion (EUR 900 million) or NOK 616 million (EUR 61 million) higher than GoAhead, and was then at the peril of losing its *third* contract.<sup>129</sup> Flytoget came in last of the six operators, with NOK 13.2 billion (EUR 1.32 billion).<sup>130</sup>
- (181) Tenders 4 and 5 covered 80 percent of the market and 60 percent of VY’s total passenger rail revenue, according to S&P’s 2021 credit rating of the group.<sup>131</sup> If VY were to also lose the two final tenders, there would not be much left of its incumbent passenger rail business.<sup>132</sup> Indeed, the ministry has explicitly acknowledged these stakes, on 31 August 2022, in a press statement by the vice-minister on its own website:

“With a continuation of the Solberg-government's railway reform, we could have risked that our two state-owned rail companies would only operate the passenger trains on the Bergen-line [VY on Tender 3] and Flytoget to Oslo airport.

This government's solution ensures continued state operation of the rail services in Eastern Norway. Therefore, this is not a continuation of the last government's tendering process. This government is a guarantor that the State will also in the future have ownership of the rail companies that run on our railway network”.<sup>133</sup>

- (182) In fact, this motivation has been reiterated also by the minister in the media, in his public speeches, and in the Parliament, repeatedly, to explain the abortions of Tenders 4 and 5.<sup>134</sup>

(b) On 14 October 2021, a new minority government took office

- (183) On 14 October 2021, the election brought a new minority government into office. The new government consisted of a coalition between the Labour party, which pursued an anti-liberalization agenda, and the Centre party, which pursued an anti-EU and anti-EEA agenda. Being a minority government, the coalition depended in the Parliament on the support of the Socialist Left party, which pursued an anti-EU, anti-EEA, and anti-NATO agenda.

- (184) On 18 October 2021, the declaration of accession to the Parliament was presented, in which the government stated the following regarding the ongoing tenders:

“The government will pursue an aggressive railway policy. Intercity development will continue. The government will stop further competition for passenger rail services and important tasks related to the rail infrastructure”.<sup>135</sup>

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129 See **Annex 17**.

130 See **Annex 19**.

131 See **Annex 11**, page 2.

132 See Section 4.5(a)(iv) above.

133 See **Annex 34**.

134 See Section 4.5(d) below.

135 See page 5 at **Annex 94**.

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(c) On 27 October 2021, the new minister confirmed in an interview with VG his intention to abort Tenders 4 and 5

(185) On 27 October 2021, less than two weeks after assuming office, the newly appointed Minister of transport confirmed in an interview with VG, titled “Will give everything to VY”, his intention to abort the two final tenders and award the services to VY.<sup>136</sup>

“[Reporter:] You want it to be VY again that runs all passenger rail transport in Norway?”

[Minister:] It follows from the nature of the case that it will be VY one builds on”.

[Reporter:] Is it now a given that VY will get the last rail packages in Eastern Norway (which is called 4 and 5)?

[Minister:] If one doesn’t run tenders then one has to award directly. And then one has to grant it to VY”.

[Reporter:] If you had the choice, would you have thrown GoAhead and SJ out of Norway?

[Minister:] No, I don't think I can say it that way. ***They have gotten contracts and they deliver good services on that basis and those conditions. This is not about that,*** says the Minister of transport”.

(186) On the same day, a member of Parliament filed a written question to ask the minister to confirm whether any professional studies or analyses had been made in advance of his planned decision to abort these public tenders, and to explain how these reports justified his planned decision.<sup>137</sup>

(187) Notably, the minister was unable to provide any kind of support when he submitted his written response to the Parliament *three weeks* later, on 3 November 2021. Indeed, the minister did not even lay claim to professional support for his decision:

“In the government declaration, the government has said that it will pursue an aggressive railway policy for the future and will accommodate for the railways to take a greater share of both passenger and cargo traffic. The government has also stated that it will review the structure of the sector and that it will abort the ongoing tendering of the rail connections in Norway. This is done to provide a better rail offer for the travellers.

The government must find solutions that are in the best interest of everyone who uses the train and give predictability to those who use the railway as a workplace.

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136 See **Annex 23.**

137 See **Annex 24.**

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I look forward to being able to deliver further investments on the railways for the benefit of rail passengers and businesses throughout the country”.<sup>138</sup>

(188) In another interview, on 4 November 2021, this time with E24/VG, titled “Will exclude the Swedes from Norway – but VY will still operate in Sweden”, the new minister stated that he had no intention of restricting VY from competing in Sweden and in the other Nordic countries where markets were open to competition, although he would be closing the Norwegian market.<sup>139</sup>

(189) On the same day (4 November 2021), the ministry met with the Railway directorate to discuss the still ongoing competitive tender processes.<sup>140</sup>

(d) On 19 November 2021, the new Minister of transport instructed the Railway directorate to abort the two final tenders after the deadline for Tender 4 had expired and VY again had failed to submit the lowest bid

(190) On 19 November 2021, or three months *after* the deadline for Tender 4 had expired, the new minister formally instructed the Railway directorate to abort the final tenders. The brief instruction read:

“The rail services, which have not been tendered out, is divided into two traffic packages. Traffic package 4 includes the passenger rail services on the Østfold-line and the Gjøvik-line, as well as the Spikkestad-Lillestrøm and Stabekk-Ski local trains. A contract signing with the operator was planned in March 2022, with start of service in December 2023. Traffic package 5 includes the intercity trains Skien-Eidsvoll and Drammen-Lillehammer, the local trains Kongsberg-Eidsvoll, Drammen-Dal and Asker-Kongsvinger, as well as the Bratsberg-line. Start of service was planned in December 2025.

The Railway directorate is hereby requested to stop the tendering of passenger rail transport. The competition for the rail services included in traffic package 4 is aborted. The competition for the rail services covered by traffic package 5 will not commence.

The Railway directorate is ordered to start working on a direct award of the rail services that are not tendered so that the rail services can be awarded within the framework of the current regulations, and by 25 December 2023.”<sup>141</sup>

(191) On the same day (19 November 2021), the minister sent out a press statement to publicly announce his decision to abort the final tenders. The minister justified his decision in the following terms:

“The government wants a better railway for everyone and aims to give passengers a better rail service so that more people choose to travel environmentally

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138 *op.cit.*

139 See **Annex 22**.

140 See page 5 at **Annex 98**.

141 See **Annex 20**.

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friendly with the railway. We believe that clear state control would be best for utilizing the limited capacity of the railway in the capital area. We have therefore ordered the Railway directorate to abort the ongoing competition for Tender 4 in Eastern Norway, and not to proceed with Tender 5, states Jon-Ivar Nygård, Minister of transport.”<sup>142</sup>

- (192) Notably, there was yet again no reference to any studies or reports that the ministry had commissioned to support why and how abolition of competition would lead to increased demand for rail services. Neither did the minister provide any reasons why and how a directly awarded contract would lead to better capacity utilization compared to the long-planned tendered contracts in the very same area, when both types of contracts would have been decided by the same Norwegian authorities. Nor did the minister discuss the legal powers and state control that the Norwegian authorities already enjoyed over all rail operators, and why these would be inadequate in relation to tendered contracts.<sup>143</sup>
- (193) Not did the minister take issue with the 2020 assessment of the Railway directorate on the issue of the shuttle services to Oslo airport, that: “A future choice of solution for the shuttle service will have very little effect on the design and progress plan for the public tenders” and that: “In the event of an integrated solution, the rail offerings in the Oslo corridor will change, and the new service offering will form a natural part of Tender 5”.<sup>144</sup>
- (194) Instead, the press statement emphasized that the minister, by aborting the final tenders, was making good on an election campaign promise included in the political agreement (the “Hurdal-platform”) between the two governing parties:<sup>145</sup>

“The passenger rail services in Eastern Norway are not exposed to competition as in the rest of the country. VY operates these services under a directly awarded contract with the Railway directorate. In addition, Flytoget has a directly awarded concession agreement with the directorate for a shuttle service on the Asker-Oslo airport connection.

-Until now, the plan has been to announce competition for the rail services that VY today operates in Eastern Norway, in two tenders. Says [minister] Nygård: ‘the government announced in the Hurdal-platform that further competition for passenger rail services will be stopped. *It is an important issue for the current government to ensure national control over the rail services.* In the Parliament, there is a clear majority that supports this’.”

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<sup>142</sup> See **Annex 21**.

<sup>143</sup> See also Section 4.1(b) on the fact that the minister under Norwegian administrative practice and policy also is restricted from using the State’s ownership to have the company accept terms offered in the passenger rail contracts.

<sup>144</sup> See Section 4.1(f) above.

<sup>145</sup> See **Annex 140**, page 42: “The government will: [...] Stop further competition for passenger traffic on the railway.” The political agreement was presented on 13 October 2023, one day before the new minority government took office.

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- (195) Consequently, the abortion of Tenders 4 and 5, even after the deadline for Tender 4 had expired, was not the result of careful deliberations and new information that in any way had impugned the basis for the decisions taken to liberalize these parts of the market.
- (196) As also demonstrated by the time frame from the minister took office to his first public statements of his intentions and his subsequent formal instruction to abort the public tenders, which all took place in the space of *five weeks*, the abortions of Tenders 4 and 5 were the result of a protectionist stance to reverse the 2015-decision made by the last government and endorsed by the last Parliament, more than *six years* earlier.
- (197) The protectionist motivation of the minister has been displayed on numerous occasions ever since in the media, in public speeches, and in the Parliament. A non-exhaustive list is provided below:
- (i) On 7 April 2022, in a press statement to announce that he had formally instructed the Railway directorate to invite VY and Flytoget to negotiate for the direct award of the new contracts in lieu of the aborted Tenders 4 and 5:
- “The state-owned railway has been developed with community funds over more than 150 years. For us, it is important to preserve strong state-owned rail companies, so that we can always guarantee passengers a rail offer. This is a critical function for society. With direct awards, the government guarantees that the community will also in the future have ownership of the rail companies that run on our rail network, says the Minister of transport”***.<sup>146</sup>
- (ii) On 31 August 2022, the vice-minister published an official statement on the ministry’s public webpage:
- “With a continuation of the Solberg-government's railway reform, we could have risked that our two state-owned rail companies would only operate passenger trains on the Bergen-line [VY on Tender 3] and Flytoget to Oslo airport.***
- This government's solution ensures continued state operation of the rail services in Eastern Norway. Therefore, this is not a continuation of the last government's tendering process. This government is a guarantor that the State will also in the future have ownership of the rail companies that run our railway network”***.<sup>147</sup>
- (iii) On 27 October 2022, in the Parliament in response to an interpellation on the then ongoing award process towards VY and Flytoget, the minister stated:
- “This government has aborted the tendering of the rail services and also of the maintenance services of the railway. This means that 1300 workers and skilled

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<sup>146</sup> See Annex 28.

<sup>147</sup> See Annex 34.

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labourers have received clarity, after the general election last year, that important professional clusters will not be exposed to competition. The rail services in Eastern Norway will be directly awarded.

This government is the guarantor that passengers will not have to deal with more rail companies. *The railway has been developed as part of the community's resources and funds during 150 years, and for us it is important to preserve strong state-owned rail companies, so that we always have national control over the passenger rail services*".<sup>148</sup>

- (iv) On 29 November 2022, in the Parliament during a debate on the potential merger between VY and Flytoget, the minister stated:

"This government is the guarantor that passengers will not have to deal with more rail operators – *we shall preserve a united railway, which has been developed with community funds during more than 150 years. For us, it is important to preserve a strong state-owned rail company, so that we always have national control over the passenger rail services. This is what the direct award will help accomplish*".<sup>149</sup>

- (v) On 16 March 2023, in the Parliament in response to a written question after the media had revealed that he had last-minute instructed the Railway directorate, without regard to price, to award to VY at least one of the 10-year contracts, the minister stated:

*"The last government's tendering of the rail services in Eastern Norway [Tenders 4 and 5] could have ended with VY only being left with the rail service on the Bergen-line and the Vosse-line [Tender 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 tendered as a new traffic package 6. Flytoget would not have been guaranteed to win that competition, and we could have ended up with not making the best possible use of the limited capacity in the Eastern region for the passengers. *This government believes that it is for best, for the community and the passengers that the State has ownership of the rail companies that operate the passenger rail services in Norway*".<sup>150</sup>

- (vi) On 28 March 2023, in a letter to the Parliament in response to an ongoing investigation by the Standing Committee on the Standing committee on scrutiny and constitutional affairs of the minister regarding the announced award to VY on 3 March 2023, the minister wrote:

"VY already operates the majority of passenger rail traffic in the Eastern region under a public service contract directly awarded by the State. In addition, VY operates the traffic on Bergen-line [Tender 3] on a tendered contract by the last

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148 See page 478 at Annex 96.

149 See page 862 at Annex 99.

150 See Annex 97.

government. *The history of the company goes all the way back to the opening of Norway's first rail line in 1854. It is a company built up by the community with the community's resources. That experience, culture and expertise which VY has acquired is extremely valuable for the Norwegian railways, and the company has proved to be competitive in Norway as well as Sweden. I did not consider it as an option that VY, as a result of the direct award process for the Eastern region, only should be left with the operation of the long-distance trains on the Bergen-line and the regional rail service on the Vosse-line [Tender 3]. This was a political consideration that became clearer during the year*".<sup>151</sup>

- (vii) On 12 April 2023, in the Parliament during Question Time on the announcement of the award of both East 1 and 2 to VY on 3 March 2023, the minister stated:

*"This government has a different railway policy than the Conservative Party. We have aborted the tendering of passenger rail services. We did not want the fragmentation that this would entail, and we did not want to be left with a situation where VY, the old NSB, could only be left with the Bergen-line [Tender 3]. We therefore terminated that policy and switched to direct awards"*.<sup>152</sup>

- (198) Notably, the common thread in the protectionist stance that these statements document is that there are no tangible efforts to explain what it is that the announced contracts reserved for VY and/or Flytoget could accomplish that would not have been possible in the long-planned tendered contracts, apart from shielding VY and Flytoget from competition.

- (199) This lack of reasoning can also be seen in the mandate and instructions that the ministry handed down to the directorate at the start and during the subsequent process in 2021-2023 that led to the awards of East 1 and 2 to VY, which have been described in Section 4.6 below.

#### **4.6 The events leading up to the announced awards on 3 March 2023 and the signing of the contracts with VY on 29 June 2023**

- (a) On 30 November 2021, the ministry summoned the directorate to consult on the possibility of arranging a "mini competition" between VY and Flytoget

- (200) On 30 November 2021, the ministry summoned the directorate to a meeting, to be held on 10 December 2021. This would be the first time that the parties met to plan the way forward, after the ministry had instructed the abortion of Tenders 4 and 5. At that time, the ministry had still no agenda prepared for the meeting, which illustrates how rash the abortion of the two final tenders had been:

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<sup>151</sup> See page 3 of **Annex 98**. The scope and status of the investigation have been described in Section 4.5(j) below.

<sup>152</sup> See page 18 at **Annex 100**.

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*“Proposals for the agenda will come later”*.<sup>153</sup>

- (201) In a follow-up email, on 7 December 2021, the ministry forwarded to the directorate its agenda for their meeting on 10 December 2021. Certain parts of the agenda have been redacted. Nevertheless, the agenda shows that the ministry, already from the start considered a *“mini competition”* between VY and Flytoget:

*“Assessments around negotiation strategy – for example a mini-competition between VY and FT”*.<sup>154</sup>

- (202) Indeed, the agenda shows how fluid the whole situation was at that time, and how little attention was paid to the legal boundaries for the process.

- (203) Moreover, the ministry put on the agenda to what extent the directorate should be able to consent to *reductions* in the public rail services compared to what were then offered under the transition contracts awarded directly to VY in 2018, see agenda item no. 4(e):

*“To what extent can [the directorate] negotiate regarding reductions in the public rail services, or whether it must be a premise (at least in an early phase before a price offer has been presented) that the public rail services that are run today to a great extent must be continued”*.<sup>155</sup>

- (204) This, again, underscored how fluid the process was from the start, because the ministry was open to the premise that the scope of the planned public service obligations did not have to be defined beforehand, and could, effectively be decided as part of negotiations with VY/Flytoget. Moreover, the agenda unveiled that the ministry, in contrast to how the abortions had been explained by the minister to the public on 19 November 2021, was open to consider reductions in the public service offering, behind closed doors.

- (205) Furthermore, in the same vein, the ministry was even open to consider *increasing* ticket prices, see agenda item no. 3(d):

*“Whether the current tariff structure/level shall be maintained”*.<sup>156</sup>

- (206) In other words, whereas the minister in public on 19 November 2021 had professed that the public would now receive *“a better railway for everyone”* and *“to give passengers a better rail service”* by aborting Tenders 4 and 5, only three weeks later, his ministry was considering the possibility to reduce the public rail offering and to increased ticket prices.

- (207) Notably, the new contracts would cover as much as 80 percent of the national market. Consequently, reductions in the public services combined with increased ticket prices from what was included in the directly awarded transition contracts in 2018 and later Tenders 4 and 5, could have significant effects on the delineation of the scope for public

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153 See page 1, at the lower end, at **Annex 113**.

154 See page 1, at the *upper* end (agenda item no. 2), at **Annex 113**.

155 *op.cit.*

156 *op.cit.*

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service obligations, as defined by Article 2(e) of Regulation 1370/2007. Still, at no point did the agenda include a discussion of the need for a *market analysis*, not even partly.

(b) On 10 December 2021, the directorate outlined for the ministry several proposals for how a “mini competition” could be arranged

(208) In their meeting, on 10 December 2021, on the basis of the agenda that the ministry had presented, the directorate held a presentation that outlined how the ministry could move forward.<sup>157</sup>

(209) The presentation demonstrates a lacking understanding of the dichotomy in Regulation 1370/2007 between a direct award and a competitive (albeit discriminatory) award of a rail contract.

(210) First, the presentation laid out “*overall guidelines for the negotiations strategy*”, which included: “**Operators involved in the process must be ensured equal treatment**”.<sup>158</sup> Then, the presentation listed “*preliminary premises for the negotiations strategy*”, which included:

**“No guidelines for whom or how many direct awards can be made to. At least one award to a Norwegian state-owned rail company. It is not considered relevant with an award towards more than two companies” [...] “In the case of a direct award to several operators, the point of departure will be the distribution that Tenders 4 and 5 were based on”.**<sup>159</sup>

(211) Then, the presentation listed “*options for choice of operator(s)*”, which included three alternatives:<sup>160</sup>

**“Option 1: A direct award is made to one operator for all traffic in Eastern Norway. The award will either go to VY or Flytoget. The choice between these will be made after initial negotiations/soundings with both”.**

(212) In its assessment of that option, with regard to level of compensation and efficiency, the directorate stated:

*“Potential economies of scale (however, there is no automaticity in such an effect). Through the division of Eastern Norway into traffic packages 4 and 5, it will, to a large extent, be possible to attain equally efficient use of production resources.*

***“Today's dominant player may assume that there is no real possibility of a direct award to someone else. In that case, this will make the negotiations more difficult and is presumed to result in cost increases. Losses in other contracts leave room for an increased risk premium in this contract to meet the required rate***

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<sup>157</sup> See Annex 120, pages 3-21.

<sup>158</sup> *op.cit.*, page 7 of the presentation.

<sup>159</sup> *op.cit.*, page 8 of the presentation.

<sup>160</sup> *op.cit.*, page 10 of the presentation.

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***of return combined. Whoever is chosen becomes virtually a monopolist and thus a demanding counterparty for the entire contract period.***<sup>161</sup>

(213) Then, the presentation laid out a second option:

*“Option 2: The award can be shared between two operators. Each award can be given to either VY or Flytoget, after parallel negotiations/soundings”.*

(214) In its assessment of that option, with regard to level of compensation and efficiency, the directorate stated:

***“Today's dominant player will also have to take into account the fact that a direct award to another operator is a possibility. This makes it easier to arrive at a good contract. In managing the contracts, it can also be advantageous to be able to compare two operators.***

*Potentially somewhat weakened economies of scale. However, through two traffic agreements with allocation as in traffic packages 4 and 5, efficient use of production resources will, to a large extent, be attainable”.*<sup>162</sup>

(215) Then, the presentation laid out a third option:

*“Option 3: The award can be shared between two operators. Each award can be given to VY, Flytoget, or other suitable rail operators. At least one contract will be awarded to VY or Flytoget. Negotiations (one period) in parallel.”*

(216) In its assessment of that option, with regard to level of compensation and efficiency, the directorate stated:

***“Today's dominant player will also have to take into account the fact that a direct award to another operator is a possibility, including someone other than Flytoget. This makes it easier to arrive at a good contract.***

*In managing the contracts, it can also be advantageous to be able to compare two operators.*

***Awarding a contract to an operator that is not owned by the state prevents mixing up of the role as owner and the role as buyer and ensures a professional buyer-supplier relationship.***

*Somewhat weakened potential economies of scale. However, through two traffic agreements with allocation as in traffic packages 4 and 5, efficient use of production resources will, to a large extent, be attainable.*

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<sup>161</sup> *op.cit*, page 11 of the presentation.

<sup>162</sup> *op.cit*, page 12 of the presentation.

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*An award to an operator that is not owned by the Norwegian state implies that ownership cannot be used in relation to this contract.*

*The process itself up to the conclusion of the contract becomes more demanding the more operators are involved. It can also be a challenge to identify which operators should be involved in negotiations, beyond VY and Flytoget”.<sup>163</sup>*

(217) The presentation then stated that the directorate had reached the preliminary conclusion that Option 2 would be the best, ahead of Option 3, with Option 1 as the least preferable choice.<sup>164</sup>

(218) Then the presentation, under a slide titled “*Some relevant approaches to the negotiation process*”, stated the following:

*“We must avoid a situation where one or more of the relevant operators assume that they will be awarded the contract regardless of what they offer or demand. In order to extract the potential of the operators and strengthen the directorate's negotiating position, **we need some form of competition for the award.** We have currently identified **three main models**:*

- *a mini competition between the relevant operators.*
- *a mini competition on basic contracts (minimum traffic, mandatory requirements, etc.) and then directly negotiating with the best operator(s) on improvements beyond the basic contract.*
- *Directly negotiating with the presumed best provider for each of TP4 and TP5, however where it is relevant to end the negotiations and bring in an alternative provider if the negotiations do not yield a satisfactory result.*

*There are pros and cons to each of these options. They have been preliminarily assessed on a detailed level. **We consider all the options to be realistically feasible**”.*<sup>165</sup>

(219) The presentation then moved on to discuss the directorate’s need for instructions and when these needed to be produced by the ministry. The directorate advised the ministry, at the latest by March 2022, to bring clarity on topics “*that affect the actual process for the negotiations, or that are pivotal for the design of the competitive basis or the offers*”.<sup>166</sup>

(220) In a final slide, the presentation then relitigated the need for having “*real dialogue*” with several operators:

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<sup>163</sup> *op.cit*, page 13 of the presentation.

<sup>164</sup> *op.cit*, page 14 of the presentation.

<sup>165</sup> *op.cit*, page 15 of the presentation.

<sup>166</sup> *op.cit*, page 17 of the presentation

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***“To limit ourselves to one operator in the first place removes the possibility to take advantage of the fact that different operators have different strengths and weaknesses (we have three different winners of the three tenders that have been completed).***

*The price offers in early stages of the negotiations vary significantly (we have seen examples of some being twice as expensive as others in the early stages). **By making a choice too early in the process, the opportunity to realize the full economic potential is weakened.***

***Opening up for several alternative contracting parties a while into the negotiations strengthens the directorate's negotiating position to a considerable extent and makes it possible to be a "demanding buyer".***<sup>167</sup>

- (221) Consequently, the evidence demonstrates how the ministry from the start veered outside the remit of a direct award process. The Norwegian authorities from the start sought to replace the aborted Tenders 4 and 5 with a “**mini-competition**” because “**we need some form of competition for the award**”, which shaped the alternative models for how this could be arranged.
- (222) On the one hand, the Norwegian authorities wanted the help of forces of competition to drive prices down and quality up, on the other hand, not so much competition that VY and Flytoget could lose the contracts to foreign operators.
- (c) On 4 January 2022, the minister summoned the director of the directorate for a high-level meeting to discuss a draft mandate for the process
- (223) Following the meeting on 10 December 2021, the ministry asked the directorate to draft a mandate, which the directorate submitted on 3 January 2022.<sup>168</sup> On the same day, the minister summoned the director to a high-level meeting already the next day, to consider the draft.<sup>169</sup>
- (224) By this time, the ministry and the directorate had coalesced on Option 2, as described in the directorate’s presentation on 10 December 2021. In its new presentation for the minister, on 4 January 2022, the directorate explained:

***“The award can be divided between two operators. Each award can be given to either VY or Flytoget.***

*The process is arranged so that the directorate can be sure that awards are made to the right operator, and that both operators have good prerequisites for giving their best offers.*

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<sup>167</sup> *op.cit.*, page 19 of the presentation

<sup>168</sup> The draft and an accompanying explanatory memorandum have not been made publicly available.

<sup>169</sup> See **Annex 119**.

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*Negotiations on the direct award of Traffic package 4 will start on the basis of the offers made by the operators in the now aborted tender. However, these offers are not binding and are subject to change during the negotiations*".<sup>170</sup>

(225) This showed that the Norwegian authorities by that time had concluded on the preferred model for the “*mini-competition*”, even starting off on the offers that both companies had submitted on 31 August 2021 in the aborted Tender 4, and that the choice of operator was not given: “*each award can be given to either VY or Flytoget*”.

(d) On 31 March 2022, the ministry instructed the directorate on how to organize the award of the final contracts (named East 1 and 2) to VY and/or Flytoget

(226) On 31 March 2022, the ministry then formally adopted the mandate and instructions for how the directorate should proceed with the award of East 1 and 2.<sup>171</sup>

(227) Because the letter had been based on the flawed considerations for a “*mini-competition*” and draft earlier presented by the directorate, the formal mandate and instructions failed from the very start to clarify how the directorate should maintain the integrity of a direct award process, and thereby avoid ending up in a *de facto* competitive tendering process between VY and Flytoget, to the exclusion of all other (non-Norwegian) operators.

(228) First, the ministry instructed that the services in Eastern Norway should continue to be split into two separate contracts, in other words as had been the plan with Tenders 4 and 5. These two contracts could now be awarded to either VY, Flytoget, or both, and *equal treatment* of VY and Flytoget was paramount:

*“The process must provide equal treatment of the two relevant operators”.*

(229) Notably, this also meant that even after the abortion of Tenders 4 and 5, the ministry *found no reason to limit the number of operators from what was intended there.*

(230) Second, the scope of the passenger rail services was also the same as for Tenders 4 and 5. Consequently, the services included in East 1 were the same as in Tender 4, namely:

- Two local rail (L-train) connections: Spikkestad/Asker-Lilletrøm and Stabekk/Skøyen -Ski); and
- Four regional rail (R-train) connections: Oslo S-Hakadal/Jaren; Stabekk-Moss; Oslo S-Mysen/Rakkestad; and Oslo S-Ski; and
- Two regional express rail (RE-train) connections: Oslo S-Halden and Oslo S-Gjøvik.

(231) Some of the frequencies were adjusted to take into account the opening of the Follo-line and the use of ERTMS on the Gjøvik-line, which also would have applied for Tender 4.

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<sup>170</sup> See Annex 119, page 6.

<sup>171</sup> See Annexes 25-26.

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- (232) Similarly, the services included in East 2 were the same as in Tender 5, namely:
- Two regional express rail (RE-train) connections: Skien-Eidsvoll and Drammen-Lillehammer; and
  - Four regional rail (R-train) connections: Kongsberg-Eidsvoll; Drammen-Dal; Asker-Kongsvinger; and Notodden-Porsgrunn (Bratsberg-line).<sup>172</sup>
- (233) Third, as was already envisioned in Tender 5<sup>173</sup>, the East 2 contract contained the option to include the shuttle service to Oslo airport from the time the concession agreement with Flytoget expired on 1 February 2028.
- (234) Notably, the shuttle is a *commercial* service on which Flytoget sets the prices, see article 8 of the agreement with the Ministry of transport, dated 1 February 2013, which reads:

*“The operator determines itself the rates on a market economy basis”.*<sup>174</sup>

- (235) Consequently, Flytoget does not receive any compensation from the State. In 2019, the last normal business year before the pandemic, Flytoget generated a turnover of NOK 1 billion (EUR 100 million) and a net income before taxes of more than NOK 447 million (EUR 44.7 million). This meant that according to the mandate set by the ministry, East 2 could include the award of a significant commercial service *five years before the service could even start under the East 2 contract*.
- (236) Fourth, and in the same vein, the ministry failed to include any instruction for a market analysis to assess the scope and proportionality of the public service obligations planned for East 1 and East 2. Notably, at the time, more than 28 years had passed without any updated market analysis to assess *whether even parts* of the market awarded could be served on a commercial basis.
- (237) Fifth, whereas none of the direct awards to VY in the past had exceeded 6 years, and usually only 1 to 4 years, the mandate for East 1 and East 2 instructed the use of 10-year periods. In other words, whereas Norway had been at the cusp of completing the liberalization of all its passenger rail services *in only six years*, from the decision was made by the former government in 2015 (including completing all administrative and corporate reorganizations and adopting all legislation), the new government now sought a maximum contract period of 10-years to delay any further exposure to competition.
- (238) Sixth, the objectives for the new contracts were set in fluid and non-ambitious terms for the entire 10-year period. Compared only to the *directly awarded 2018 contracts*:
- “the contracts will maintain and develop the current passenger rail offer, and contribute to the realization of the following overall objectives:
1. More happy passengers

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<sup>172</sup> See page 2 at **Annex 101**.

<sup>173</sup> See TED notice

<sup>174</sup> See **Annex 27**.

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2. Better capacity utilization, route offering and reliability
3. Efficient operation and lower compensation from the State
4. A coordinated part of an overall transport system”.

(239) Furthermore, on the level of public compensation, the ministry afforded wide discretion to continue the overcompensation in the 2018 directly awarded contracts to VY.

(240) First, the wording on this issue was inconsistent and fluid because on the one hand, the instruction referred to the objective as merely obtaining “lower compensation”. On the other hand, the mandate also stated, “significantly lower compensation”. Nevertheless, the ministry empowered the directorate to pay up until “*the present compensation level*” in the 2018-directly awarded contracts to VY:

*“The directorate shall regard the current compensation level as the upper limit for the new contracts until an authorization to commit the State for future budget years, with regard to the purchase of passenger rail services, is provided”.*<sup>175</sup>

(241) This was the significant ceiling in the state budget based on the 2018 directly awarded contracts.

(242) Moreover, as for the East 1 contract, where VY during Tender 4 had bid substantially lower compared to what it was receiving under the 2018 directly awarded contracts, the ministry stated that the bids submitted by VY and Flytoget “*could*” be a starting point for the negotiations.

(243) Notably, the instruction also asked the directorate to propose a budget allocation for future budget years based on the results of its own negotiations, which was planned to be submitted to the Parliament by February 2023. *In other words, if the negotiations would result in relatively high compensation, the directorate would simply be invited to draft an authorization for a high-level budget allocation.*

(244) This is precisely what happened when the government on 11 May 2023 later presented its revised budget proposal.<sup>176</sup> The government requested an authorization for NOK 34 billion (EUR 3.4 billion) in total for all passenger rail services (VY’s current market share is an estimated 80-85 percent) and to spend up to NOK 5.6 billion (EUR 560 million) per year (compared to NOK 4.5 billion or EUR 450 million in 2021), and made it clear to the Parliament that it could be necessary to increase the level even further.

(245) Seventh, the ministry also afforded wide discretion to include “safety valves” in the new contracts to reduce the company risk in estimating future income, growth, and costs. In fact, while the ministry in general and superficial terms asked that these safety valves should “still motivate the operators to reduce their costs and increase their income”, it was concurrently made clear to the directorate *that it could go up to the ceiling of the state budget that continues to be based on the overcompensation in the 2018 directly*

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<sup>175</sup> See page 38 at **Annex 103**.

<sup>176</sup> See pages 227-228, and 360, at **Annex 102**.

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*awarded contracts. In addition, the ministry committed that the State was prepared to subsidize potentially substantial pension costs.*

- (246) Eight, the ministry instructed that the contracts should be awarded and signed between April-June 2023. This time limit was later extended until 24 December 2023.<sup>177</sup>
- (247) On 8 April 2022, by letter to VY and Flytoget, and in parallel meetings on 27<sup>178</sup> and 28 April 2023<sup>179</sup>, the directorate informed that it would first select a preferred operator for East 1 and then for East 2. The preferred operator would be invited to make an offer, and the negotiations would be conducted with that chosen operator. If the negotiations should lead to a satisfactory result, a contract would be awarded without inviting the other company to make an offer. If the negotiations with the preferred operator should not progress timely or be found unlikely to lead to a satisfactory result, the negotiations would be terminated. In that case, the directorate would obtain an offer from the other company and commence negotiations with that operator instead.
- (248) Notably, the ministry later *set aside these premises*, both on 2 December 2022 and then again on 16 January 2023, as laid out below.
- (e) On 11 April 2022, the directorate published TED-notices for East 1 and 2 that concealed the planned “mini-competition” between VY and Flytoget
- (249) On 11 April 2022, the directorate formally announced East 1 and 2 as two separate direct award processes.<sup>180</sup> The notices concealed that the process entailed that the award would not be made to a “given” operator, or that either VY and/or Flytoget could be awarded the contracts and how that selection would be made. The outside world was not privy to the “mini-competition” that the Norwegian authorities had been deliberating.
- (250) To the outside world, the planned awards were presented as: “*Direct awards for railway transport (art. 5(6) of 1370/2007*”. Therefore, the TED-notices afforded no opportunity to object that a discriminatory competitive tendering procedure had been dressed up and unlawfully presented as a direct award in violation of Articles 7(2) to (4) of Regulation 1370/2007.<sup>181</sup>
- (f) On 20 May 2022, the directorate selected VY as preferred operator for East 1 (formerly Tender 4)
- (251) On 20 May 2002, the directorate announced that VY had been selected as the preferred operator for the East 1 contract.<sup>182</sup> The justification for the decision was summarized in

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<sup>177</sup> See **Annex 133**, page 1.

<sup>178</sup> See **Annex 29**.

<sup>179</sup> See **Annex 12**.

<sup>180</sup> See **Annexes 111-112** (TED-notices)

<sup>181</sup> See Judgement of 24 October 2019, *Autorità Garante delle Concorrenza e del Mercato v Regione Autonoma della Sardegna*, Case C-515/18, EU:C:2019:983, para. 33.

<sup>182</sup> See **Annex 30**.

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an email to Flytoget the same day, including the criteria that the directorate had relied on.<sup>183</sup>

(252) VY's CEO announced in a press statement the same day that the company "works hard" to be selected as the preferred operator also for East 2.<sup>184</sup>

(g) On 18 August 2022, the directorate selected *Flytoget* as preferred operator for East 2 (formerly Tender 5)

(253) On the 18 August 2022, the directorate found reason to send an advance letter to the ministry to inform that it the next day would announce *Flytoget* as the preferred operator for the East 2 contract. The directorate also moved forward its timeline so that East 2 would be awarded already in Q1/2023 to allow more start-up time.

(254) On East 2, the directorate relied on five criteria for the selection of its preferred operator: quality/reputation/customer satisfaction; economy; counterparty risk; exploitation of infrastructure and development of the shuttle service; and execution of the negotiation process.

(255) In its press statement on 19 August 2022, the directorate also emphasised that:

"We think that it is positive for the development of the passenger rail service that we have two strong state-owned train companies in Norway".<sup>185</sup>

(256) The directorate invited VY to a separate meeting on 25 August 2022 to receive a more comprehensive explanation for its decision to reject VY as the preferred operator of the East 2 contract.<sup>186</sup>

(257) Flytoget subsequently submitted a first offer for East 2 on 21 October 2022 and a revised offer on 15 December 2022, which was revised again on 22 December 2022.<sup>187</sup>

(h) On 9 September 2022, the ministry gave the directorate *two* working days to respond to VY's objections against not becoming the preferred operator also on East 2 – and the minister publicly aired a potential merger between VY and Flytoget

(258) The choice of Flytoget as preferred operator for East 2 did not go down well with VY, which launched a media and lobby campaign to overturn the decision.

(259) Earlier, on 14 June 2023, the two rail unions, NLF and NJB, had gone on strike to protest the ministry's decision to even open for the possibility of using anyone but VY on both East 1 and 2.<sup>188</sup> Pouring gasoline on that fire, VY's CEO, on 6 September 2023, sent an open letter to the minister, with copies to the unions and to the directorate, to protest the

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183 See Annex 29.

184 See Annex 31.

185 See Annex 32.

186 See Annex 41, page 2.

187 See Annex 132, page 7.

188 See Annexes 32 and 35.

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choice of Flytoget as preferred operator on East 2.<sup>189</sup> The letter was circulated to the media and generated substantial negative spin, including “*VY goes for the throat of the directorate*” (Klassekampen); “*Warns against new rail plan – VY claims rail offer will become worse*” (VG);<sup>190</sup> and, “*VY attacks rail report*” (VG)<sup>191</sup>, to include only some examples of the coverage.

- (260) The initial response from the minister was to express support for the directorate, which had merely executed on a mandate given by his own ministry when it selected Flytoget as preferred operator for East 2: “*Nygård will not intervene against rail split*” (NTB/Nationen).<sup>192</sup>
- (261) On 5 September 2022, a high-level meeting took place to discuss the situation, which included not only the minister and the three unions, LO, NLF and NJF, but also three vice-ministers, and even the prime minister.<sup>193</sup>
- (262) On 7 September 2022, a meeting took place between the directorate and the ministry.<sup>194</sup> Then, on 9 September 2022, the minister reversed course and intervened: the directorate was given only *two* working days to respond to VY’s objections:

“In the letter, VY has mentioned a series of negative consequences they believe will occur if the rail service in the Eastern part of the country is divided between two rail companies. We ask for the directorate’s assessment of the points made in the letter [...]

Your response is requested by the end of Tuesday 13 September”.<sup>195</sup>

- (263) Although the directorate had been given just two working days to respond, the minister did not have time to await the answer. To appease the pressure, the ministry’s letter was circulated to the media and the minister gave several media statements the same day in which he conveyed that he had also started reviewing a potential merger between VY and Flytoget.<sup>196</sup> VY’s CEO instantly issued a media statement in support of the minister: “*VY supports merger with Flytoget*” (NTB/Adresseavisen).<sup>197</sup>

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189 See **Annex 36**.

190 See **Annexes 37-39**.

191 <https://www.vg.no/nyheter/innenriks/i/dwdgiw/vy-angriper-tograpport-antas-antar-antatte-fordel-antas>

192 <https://www.nationen.no/nyhet/nygard-vil-ikke-gripe-inn-mot-tog-oppsplitting-pa-ostlandet/>

193 See page 10 at **Annex 107**.

194 See page 6 at **Annex 107**.

195 See **Annex 40**.

196 VG on 09.09.22 (“*Starts review of merger between VY and Flytoget*”):

<https://www.vg.no/nyheter/innenriks/i/4oqAe9/starter-utredning-av-sammenslaaing-av-vy-og-flytoget;>

Dagsavisen on 09.09.22 (“*Transport-minister will start review of merger of VY and Flytoget*”):

<https://www.dagsavisen.no/nyheter/innenriks/2022/09/09/samferdselsministeren-vil-utrede-sammenslaaing-av-vy-og-flytoget/>

197 <https://www.adressa.no/nyheter/innenriks/i/JQo5LX/samferdselsministeren-til-vg-starter-utredning-av-sammenslaaing-av-vy-og-flytoget>

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- (264) On 13 September 2022, the directorate submitted a pointed rebuttal of VY’s objections to the ministry.<sup>198</sup> The directorate found it expedient to remind the ministry that it had, in fact, earlier provided a professional assessment of its reasons for proposing the award of two separate contracts, and that this report had been sent to the ministry in January 2022:

“After the abortion of Tender 4 and 5 in November 2021, the Railway directorate conducted a new assessment of what would be the best possible structure for a direct award: either to combine the traffic in Eastern Norway in one contract or divide Eastern Norway into two contracts. Both alternatives were assessed against the following criteria:

- More satisfied customers
- More travelers choose the train
- Best possible capacity utilization of the infrastructure (capacity in the Oslo-tunnel)
- Efficient operation and low state compensation
- A coordinated part of an integrated transport system

The professional assessments concluded that it was appropriate to maintain two contracts instead of combining all traffic in Eastern Norway in one contract.

The report was sent to the Ministry of Transport in January 2022, where we recommended starting a dialogue with VY and Flytoget, based on an individual assessment of each of the two contracts. Based on the mandate we received from the Ministry of Transport in March, dialogue has begun with both companies.”

- (265) Notably, the directorate also warned the ministry of the risk that it would become harder to avoid overcompensation if only one operator should be selected for all the traffic in the Eastern region (covering 80 percent of the entire market), as VY wanted:

*“Such a choice will make it more demanding to negotiate reasonable remuneration and **make it more difficult to avoid overcompensation**”.*

- (266) Moreover, the directorate informed that the negotiations with VY on East 1 was ongoing and that it had not yet received an offer from Flytoget for East 2, which was expected in October 2022.

- (267) The directorate’s professional assessment was lost in the heated debate. On 26 October 2022, the government coalition-party, the Centre-party, announced an initiative to close the directorate altogether:

“The Centre-party’s national board has limited appreciation of what public tasks the Railway directorate serves when the railway reform is cancelled. It is

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198 See Annex 41.

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therefore appropriate to plan for a closure of the directorate. It will save the public needless bureaucracy, costs, and resources”.<sup>199</sup>

- (268) On 19 September 2022, another meeting between LO, a vice-minister from the cabinet of the prime minister, and MEPs from the Labour party met to discuss the process.<sup>200</sup>
- (269) On 30 September 2022, the ministry then met with the directorate yet again to discuss the process.<sup>201</sup>
- (270) With the outpouring of support from the minister and other members of the government, VY had little incentive to improve the offer for East 1 in its ongoing negotiations with the directorate at that time. When turmoil had ensued over the prospect that VY would not be awarded East 2, then bedlam was all but guaranteed if VY would not even receive *East 1*.
- (i) In October 2022, the negotiations with VY were at the brink of collapse and the directorate asked *Flytoget* to be ready on short notice to bid for East 1
- (271) During the fall, the negotiations between the directorate and VY had rapidly deteriorated and were in October at the brink of collapse over the compensation that VY insisted on after the tenders had been aborted.
- (272) The record shows that VY presented a first offer on 4 July 2023 and then the parties met at least six more times:<sup>202</sup>
- on 16 August 2022 to discuss maintenance costs in the offer;
  - on 8 September 2022 to discuss energy costs in the offer;
  - on 12 September 2022 to discuss statistic models in the offer;
  - on 22 September 2022 to discuss estimated traffic income in the offer;
  - on 10 October 2022 to discuss “risk and margin” and the “calculation of the loss of economies of scale” from the separation of East 1 and 2, according to VY; and
  - on 18 October 2022 to discuss the application of the “BØR” agreement.<sup>203</sup>
- (273) On 26 October 2022, the situation had become so untenable that the directorate found it necessary to inform *Flytoget* that it needed to be prepared for the possibility that the

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<sup>199</sup> NTB/E24 on 26.10.22: “*Senterpartiet will close down the Railway Directorate*”.  
<https://e24.no/internasjonalt-oekonomi/i/y66AQJ/sp-vil-legge-ned-jernbanedirektoratet>

<sup>200</sup> See page 10 at **Annex 107** and page 7 at **Annex 98**.

<sup>201</sup> See page 7 at **Annex 107**.

<sup>202</sup> See **Annex 132**, page 5 and pages 8-9 at **Annex 107**.

<sup>203</sup> [www.jernbanedirektoratet.no/no/aktualiteter/2021/avtale-om-rute--pris--og-billett-samarbeid-i-viken/](http://www.jernbanedirektoratet.no/no/aktualiteter/2021/avtale-om-rute--pris--og-billett-samarbeid-i-viken/)  
(last accessed on 31.07.23)

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directorate would terminate the negotiations with VY and instead select Flytoget as the preferred operator also for East 1. According to the directorate's account:

***“The directorate informed Mr Phillip Engedal, CEO of Flytoget, on 26 October 2022 that the negotiations on East 1 were highly demanding and requested that Flytoget be prepared to quickly respond to a possible request for an offer on East 1, in addition to the work on East 2”***.<sup>204</sup>

- (274) In the same afternoon (26 October 2021), news appeared to be spreading fast, and the ministry summoned the directorate for a meeting just two days later, on the 28 October 2022. The ministry asked the head of the directorate to come in for an *impromptu* update on the negotiations:

***“It would be useful for us if we could get an update on the negotiations with VY about [East 1] and the one-year-contract, and Flytoget about [East 2] before the steering meeting on Friday. Would you [director of contracts and procurements] and Knut [head of the directorate] come in half an hour before the start of the meeting?”***<sup>205</sup>

- (275) On 28 October 2022, VY submitted its second offer.<sup>206</sup>

- (276) On the same day (28 October 2022) the ministry sat down with the directorate to discuss the status of the negotiations. Then, on 10 November 2022, the directorate met with the ministry again.<sup>207</sup> Then, on 28 November 2022, the directorate met with the ministry yet again.<sup>208</sup>

- (277) By then, the ministry had apparently become alarmed of the risk that the competitive process it had opened between VY and Flytoget could now leave VY with no contracts at all and instead Flytoget with both East 1 and 2.

- (j) On 2 December 2022, the ministry instructed the directorate to award at least one of the two contracts (East 1 or 2) to VY without regard to price

- (278) On 2 December 2022, four days after its last meeting with the directorate, the ministry sent a new instruction that fundamentally altered the mandate given to the directorate at the start of the process.

- (279) The original instruction stated: *“Direct awards can be made to Vygruppen AS, Flytoget AS, or divided between Vygruppen AS and Flytoget AS”*. In the new instruction, this part was amended to: *“Direct awards can be made to Vygruppen AS or divided between Vygruppen AS and Flytoget AS”*.

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204 See page 5 at Annex 106.

205 See Annex 121.

206 See Annex 132, page 5.

207 See Annex 98, page 6.

208 See Annex 123.

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- (280) To make the significance of this amendment crystal clear to the directorate, the ministry added, without including any reservations with regard to price:

*“This means that at least one of the contracts must be awarded to VY”*.<sup>209</sup>

- (281) The instruction did not, however, instruct which of the contracts VY should be awarded. Consequently, the selection of operator for either contract was still not given.

- (282) Furthermore, to prevent surprises again, the ministry instructed:

*“The Railway directorate must by end of Friday 6 January 2023 summarize the results of the negotiations in a letter to the Ministry of transport. **The Railway directorate must concurrently submit a professionally reasoned recommendation for which rail operator that the rail service in the Eastern region will be directly awarded. The ministry must be informed before the award of any contract**”*.

- (283) On the same day (2 December 2022), the minister, a vice-minister, and members of the civil service met with all the unions: LO, NLF and NJF.<sup>210</sup>

(k) On 16 December 2022, VY sent the ministry and the directorate a proposal for making a binding offer on both East 1 and 2

- (284) On 16 December 2022, VY sent a letter to the directorate to describe a proposal for an offer on *both* East 1 and 2, notwithstanding the fact the directorate had already rejected VY on East 2 and the fact that its negotiations on East 1 had been at the brink of collapse, and the fact that the directorate had no mandate to even consider that proposal.

- (285) The ministry, which had the authority to amend the process, was copied in on the letter.

- (286) VY alleged that it could operate both East 1 and 2 for compensation *“substantially lower than the State pays VY today to run the rail service in the Eastern region”*.<sup>211</sup> No reasons were apparently offered, nor even requested then or later by the ministry, why VY was being paid substantially higher compensation for the same services under the 2018 directly awarded contracts. Indeed, VY had then long operated all the rail services in the Eastern region combined.

(l) On 4 January 2023, the directorate met with VY to discuss the proposal

- (287) Although the ministry at that time had yet not amended its mandate and instructions on this point, the directorate, nevertheless, met with VY, on 4 January 2023, to discuss the unsolicited non-binding offer for both East 1 and 2.<sup>212</sup>

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<sup>209</sup> See **Annex 134**.

<sup>210</sup> See page 10 of **Annex 107**.

<sup>211</sup> See page 1 at **Annex 1**.

<sup>212</sup> See page 8 at **Annex 107**, confirming that: “Vy presents alternative offer for entire Eastern region cf, letter to ministry/directorate 16.12.22”.

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(288) Notably, the meeting included the head of the directorate and the CEO of VY.

(289) The unredacted parts of the minutes read:

“Background

The meeting was held at the initiative of [VY]. [VY] sent a letter to the Railway directorate on 16 December 2022 with route proposals and a combined price estimate for East 1 and 2. The purpose of the meeting was to give [VY] the opportunity to present supplementary information about the route proposal and to expand on the financial considerations.

Introduction

Knut Sletta [head of the directorate] started the meeting by giving a brief update on ongoing formal processes for direct awards of the rail services in Eastern Norway. Furthermore, *it is of interest for the Railway directorate to get input from [VY] on the sidelines of the formal processes for the direct award.*

Presentation by [VY]

[VY] began the presentation by explaining that they during the work on the price offers for East 1 and East 2, have identified significant synergy effects by offering a combined traffic package for the Eastern region. VY’s assessment is that a combined traffic package offers opportunities for more coordinated route offers, a better utilization of production resources, and a more favourable price.

[redacted]

Conclusion

[VY] wishes to make a combined price offer to the Railway directorate for the traffic included in the traffic packages East 1 and East 2”.<sup>213</sup>

(290) Notably, this showed that the directorate no longer felt constrained by the instruction to provide equal treatment (“get input from VY on the sidelines of the formal processes”). Moreover, it also showed that VY’s proposition was based on its own redesign of the routes included in the Eastern region and therefore its own delineation of the content of the public service obligations.

(m) On 8 January 2023, the directorate advised against considering an offer from VY for both East 1 and 2

(291) On 8 January 2023, the directorate reverted to the ministry to summarize the results of the negotiations with VY and Flytoget and to give a reasoned recommendation on which company should be awarded East 1 and 2.<sup>214</sup> According to the ministry, the directorate

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<sup>213</sup> See Annex 125.

<sup>214</sup> See Annex 132.

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submitted a draft recommendation on (Sunday) 8 January 2023, which was finalized on 11 January 2023.<sup>215</sup>

- (292) After six months of negotiations, the directorate advised the ministry that VY should be awarded East 1 and Flytoget should be awarded East 2.<sup>216</sup>
- (293) In its recommendation on East 1, the directorate, repeatedly, noted a “significant gap” between what VY demanded in compensation and the directorate deemed “acceptable compensation”.<sup>217</sup> The directorate made it clear that its recommendation was caused by the instruction it had received on 2 December 2022 to award at least one of the contracts to VY without regard of price. In fact, according to the memo, VY’s last offer on East 1, which had been submitted on 28 October 2022 when negotiations were at the brink of collapse and the directorate had advised Flytoget to be ready on short notice to bid for the same contract, was “*ca [redacted] billion more than the directorate has defined as the worst acceptable level*”.<sup>218</sup>
- (294) Moreover, the directorate stated that there was a modest but acceptable risk in allowing Flytoget to assume the responsibility for all the traffic on East 2 from VY and confirmed that both VY and Flytoget remained possible operators for *both* agreements:

“*Both Vygruppen and Flytoget are relevant as parties to both contracts*”.<sup>219</sup>

- (295) Regarding VY’s proposal for an offer for both East 1 and 2, the directorate advised that the initiative transgressed the mandate and instructions set for the award process. In fact, ***VY had even proposed new ticket prices***, apparently with the aim of moving the burden of costs from the State onto the passengers to avoid cutting VY’s own compensation. In addition, VY had proposed a different route model and thereby redesigned the scope and content of the public service obligation, including adding services that Bane NOR, the infrastructure company, had considered unrealistic.<sup>220</sup>
- (296) Furthermore, the directorate advised that if it were to request a binding offer from VY on East 1 and 2, which would be competing against Flytoget’s offer on East 2 and VY’s offer on East 1, ***this could compromise the award process because the directorate then would be considering competing offers for the same contract on East 2***.<sup>221</sup>

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<sup>215</sup> See **Annex 130**. See also page 2 at **Annex 107**.

<sup>216</sup> See **Annex 131**, page 14, and **Annex 132**, pages 7 and 11.

<sup>217</sup> See **Annexes 131-132**. See also page 1 at **Annex 105**.

<sup>218</sup> See **Annex 132**, page 7.

<sup>219</sup> See page 3 at **Annex 105**.

<sup>220</sup> See section 4 at **Annex 132**. See also page 1 at **Annex 105** and page 1 at **Annex 1**.

<sup>221</sup> See **Annex 132**, page 11.

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- (297) On 12 January 2023, the directorate met with the ministry to discuss the situation.<sup>222</sup> In an email on 11 January 2023, the ministry confirmed to the directorate that the minister had in advance read and discussed the essence of the proposal sent on 8 January 2023.<sup>223</sup>
- (298) In parallel, on 13 January 2023, the directorate awarded VY another contract, titled “The Eastern region 2023”.<sup>224</sup> This was another transition contract after the transition contract VY had received in 2018, which was supposed to have been gradually phased out by Tenders 4 and 5, had on 11 December 2022 already expired. Therefore, the new one-year contract was given retroactive effect.
- (299) Although the new 2023 contract was also a transition contract, this time it was given to transition backwards to a closed market. The one-year contract would come in addition to the 10-year contracts for East 1 and 2.<sup>225</sup> The compensation for the one year of service was set an exorbitant level: NOK 3.4 billion (EUR 340 million).
- (300) In fact, in its recommendation to the ministry on 8 and 11 January 2023 against allowing VY to bid for both East 1 and 2, the directorate described already the negotiations on East 1 as “incredibly demanding”.<sup>226</sup>
- (n) On 16 January 2023, the ministry instructed the directorate to obtain a binding offer from VY on East 1 and 2 and compare against the binding offers from Flytoget on East 2 and VY on East 1
- (301) The recommendation and reservations of the directorate were rejected by the ministry only *two* working days later. On 16 January 2023, the ministry yielded to the pressure mobilized after the directorate had selected Flytoget as the preferred operator on East 2 and issued a new mandate and instruction to the directorate.
- (302) The content of the letter has been included in its entirety below:

“Direct award of the rail services in the Eastern region

We refer to the ongoing direct award process for the rail services in the Eastern region, which Railway directorate (JDIR) carries out under a mandate from the Ministry of transport (SD). Vygruppen AS (VY) has been selected by JDIR as the preferred contracting party for the rail services covered by East 1. Flytoget AS (Flytoget) is the preferred contracting party for the rail services covered by East 2.

On 16 December 2022, VY sent a letter to [the directorate] with a copy to [the ministry]. VY describes a non-binding proposal for how the company can operate both contracts that cover the rail services in the Eastern region. Overall,

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<sup>222</sup> See **Annex 131**.

<sup>223</sup> See **Annex 130**.

<sup>224</sup> See **Annex 118**.

<sup>225</sup> See Section 5.6 below which is contesting this as an unlawful circumvention of Article 8(2) of Regulation 1370/2007.

<sup>226</sup> *op.cit*, page 7.

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VY proposes an alternative route model that can provide a good offer for passengers and lead to more people travelling by rail. VY outlines that this can be carried out at a much lower price than the compensation the State pays VY for operating the rail services in the Eastern region today, among other things by exploiting economies of scale. [The ministry] believes it is positive that VY has outlined solutions that can give passengers a good rail offer, at a good price for the State.

The letter is not a binding offer. The conditions for the proposed route model and compensation are described at an overall level *and cannot easily be compared with the binding offer that Flytoget has made for the contract on East 2*. The compensation outlined by VY is based, among other things, on the assumption of increased ticket prices on regular rail departures to and from Oslo airport. Because the affected county councils are the authorities deciding the charges for local public transport, the realism of the proposal will depend on further dialogue with the relevant county councils on changes in the current rate- and zone structure. The proposal could have been implemented regardless of who the rail operator is, and increased ticket prices would therefore also lead to reduced compensation to Flytoget, were Flytoget to be awarded East 2.

*[The ministry] wants the proposal to be considered on the merits against other binding offers.* We assume that VY has undertaken sufficient preparatory work to be able to quickly respond to questions about the operation of the combined Eastern region. *[The ministry] therefore asks [the directorate] to immediately obtain a binding offer from VY for a combined operation of the Eastern region, and necessary rapid clarifications so that the directorate in a short time can conclude on which offer will best meet the objectives, of the mandate.* In the event of a change of rail operator, we will consider a somewhat longer startup period.

*[The ministry] requests that [the directorate], by 1 March 2023, has completed the dialogue with VY and clarified whether VY's offer for East 1 and 2 better meets the objectives than a direct award to, respectively, VY and Flytoget.*<sup>227</sup>

- (303) In other words, the ministry requested from the directorate that it should obtain a binding offer from VY on East 1 and 2 and to compare that offer against the binding offers from Flytoget on East 2 and VY on East 1, and on that basis conclude on the choice.
- (304) The directorate thereafter met with VY on 19 January 2023 and 24 January 2023, and, in parallel, with Flytoget on 16 January 2023; 17 January 2023; 10 February 2023; and 14 February 2023, before it announced the awards on 3 March 2023.<sup>228</sup>
- (305) It is worth recalling the directorate's warning to the ministry on 13 September 2022 that selecting only one operator for East 1 and 2 "will make it more demanding to negotiate

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227 See **Annex 1**.

228 See pages 5-7 at **Annex 107** and page 6 at **Annex 98**.

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reasonable remuneration and make it more difficult to avoid overcompensation”<sup>229</sup> and the fact that negotiations with VY on East 1 had been headed for a collapse before the ministry intervened on 2 December 2022. Still, the directorate was now instructed by the ministry to obtain a binding offer from VY on both East 1 and 2, and to conclude by 1 March 2023, which meant *in just six weeks*.

- (306) When the minister’s decision was announced, this caused immediate questioning in the Parliament<sup>230</sup>, and later also led the Standing Committee on Scrutiny and Constitutional Affairs to open enquiries on 21 March 2023.<sup>231</sup>
- (o) On 23 January 2023, the directorate invited VY to make a binding offer on both East 1 and 2
- (307) On 19 January 2023, the directorate met with VY apparently to resume negotiations on East 1 and a revised offer expected on 27 January 2023.<sup>232</sup> However, in the presentation that the *directorate* held for VY in that meeting, it transpires that VY was also advised about the process ahead, although no formal invitation had been made, that VY’s revised offer on East 1 “will together with Flytoget’s offer on East 2 and other relevant factors, be assessed against VY’s combined offer for East 1 and 2”.<sup>233</sup> VY was also advised that a formal invitation would be extended on 23 January 2023 with a time limit to submit offer set for 6 February 2023 and one week for “eventual clarifications”.
- (308) On 23 January 2023, the directorate then invited VY to make a binding offer on both East 1 and 2.<sup>234</sup> In its letter, the directorate formally confirmed that the process had been amended and that the binding offers from VY and Flytoget would be compared against the binding offer from VY on both East 1 and 2.
- (309) On 25 January 2023, the CEO and the chairman of Flytoget sent a letter to the ministry to protest. The letter leaves a disturbing inside view of the process, as experienced by Flytoget.<sup>235</sup> Flytoget stated that it had been unable to review the criteria laid down for VY, *including how the public service obligations had been defined*.
- (310) On 30 January 2023, the minister met again with the unions, LO and NJF, apparently in person at the offices of LO.<sup>236</sup> The decision on 16 January 2023 had caused a public rift between the unions after employees in Flytoget and VY were effectively pitted against each other.<sup>237</sup> Flytoget risked closure from 1 February 2028 if both contracts now were awarded to VY.

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229 Section 4.4.8 above.

230 See examples included at **Annexes 44-45 and 97**.

231 See **Annex 104** and subsection (s) below.

232 See **Annex 139**.

233 *op.cit*, page 3 of the presentation.

234 See **Annex 126**, pages 3-4.

235 See **Annex 48**.

236 See page 10 at **Annex 107**.

237 See **Annex 49**.

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- (p) On 20 February 2023, the ministry instructed the directorate that start of service could take place *after* December 2023 to maintain that the outcome of the process was still not given
- (311) On 20 February 2023, the ministry again amended its mandate and instructions to the directorate.<sup>238</sup> This time the ministry wanted to give more leeway for the start of service under East 1 and 2.
- (312) Whereas the ministry originally had instructed that the two contracts should be signed so that start of service would take place “in December 2023”, the ministry now green-lighted that start of service could also take place *after* December 2023, with no specific time limit placed on the directorate. The motivation for the change was that the ministry wanted to hold the option open for Flytoget to be awarded East 2, which would require a longer start-up period for taking over approximately 40 percent of the market from VY.<sup>239</sup>
- (313) This showed again that the outcome of the process, also at that time, was not given due to its competing nature.
- (314) The ministry then made sure to keep the directorate on a tight leash and under significant time pressure by instructing that the directorate revert with its recommendation “by the end of Wednesday 1 March” and that no award could take place without first informing the ministry:
- “[The directorate] must by the end of Wednesday 1 March 2023 summarize the result of the negotiations with [VY] and [Flytoget] in a letter to [the ministry]. At the same time, [the directorate] must give a professionally justified recommendation on which rail operators the rail services in Eastern Norway should be directly awarded. The ministry must be informed before ahead of any contract award.”
- (315) The way the ministry orchestrated the process through its series of amendments of the mandate and instructions demonstrate how instrumentalized the directorate had become.
- (q) On 3 March 2023, the directorate announced that it had awarded East 1 and 2 to VY in accordance with the instructions from the ministry
- (316) On 1 March, the directorate reverted to the ministry with its recommendation, as it had been instructed to do before any award could be announced. On the basis of the mandate and instructions given on 31 March 2022, and as amended on 2 December 2022, 16 January 2023 and 20 February 2023, the directorate *now* recommended that both East 1 and 2 should be awarded to VY.<sup>240</sup>

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<sup>238</sup> See **Annex 124**.

<sup>239</sup> See **Annex 44**, page 2.

<sup>240</sup> See **Annex 137**, page 5.

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(317) The competitive nature of the process, certainly for East 2, bleeds through the document. First, the directorate listed the objective for the process:

“1. More satisfied passengers; 2. More passengers; 3 Better capacity utilisations, route offers and reliability; 4. Efficient operation and lower state compensation; 5. A coordinated part of an overall transport system.”<sup>241</sup>

(318) Second, then the directorate explained that these objectives were the point of departure for the development of the following “specific assessment criteria, which were used as a basis for choosing the preferred contracting party, and when comparing the two alternatives (shared or joint award)”:

“a) Quality/reputation/customer satisfaction. The criterium covers both the objective of more satisfied passengers, route offers and reliability, and the objective concerning a coordinated part of an overall transport system.

b) Economy. The criterium covers the objective of more passengers, efficient operation, and lower state compensation.

c) Execution/counterparty risk.

d) Utilization of infrastructure and development of the shuttle service. The criterium covers the objective of better capacity utilisations.

e) Execution of the negotiation process.”

(319) Third, the directorate recalled the instruction on 2 December 2022 to award at least one of the contracts to VY, and that the concession agreement with Flytoget on the shuttle service, in any event, would run until 2028.

(320) Fourth, then the directorate compared the competing offers from VY for both East 1 and 2, against VY’s offer for East 1 and Flytoget’s offer for East 2, against the criteria laid out above, and on that basis reached its new conclusion that VY should be awarded both contracts.

(321) Notably, the directorate itself found reason to note the obvious:

***“East 2 (E2) contains elements of competition between the two suppliers.*** Here, there is a certain risk that the suppliers base their offers on unrealistic assumptions, in order to reduce the compensation. For East 1 (E1), there is a certain risk that Vygruppen, as the only supplier, puts the cost estimates high, the revenue forecasts low and thus demands too high compensation. ***We have tried as far as possible to prevent such unfortunate adaptations but observe***

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<sup>241</sup> *op.cit.*, page 1. Notably, these were also the criteria that the directorate relied on when it recommended to the ministry in January 2022, after Tenders 4 and 5 had been aborted on 19 November 2021, to continue to award two separate contracts for East 1 and 2, see **Annex 41**, page 1.

***that the bid compensation on E1 is significantly further from our expectations than both offers on E2 do***".<sup>242</sup>

- (322) Indeed, the explanation for the divergence between the bids was that the process which, to the outside world had been presented as a direct award, was effectively a competitive procedure, albeit restricted to only include VY and Flytoget and discriminate against all cross-border suppliers in the EU/EEA.
- (323) Notably, the directorate stated that VY's bids for East 1 had been "***very high above the directorate's calculated maximum acceptable remuneration***".<sup>243</sup>
- (324) Whereas VY bid NOK 9.9 billion (EUR 990 million) in Tender 4 on 31 August 2021, the company now demanded NOK 15.4 billion (EUR 1.54 billion) in its stand-alone bid, and NOK 14.3 billion (EUR 1.43 billion) in its combined bid, or almost 55 percent more just 18 months later, when all cross-border competition had been excluded. For East 2, VY bid NOK 7.39 billion (EUR 739 million) against Flytoget which had bid NOK 7.31 billion (EUR 731 million).<sup>244</sup>
- (325) The memo lacks any reference or even a reservation regarding a market analysis. That is rather surprising because, in the words of the Standing Committee on Scrutiny and Constitutional Affairs on 25 April 2023:

"In the memo from the Railway directorate on 8 January, it is clear that the outlined offer from VY on 16 December for a combined Eastern Norway does not comply with the adopted framework for the negotiations with respectively VY or Flytoget. Among other things, ***VY proposes other fares, a different route model and certain route offers that are not considered realistic by Bane NOR. Flytoget, on the other hand, was not given the opportunity to freely draw up solutions***".<sup>245</sup>

- (326) The directorate appears to have been oblivious to the fact that allowing VY to "freely draw up solutions" could very well directly affect the legal delineation of public service obligations included in East 1 and 2 pursuant to Article 2a cf Article 2(e) of Regulation 1370/2007.
- (327) Furthermore, as explained above in Section 4.5(a), the directorate had earlier been taken by surprise when Tender 3 resulted in VY offering to *pay the State* NOK 2.2 billion for the contract, when VY in 2019, alone, *was being paid* NOK 201 million by the State for the same traffic under the 2018 directly awarded contract.
- (328) Moreover, with its recommendation for VY to be awarded both East 1 and 2, Norway would end up with a national grid served by four operators (VY, Flytoget, GoAhead and

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<sup>242</sup> *op.cit*, page 2.

<sup>243</sup> *op.cit*, page 3.

<sup>244</sup> *op.cit*, page 3.

<sup>245</sup> See **Annex 105**, page 1.

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SJ), whereas the directorate, when finalizing the tender plans, had accommodated for up to seven different operators.<sup>246</sup>

(329) Even so, and even at that stage, the directorate omitted to even raise the issue of a market analysis before making the recommended awards to VY for East 1 and 2. The issue was apparently completely lost on the directorate.

(330) By contrast, the directorate did raise the issue that it by including in East 2 the slots used by Flytoget for the shuttle service under the concession agreement, could be unlawfully circumventing Regulation 1370/2007. Whereas the award of East 2 would occur before 24 December 2023, VY would not be able to use these slots until Flytoget's agreement expired in 2028, almost *five years* after the award of East 2.<sup>247</sup>

(331) The directorate briefly noted that: "***There are few sources of law, and it is difficult to reach certain conclusions*** regarding the possibility to maneuver under the transitional arrangements in the PSO Regulation". Nevertheless, the directorate found no reason to err on the right side of caution, and instead advised the ministry that the "***litigation risk is acceptable***".<sup>248</sup>

(332) No proportionality assessment was included, which is surprising because the directorate previously in its memo confirmed that: "A combined award provides opportunities for increased capacity utilization and a better rail offering ***only after 2028*** and for the rest of the contract period".<sup>249</sup> Capacity utilization is therefore a fig-leaf for hiding the real reason for the abortion of Tenders 4 and 5.<sup>250</sup>

(r) On 21 March 2023, the Standing Committee on Scrutiny and Constitutional Affairs in the Parliament started to investigate the announced awards to VY

(333) On 21 March 2023, the Standing Committee on Scrutiny and Constitutional Affairs in the Parliament decided to investigate the minister's involvement in the events that had led up to the announced award on 3 March 2023 to VY.<sup>251</sup> Under Articles 14 and 15 of the Parliament's Rules of procedure, the committee is the only standing committee with powers to initiate enquiries into the civil service on whether the government has acted in accordance with the decisions and intentions of the Parliament.<sup>252</sup>

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<sup>246</sup> See Section 4.1(e) above.

<sup>247</sup> The advance award of the slots used by Flytoget until 2028 has been contested as an infringement of Regulation 1370/2007 in Section 5.3 below.

<sup>248</sup> See **Annex 137**, page 4.

<sup>249</sup> *op. cit.*, page 4.

<sup>250</sup> In the same vein, the directorate has confirmed in the memo that the contracts contain "a series of options", see **Annex 137**, page 1. The scope and content of these are still unknown. The complainant may therefore later expand this complaint when non-confidential versions eventually must be made available.

<sup>251</sup> See **Annex 104**.

<sup>252</sup> See **Annex 108**.

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- (334) In this case, the minister responded to the first written enquiry on 28 March 2023, which led the committee to issue a second written enquiry on 25 April 2023.<sup>253</sup> The minister responded to the last enquiry on 3 May 2023 and 10 May 2023<sup>254</sup>.
- (335) After the committee became aware of ESA's preceding decision, on 14 March 2023, to open an *ex officio* investigation in ESA Case no. 90137, and ESA's subsequent decision, on 31 May 2023, to open a formal state aid investigation, the committee decided, on 13 June 2023, to end its own enquiries.<sup>255</sup>
- (s) On 29 March 2023, ESA informed the Norwegian authorities of its decision to open an investigation into the announced awards to VY
- (336) On 29 March 2023, ESA informed the Norwegian authorities of its preceding decision on 14 March 2023 to open an *ex officio* investigation into the announced awards of East 1 and 2 and issued an RFI.<sup>256</sup> It transpires from that letter that the Norwegian authorities had been aware of ESA's interest in the process since at least 2 December 2022.
- (337) On 28 April 2023, the Norwegian authorities responded to the.<sup>257</sup>
- (338) This meant that the government was facing investigations into the same matter from both the Parliament and ESA. It is unclear when the Parliament was informed of ESA's parallel investigation.
- (339) On 31 May 2023, ESA informed the Norwegian authorities of its decision to also open a state aid investigation into possible overcompensation of VY concerning the passenger rail contracts for 2018-2023 that VY was awarded in 2018.<sup>258</sup> The state aid case concerns potentially more than NOK 8 billion (EUR 800 million) in unlawful and incompatible aid.
- (340) The contractual "ex-post mechanism" is a focal point in that investigation. It is notable that the East 1 and 2 contracts have likely been based on the 2018-contracts, including the contentious ex-post mechanism. Minutes from a meeting between VY and the Railway directorate as late as on 13 March 2023 state regarding the finalization of the East 1 and 2 contracts:

"Ex post.

[The directorate] has asked VY to state which level the company used as a basis for its offers, as this is unclear to [the directorate]. At the same time, [the directorate] will make a final assessment on whether the proposed ex-post

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<sup>253</sup> See **Annexes 104 and 98.**

<sup>254</sup> See **Annexes 105-107.**

<sup>255</sup> [www.stortinget.no/no/Representanter-og-komiteer/Komiteene/Kontroll--og-konstitusjonskomiteen/kontroll--og-konstitusjonskomiteens-undersokelser-20212025/vedrorende-prosessen-om-tildeling-av-personotografikken-pa-ostlandet/](http://www.stortinget.no/no/Representanter-og-komiteer/Komiteene/Kontroll--og-konstitusjonskomiteen/kontroll--og-konstitusjonskomiteens-undersokelser-20212025/vedrorende-prosessen-om-tildeling-av-personotografikken-pa-ostlandet/) (last accessed on 31.07.23).

<sup>256</sup> See **Annex 135.**

<sup>257</sup> See **Annex 136.**

<sup>258</sup> ESA Decision no. 82/23/COL.

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mechanism is in line with current rules and laws. If we find something that should be looked into more closely, VY will be contacted”.<sup>259</sup>

(341) Furthermore, on 5 June 2023, the Norwegian authorities were compelled to release all evidence that the Parliament had requested for its own investigations. At that time, the Parliament had started receiving public access request for that evidence, including all internal correspondence which otherwise might have been suppressed but which now had fallen into the public domain because they had been surrendered to the Parliament.

(342) Consequently, the ministry was facing the prospect of seeing the Parliament releasing its own internal documents. Only then did the ministry release the documents itself.<sup>260</sup>

(t) On 29 June 2023, the Norwegian authorities signed the contracts with VY

(343) On 29 June 2023, the directorate sent out a press statement which celebrated the signing of the East 1 and 2 contracts with VY.<sup>261</sup> Consequently, the contracts were signed while ESA’s investigations were ongoing and leaving no time for ESA to consider the plethora of new evidence released on 5 June 2023.

(344) Notably, the Railway directorate was as late as on 13 March 2023 authorized to sign the contracts, if need be, as late as on 24 December 2023.<sup>262</sup>

**4.7 The minister has confirmed that his further intention is to eject SJ and GoAhead from the Norwegian market whereas his ministry has endorsed VY’s strategy to become *the Nordic market leader***

(345) The Minister of transport has confirmed in the media, the Parliament, and by letter his intention to also eject SJ and GoAhead from the Norwegian market, and to award their contracts to VY when they expire.

(346) Already on 6 July 2022, the minister invited a union leader to give a joint interview with Aftenposten, to communicate that message.<sup>263</sup> Similarly, as late as on 2 May 2023, in a letter to the CEO of SJ, sent after the minister weeks earlier had read a critical interview in Aftenposten, he again stated:

“It is the government's intention to directly award rail services also after the unconditional right to direct awards expires in December this year. ***I was clear about this already in the first meeting we had after I took office as minister***”.<sup>264</sup>

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<sup>259</sup> See **Annex 133**, page 1.

<sup>260</sup> <https://www.regjeringen.no/no/aktuelt/direktetildeling-av-personotogkontrakter-pa-ostlandet-svar-pa-sporsmal-fra-stortingets-kontroll-og-konstitusjonskomite/id2982745/>

<sup>261</sup> See **Annex 138**. The Norwegian authorities are apparently stalling public access to the contracts until near/after the local elections in September.

<sup>262</sup> *Ibid.*

<sup>263</sup> See **Annex 43**.

<sup>264</sup> See **Annex 95**.

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- (347) However, the minister has apparently never put forward any legal support and reasoning why this should even be legal under the PSO Regulation. Neither has he explained why it is of importance to start communicating publicly his intention to eject SJ and GoAhead more than five years before the first contract expires, in 2028, and thus at the risk of seriously disrupting their business organizations.
- (348) These statements of motive have been complemented with statements confirming that the minister concurrently endorses VY's strategy to expand into EU Member States that, by contrast, remain open to competition.
- (349) In fact, the ministry has since 2002 continuously endorsed VY's strategy to consider the Nordic region as its "home market" where it should become "a market leader". On 5 June 2018, the strategy grew even more ambitious, when it was amended to state that VY's "main objective" is to become "the Nordic market leader" by 2025:

"The NSB Group's *main objective is to be the Nordic market leader by 2025.*

Growth to achieve the main objective in 2025 will be created by the group first by building solid market leader positions in Norway and Sweden.

Until 2020, growth will therefore concentrate on these two countries. From 2020, additional investment in Denmark and Finland will be considered".<sup>265</sup>

- (350) In an interview, on 4 November 2021, with E24/VG, titled "***Will exclude the Swedes from Norway – but VY will still operate in Sweden***", the minister confirmed that he had no intention of restricting VY from competing in Sweden and other Nordic countries, even though he would be closing the Norwegian market.<sup>266</sup>

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<sup>265</sup> See **Annex 127**, pages 3 and 8.

<sup>266</sup> **Annex 22.**

## 5. GROUNDS OF COMPLAINT

### 5.1 Norway has infringed Article 5(3) of Regulation 1370/2007 and the prohibition of discrimination on grounds of nationality in Article 4 EEA by aborting Tender 4 (East 1), which was announced as a competitive tender under Regulation 1370/2007, after the time limit to submit bids had expired and the two Norwegian state-owned operators, VY and Flytoget, had failed to submit the lowest bid, and then instead awarding the East 1 contract to VY on 29 June 2023, after only allowing VY and Flytoget a new opportunity to be awarded the contract

- (351) At the outset, the complainant has taken note of the fact that, based on the evidence then available to ESA, this issue was apparently not included in the RFI sent to Norway on 29 March 2023.<sup>267</sup> The complainant therefore respectfully requests that the issue be included in the ongoing investigation.
- (352) Tender 4 (East 1) concerns approximately 40 percent of the Norwegian market and the transport of some 30 million passengers annually. The contract awarded on 3 March 2023, and signed on 29 June 2023, has a contract value of NOK 14.3 billion (EUR 1.43 billion) in the 10-year period from December 2023-2033.<sup>268</sup>
- (353) Tender 4 was announced as a competitive tender under the Regulation 1370/2007 (“**the PSO Regulation**”), with a pre-qualification scheme to that end, on 3 September 2019, on 20 March 2020, and on 30 October 2020.<sup>269</sup>
- (354) The Norwegian government decided already in 2015 to liberalize the entire market and Tender 4 was one of the two final tenders announced to implement that decision. The Parliament had adopted the necessary legal amendments by 2016, and the government had completed the administrative and corporate reorganizations by 2016-2017.<sup>270</sup> The government confirmed in 2018 that it already complied with Regulation 2016/2338, in practice, and assured in 2020 that its incorporation by national regulation, which entered into force on 30 June 2021, “*will establish greater legal certainty*” and “*mitigate any perception that national authorities will favour the incumbent supplier through the direct award of contracts, or in any other way*”.<sup>271</sup>
- (355) On 5 March 2021, the Norwegian authorities confirmed that the documents for Tender 4 had been sent to all pre-qualified operators. The time limit for submitting bids expired on 31 August 2021. Six operators bid for Tender 4, including GoAhead, SJ, Stagecoach, VR, and the two incumbent operators, Flytoget and VY, which are owned by Norway.
- (356) GoAhead, which had won Tender 1 (South), had this time submitted the lowest bid also for Tender 4, requiring NOK 9.3 billion (EUR 930 million) for a *12-year contract*, and was in pole position to win the contract. VY, by contrast, had bid NOK 9.9 billion (EUR

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<sup>267</sup> See **Annex 105**.

<sup>268</sup> See **Annex 137**, page 3.

<sup>269</sup> See Section 4.4 above.

<sup>270</sup> See Section 4.1 above.

<sup>271</sup> See Sections 4.2 and 4.3 above.

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990 million) and thus NOK 616 million (EUR 61 million) more than GoAhead. VY was therefore at the peril of losing its third contract, after having lost both Tender 1 (South) and Tender 2 (North) in 2018 and 2019. Flytoget came in last of the six operators.

- (357) When Tender 4 was aborted, on 19 November 2021, five weeks after the new minority government came into office<sup>272</sup>, the Norwegian authorities embarked on a new process in which only the Norwegian state-owned operators, VY and Flytoget, were afforded a new opportunity to be awarded the contract.<sup>273</sup>
- (358) On 3 March 2023, after having completed the new process with VY and Flytoget, the Norwegian authorities announced the award to VY. This time, the contract was awarded on **substantially higher** compensation than VY itself had bid in Tender 4, namely NOK 14.3 billion (EUR 1.43 billion) compared the NOK 9.9 billion (EUR 990 million) which VY offered on 31 August 2021, merely 18 months earlier (a 55 percent divergence).
- (359) The issue at the heart of this matter therefore concerns whether a Member State that has elected to announce a competitive tender under the PSO Regulation and which is in the process of implementing that competitive tender (even with the objective of completely opening its passenger rail market), can abort the tender unconditionally under the PSO Regulation, and thus at its own discretion, *after* the time limit to submit bids has expired and its own two operators have failed to submit the lowest bids, and then instead award the contract to one of its own operators (even at substantially higher compensation) after only allowing its own two operators a new opportunity to be awarded the contract, as long as this is done before 25 December 2023.
- (360) The complainant submits that the PSO Regulation does not provide for an unconditional right to abort an announced and ongoing competitive tender under such circumstances.
- (361) On the contrary, the decisions of the Norwegian authorities constitute unlawful discrimination based on nationality in flagrant violations of Article 5(3) of the PSO Regulation and of the prohibition in Article 4 EEA. Indeed, in their response to ESA's RFI on 28 April 2023, the Norwegian authorities have offered no objective justification for the awards to VY.<sup>274</sup>
- (362) The PSO Regulation entered into force on 3 December 2009.
- (363) Contrary to what the Norwegian authorities appear to imply in their response to ESA's RFI, there is no provision in the PSO Regulation that allows for unconditional abortion of an announced and ongoing competitive tender.
- (364) The fact that a Member State *may* rely on Article 8(2) and opt for an unconditional direct award of a rail contract under Article 5(6) instead of announcing a competitive tender under Article 5(3), *in the first place*, does not according to the wording of any provisions in the PSO Regulation, also provide for an unconditional right to abort an announced

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<sup>272</sup> See Section 4.5 above.

<sup>273</sup> See Section 4.6 above.

<sup>274</sup> See **Annex 136**.

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and already ongoing competitive tender *after* the time limit to submit bids has expired and the incumbent operators find themselves at risk of losing the contract.

- (365) First, Article 5(3) provides that, if a competent authority uses a third party other than an internal operator to provide public passenger transport services, it shall award public service contracts through a fair, open, transparent and non-discriminatory competitive tendering procedure “except in the cases specified”:

“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.*** 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. Following the submission of tenders and any pre-selection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements”.

- (366) Article 5(3) was amended by Regulation 2016/2338 to include additional exceptions:

“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 3a, 4, 4a, 4b, 5 and 6.*** 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. Following the submission of tenders and any pre-selection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements”.

- (367) Consequently, as stated in the Commission’s Interpretative guidelines, “***any derogation or exception***” from that principle should therefore be interpreted narrowly:

“This provision thus ***clearly establishes that the competitive tendering procedure under Article 5(3) is the principle***, while paragraphs 3a, 4, 4a, 4b, 5 and 6 provide for exceptions to this rule. According to the case law, any derogation from or exception to a general rule should be interpreted narrowly”.

[...]

***The exception to the general rule of a competitive award procedure must also be applied restrictively***”.<sup>275</sup>

- (368) Second, the exception relied on by the Norwegian authorities in their response to your RFI as their legal basis for the contested awards, namely Article 5(6), does not contain any wording setting out an unconditional right to abort already announced and ongoing competitive tender after the time limit to submit bids has expired.

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<sup>275</sup> See sections 2.5.2 and 2.5.3.5 of the 2023 Interpretive guidelines.

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(369) Article 5(6) merely provides:

“Unless prohibited by national law, competent authorities may decide to make direct awards of public service contracts where they concern transport by rail, with the exception of other track-based modes such as metro or tramways. In derogation from Article 4(3), such contracts shall not exceed 10 years, except where Article 4(4) applies”.

(370) In fact, even if there had been, somewhere in the PSO Regulation, a provision providing for an unconditional right to abort an announced and ongoing competitive tender after the time limit to submit bids has expired (*quod non*), the award of East 1 to VY would in any event not be considered a lawful direct award under the PSO Regulation.

(371) The legal definition of a “*direct award*” is set out in Article 2(h), which reads:

“‘*direct award*’ means the award of a public service contract **to a given public service operator without any prior competitive tendering procedure**”.

(372) According to this wording, the exception in Article 5(6) does not apply to the decisions of the Norwegian authorities in this case because the award to VY was neither “**given**” nor was it made without “**any prior**” competitive tendering procedure.

(373) On the contrary, Tender 4 was precisely a prior competitive tendering procedure, which the Norwegian authorities aborted after the time limit to submit bids had expired, when VY and Flytoget failed to submit the lowest bid. Therefore, to begin with there, indeed, existed a prior competitive tendering procedure which the national operators were at the risk of losing. Moreover, according to the mandate and instructions on 31 March 2022, the bids received for Tender 4 could be used as a starting point in the new process, and the contract would also include the same connections as were included in Tender 4.<sup>276</sup>

(374) This alone precludes the application of Article 5(6).

(375) In fact, the internal communications that were released as late as on 5 June 2023 indicate that this was a matter that the Norwegian authorities also were starting to realize a while into the new process.<sup>277</sup>

(376) Moreover, the award of East 1 to VY was not “given”. After the Norwegian authorities had aborted Tender 4 and then embarked on their new process, both VY and Flytoget were assessed against the same set of criteria for the invitation to negotiate the contract. Indeed, the mandate and instructions adopted on 31 March 2023 were explicitly based

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<sup>276</sup> See Section 4.6(d) above and **Annex 26**, pages 1-2 (“In relation to a direct award of East 1, it may be relevant **to use as a starting point the offers received in the aborted competition for traffic package 4**, including possible offer improvements”).

<sup>277</sup> See Section 4.6(m) above and **Annex 132**, page 1 (“It would in addition entail **risk that the bidders in Tender 4 could claim that a competition is still ongoing but restricted to the two state-owned rail companies**”).

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on the premise of equal treatment of the two operators: “The process must provide equal treatment of the two relevant operators”.<sup>278</sup>

- (377) On 20 May 2022, based on that equal treatment requirement, the Norwegian authorities then selected VY as their “preferred operator”, after comparing both companies against the same criteria.<sup>279</sup>
- (378) Moreover, the status as “preferred operator” did not entail that VY was even *then* a “given” operator which would be awarded the contract. According to the directorate, it was authorized to stop the negotiations and instead turn to *Flytoget* if the negotiations with VY should not progress timely or be considered unlikely to lead to a satisfactory result.<sup>280</sup> The companies were also informed of these conditions and accepted them in writing. When then making its decision on the “preferred operator”, the directorate also prepared reasoned decisions, which it shared with the companies and summarized for the public.
- (379) In fact, in October 2022, the Norwegian authorities asked Flytoget to be ready on short notice for making an offer on precisely East 1 because the negotiations with VY were at the brink of collapsing.<sup>281</sup> This shows that the process also in practice meant that the award to VY was not “given”.
- (380) Also, for that reason, the exception in Article 5(6) would, in any event, not be applicable in this case.
- (381) The reality of the matter is that from the first meeting and throughout their preparations of the mandate and instructions for the process, in December 2021-March 2023, the Norwegian authorities explicitly stated that “*we need some form of competition*” and referred to the models they considered as “*mini-competition*”.<sup>282</sup>
- (382) Consequently, the process from which the award of East 1 to VY emerged would not, in any event, be a lawful direct award as defined by Article 2(h).
- (383) Third, Article 8(2) contains a transitional arrangement for new contracts awarded after the PSO Regulation entered into force on 3 December 2009.
- (384) However, Article 8(2) does not contain any wording spelling out an unconditional right to abort an announced and ongoing competitive tender after the time limit to submit bids has expired. Instead, Article 8(2) provided from its inception for a transitional period that would last until 3 December 2019. During this 10-year period, the Member States were obligated to “take measures to gradually comply with Article 5” and inform the Commission of “any gradual award of public service contracts in line with Article 5”:

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<sup>278</sup> See Section 4.6(d) above and **Annex 26**, page 2 (“The process *must ensure equal treatment* of the two relevant operators”).

<sup>279</sup> See Section 4.6(f) above.

<sup>280</sup> See Section 4.6(d) above.

<sup>281</sup> See Section 4.6(g) above.

<sup>282</sup> See Sections 4.6(a) to (c) above.

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“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.

Within six months after the first half of the transitional period, Member States shall provide the Commission with a progress report, highlighting the implementation of any gradual award of public service contracts in line with Article 5. On the basis of the Member States’ progress reports, the Commission may propose appropriate measures addressed to Member States”.

- (385) According to Recital 31, the purpose of the transitional arrangements was to provide the Member States with “time to adapt to the provisions of this Regulation”:

“Given that competent authorities and public service operators will need time to adapt to the provisions of this Regulation, provision should be made for transitional arrangements. ***With a view to the gradual award of public service contracts in line with this Regulation,*** Member States should provide the Commission with a progress report within the six months following the first half of the transitional period. The Commission may propose appropriate measures on the basis of these reports.

***During the transitional period, the application of the provisions of this Regulation by the competent authorities may take place at different times.*** It may therefore be possible, during this period, that public service operators from markets not yet affected by the provisions of this Regulation tender for public service contracts in markets that have been opened to controlled competition more rapidly. In order to avoid, by means of proportionate action, any imbalance in the opening of the public transport market, competent authorities should be able to refuse, in the second half of the transitional period, tenders from undertakings, more than half the value of the public transport services performed by which are not granted in accordance with this Regulation, provided that this is applied without discrimination and decided in advance of an invitation to tender.”

- (386) At no point does any of the recitals refer to the need for more time if a Member States should find that its own companies are at the risk of losing an announced and ongoing competitive tender, after the time limit to submits bids has expired.
- (387) In fact, what Recital 31 explicitly confirms is that in the transition period, during which the Member States by virtue of Article 8(2) would be obliged to “gradually comply with Article 5”, the “application” of the PSO Regulation “***may take place at different times***”.
- (388) This was also confirmed by the Court of Justice in *Mobit*:

“It is apparent from the wording of Article 8(2) of Regulation No 1370/2007 which was finally adopted by the EU legislature that, in deciding to disregard in the final version of that provision such a quantitative reference, the EU legisla-

ture preferred to allow the Member States *a certain margin* regarding implementation of Article 5 of that regulation during the transitional period”.<sup>283</sup>

[...]

**“It should be added that a Member State may indeed implement Article 5 of Regulation No 1370/2007 in advance, in the context of the measures taken to gradually comply with Article 5,** provided for in the second sentence of the first subparagraph of Article 8(2) of that regulation”.<sup>284</sup>

- (389) Consequently, Article 8(2) could at the most have afforded an option for the Norwegian authorities, in the first place, to make a direct award, provided that the criteria of a lawful “direct award” in Article 2(h) were met (*quod non*).
- (390) However, when the Norwegian authorities instead decided to announce Tender 4 as a competitive tender under the PSO Regulation and ran that competitive tender all the way across the time limit to submit bids, the Norwegian authorities no longer had the freedom to disapply Article 5(3) that governs competitive tenders and instead transition *backwards* and away from that main principle in the PSO Regulation.
- (391) This is also confirmed by the exclusion mechanism included in Article 8(4) to take into account the fact that the application of Article 5 would be gradually phased in and could occur at different times between the Member States during the transition period:

“Without prejudice to paragraph 3, the competent authorities may opt, in the second half of the transitional period specified in paragraph 2, to exclude from participation in the award of contracts by invitation to tender those public service operators which cannot provide evidence that the value of the public transport services for which they are receiving compensation or enjoy an exclusive right granted in accordance with this Regulation represents at least half the value of all the public transport services for which they are receiving compensation or enjoy an exclusive right. ***Such exclusion shall not apply to public service operators running the services which are to be tendered.*** For the application of this criterion, no account shall be taken of public service contracts awarded by emergency measure as referred to in Article 5(5).

Where competent authorities make use of the option referred to in the first subparagraph, they shall do so without discrimination, exclude all potential public service operators meeting this criterion and inform the potential operators of their decision at the beginning of the procedure for the award of public service contracts.

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<sup>283</sup> Judgement of 21 March 2019, *Mobit Soc. Cons. arl v Regione Toscana*, Joined Cases C-350/17 and C-351/17, EU:C:2019:237, paras. 42 and 48.

<sup>284</sup> See to that end also section 2.6.2 of the *Communication from the Commission on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road*, OJ C 92, 29.3.2014, p. 1-21.

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The competent authorities concerned shall inform the Commission of their intention to apply this provision at least two months before the publication of the invitation to tender”.

- (392) This exclusion mechanism, and in particular the exception provided for “**public service operators running the services which are to be tendered**” would be undermined if, at the same time, Member States had an unconditional right to abort announced and ongoing competitive tenders after the time limit to submit bids had expired and those operators were at the risk of losing their contracts.
- (393) Therefore, Article 8(4) negates an unconditional right to abort a competitive tender and then reverse backwards to the unconditional use of direct awards in Article 5(6) during the transition period.
- (394) The fact that a Member State cannot unconditionally abort an announced and ongoing competitive tender is also supported by AG Saugmandsgaard Øe in *Mobit*:

“The dispute in the main proceedings concerns an award made on 2 March 2016, that is before the expiry of that transitional period. I infer from this that the Regione Toscana was not required to comply with Article 5 of Regulation No 1370/2007 in the context of that dispute.

***It would be otherwise only if the award at issue in that dispute fell within a national scheme implementing in advance Article 5 of Regulation No 1370/2007, as expressly authorised and even encouraged by the second sentence of the first subparagraph of Article 8(2) of that regulation. In such circumstances, it would be necessary to conclude that the Regione Toscana was indeed required to comply with Article 5 in that dispute, to the extent determined by that national scheme.***

However, there is no evidence in the file before the Court that the Italian Republic or the Regione Toscana decided to implement Article 5 of Regulation No 1370/2007 in advance, that is to say before the expiry of the transitional period. When questioned on this subject at the hearing, the Italian Government and the Regione Toscana confirmed that there had been no advance implementation. It is, however, for the referring court to verify that this is indeed the case”.<sup>285</sup>

- (395) Consequently, it would run against the wording of the PSO regulation, its objective, and system, to afford the Norwegian authorities with an unconditional right to abort Tender 4 in this case after the time limit to submit bids had expired and then rely on Article 5(6) to justify the award of East 1 to VY.

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<sup>285</sup> Opinion of Advocate General Saugmandsgaard Øe of 25 October 2018, *Mobit Soc. Cons. arl v Regione Toscana*, Joined Cases C-350/17 and C-351/17, EU:C:2018:869, para. 53. Notably, *Mobit* concerned an award made in the transition period, whereas the award in the present case was made after. Furthermore, the Opinion must be read in light of the fact that *Mobit* concerned a regional contracting authority and not a national, as in the present case.

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- (396) Furthermore, the amendments of Article 8(2) in Regulation 2016/2338 only confirmed that after the transition period and thus from 3 December 2019, “**Article 5 shall apply to public passenger transport services by rail**”:

[...]

**(ii) Article 5 shall apply to public passenger transport services by rail from 3 December 2019**

(iii) Article 5(6) and Article 7(3) shall cease to apply from 25 December 2023.

The duration of contracts awarded in accordance with Article 5(6) between 3 December 2019 and 24 December 2023 shall not exceed 10 years.

Until 2 December 2019, Member States shall take measures to gradually comply with Article 5 in order to avoid serious structural problems in particular relating to transport capacity.

Within six months after 25 December 2020, Member States shall provide the Commission with a progress report, highlighting the implementation of any award of public service contracts that comply with Article 5. On the basis of the Member States' progress reports, the Commission shall carry out a review and, if appropriate, submit legislative proposals”.

- (397) In this case, Tender 4 was explicitly announced as a competitive tender under the PSO Regulation on 30 October 2020 and the tender documents were sent to the pre-qualified operators on 5 March 2021. On 31 August 2021 the time limit to submit bids expired and on 19 November 2021 the Minister of transport instructed the abortion of the tender. Consequently, the competitive tender was started and aborted after the transition period in Article 8(2) had expired on 3 December 2019.

- (398) Therefore, the lawfulness of that decision to abort Tender 4 and then embark on the new process, into which only VY and Flytoget were included, and which led the Norwegian authorities to award of East 1 to VY, depend on Article 5(3) which governs competitive tenders.

- (399) Article 5(3) requires 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.** Following the submission of tenders and any pre-selection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements”.

- (400) Furthermore, Recital 20 also notes 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 on public contracts and concessions, as established by Articles 43 to 49 of the Treaty, and the principles of transparency and equal treatment***".

(401) Consequently, a decision to abort an announced and ongoing competitive tender under the PSO Regulation must also satisfy the criteria of being "fair" and complying with the principle of non-discrimination.

(402) In this case, the evidence demonstrates the exact opposite. The decision to abort Tender 4 was chiefly motivated by the risk that the two national operators could lose the tender, as repeated time and again by the new minister. As laid out, non-exhaustively, in Section 4.5(d) above:

(403) In his announcement of the decision to abort Tender 4 on 19 November 2021:

"The government announced in the Hurdal-platform that further competition for passenger rail services will be stopped. It is an important issue for the current government to ***ensure national control over the rail services***".

(404) In his announcement on 7 April 2022 of the instruction for the Railway directorate to invite VY and Flytoget "to negotiate" for the new contract awards:

"The state-owned railway has been developed with community funds over more than 150 years. ***For us, it is important to preserve strong state-owned rail companies***, so that we can always guarantee passengers a rail offer. This is a critical function for society. With direct awards, the government ***guarantees that the community will also in the future have ownership of the rail companies that run on our rail network***".<sup>286</sup>

(405) In an official statement published on the ministry's homepage by his vice-minister on 31 August 2022:

"With a continuation of the Solberg-government's railway reform, ***we could have risked that our two state-owned rail companies would only operate passenger trains on the Bergen-line [VY on Tender 3] and Flytoget to Oslo airport.***

***This government's solution ensures continued state operation of the rail services in Eastern Norway. Therefore, this is not a continuation of the last government's tendering process. This government is a guarantor that the State will also in the future have ownership of the rail companies that run our railway network***".<sup>287</sup>

(406) On 27 October 2022, in the Parliament where the minister responded to an interpellation concerning the new process for VY and Flytoget:

"This government has aborted the tendering of the rail services and also of the maintenance services of the railway. This means that 1300 workers and skilled

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<sup>286</sup> See Annex 28.

<sup>287</sup> See Annex 34.

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labourers have received clarity, after the general election last year, that important professional clusters will not be exposed to competition. The rail services in Eastern Norway will be directly awarded.

This government is the guarantor that passengers will not have to deal with more rail companies. *The railway has been developed as part of the community's resources and funds during 150 years, and for us it is important to preserve strong state-owned rail companies, so that we always have national control over the passenger rail services*".<sup>288</sup>

(407) On 29 November 2022, in the Parliament where the minister again stated:

"This government is the guarantor that passengers will not have to deal with more rail operators – *we shall preserve a united railway, which has been developed with community funds during more than 150 years. For us, it is important to preserve a strong state-owned rail company, so that we always have national control over the passenger rail services. This is what the direct award will help accomplish*".<sup>289</sup>

(408) On 16 March 2023, in the Parliament in response to a written question after the media exposed that he had secretly instructed the Railway directorate, without regard to price, to award VY at least one of the two 10-year contracts, where the minister stated:

*"The last government's tendering of the rail services in Eastern Norway [Tenders 4 and 5] could have ended with VY only being left with the rail service on Bergensbanen and Vossebanen [Tender 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 tendered as a new traffic package 6. *Flytoget would not have been guaranteed to win that competition,* and we could have ended up with not making the best possible use of the limited capacity in the Eastern region for the passengers. *This government believes that it is for best, for the community and the passengers that the State has ownership of the rail companies that operate the passenger rail services in Norway*".<sup>290</sup>

(409) On 28 March 2023, in a letter to the Parliament in response to the then ongoing enquiries into the announced awards to VY on 3 March 2023, where the minister wrote:

"VY already operates the majority of passenger rail traffic the Eastern region under a public service contract, directly awarded by the State. In addition, VY operates the traffic on Bergen-line [Tender 3] on a tendered contract by the last government. The history of the company goes all the way back to the opening of Norway's first rail line in 1854. It is a company built up by the community with the community's resources. That experience, culture and expertise which VY has acquired is extremely valuable for the Norwegian railways, and the company has

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288 See page 478 at Annex 96.

289 See page 862 at Annex 99.

290 See Annex 97.

proved to be competitive in Norway as well as Sweden. *I did not consider it as an option that VY, as a result of the direct award process for the Eastern region, only should be left with the operation of the long-distance trains on the Bergen-line and the regional rail service on the Vosse-line [Tender 3].* This was a political consideration that became clearer during the year”.<sup>291</sup>

- (410) And again, as late as on 12 April 2023, in the Parliament during Question Time on the announced awards to VY on 3 March 2023, the minister stated:

“This government has a different railway policy than the Conservative Party. *We have aborted the tendering of passenger rail services. We did not want the fragmentation that this would entail, and we did not want to be left with a situation where VY, the old NSB, could only be left with Bergen-line [Tender 3]. We therefore terminated that policy and switched to direct awards*”.<sup>292</sup>

- (411) Consequently, the decisions made in this case that led to the award to VY of East 1 not only constitute a flagrant violation of the fairness and non-discrimination criteria in Article 5(3) but also of the prohibition against discrimination based on nationality in Article 4 EEA. No objective justification can be invoked for such discrimination or has even been attempted by the Norwegian authorities before ESA, in their response to the RFI on 28 April 2023.

- (412) Therefore, the decision by the Norwegian authorities to award East 1 to VY on 29 June 2023 must be declared unlawful.

**5.2 Norway has infringed Article 5(3) and the prohibition of discrimination on grounds of nationality in Article 4 EEA by cancelling Tender 5 (East 2) that for years was planned and pre-announced as a competitive tender under Regulation 1370/2007, and then awarding the East 2 contract to VY on 29 June 2023 after arranging a “mini-competition” in which only VY and Flytoget were invited to bid for the contract**

- (413) At the outset, the complainant has taken note of the fact that, based on the evidence then available to ESA, this issue was apparently not included in the RFI sent to Norway on 29 March 2023.<sup>293</sup> The complainant therefore respectfully requests that the issue be included in the ongoing investigation.

- (414) Tender 5 (East 2) concerns approximately 40 percent of the Norwegian market and the transport of some 30 million passengers annually. The contract awarded on 3 March 2023, and signed on 29 June 2023, has a contract value of NOK 7.39 billion (EUR 739 million) in the 10-year period from December 2023 to December 2033.<sup>294</sup>

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<sup>291</sup> See page 3 of **Annex 98**. The scope and status of the investigation have been described in Section 4.5(j) below.

<sup>292</sup> See **Annex 100**, page 18.

<sup>293</sup> See **Annex 105**.

<sup>294</sup> See **Annex 137**, page 3.

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- (415) Notably, this contract also includes, *from 1 February 2028*, slots reserved for Flytoget in their concession agreement to provide a shuttle service to Oslo airport. The airport shuttle is a commercial service run without State compensation. In 2019, the last normal business year before Covid19, Flytoget generated a turnover of NOK 1 billion (EUR 100 million) and a net income before taxes of NOK 447 million (EUR 44.7 million).<sup>295</sup>
- (416) Tender 5 was planned for years, made, and pre-announced as a competitive tender on 30 October 2020 after having been made subject to the same pre-qualification scheme as Tender 4 on 3 March 2020 under the PSO Regulation. The Norwegian authorities clarified in the pre-announcement of Tender 5 also that a possible competitive tendering of the shuttle service would be clarified, “at the latest in connection with the publication of Traffic Package 5”.<sup>296</sup>
- (417) The exception relied on by the Norwegian authorities in their response to your RFI as their legal basis for the contested award of East 2, namely Article 5(6), provides:

*“Unless prohibited by national law, competent authorities may decide to make direct awards of public service contracts where they concern transport by rail, with the exception of other track-based modes such as metro or tramways. In derogation from Article 4(3), such contracts shall not exceed 10 years, except where Article 4(4) applies”.*

- (418) However, the legal definition of a “*direct award*” is set out in Article 2(h), which reads:

*“‘direct award’ means the award of a public service contract to a given public service operator **without any prior competitive tendering procedure**”.*

- (419) In *Autorità Garante delle Concorrenza e del Mercato v Regione*, the Court of Justice emphasised that the objective of Article 2(h) is to “

*“**distinguish between two schemes** for awarding public service contracts for the transport of passengers by rail and by road by defining the term ‘direct award’ as the award of a public service contract to a given public service operator without any prior competitive tendering procedure. As a result, ‘direct award’ excludes any prior competitive tendering procedure”.*

*“If the provisions of Article 7(2) and (4) of Regulation No 1370/2007 were to be understood as introducing a publicity scheme substantially identical to that of a competitive tendering procedure and as **requiring a comparative assessment of any bids received**, such an interpretation would lead to the procedure for direct award being equated to a competitive tendering procedure and would thus*

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<sup>295</sup> See Section 4.6(d) above. This part of the award is therefore also contested as a separate infringement and unlawful circumvention of Article 5(3) in Section 5.3 below.

<sup>296</sup> See Section 4.4 above.

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ignore the important differences that Regulation No 1370/2007 provides for in their regard.”<sup>297</sup>

- (420) Consequently, it follows from the wording of Article 2(h) and case law that a “**comparative assessment of any bids received**” must be equated to competitive tendering that fall subject to Article 5(3).
- (421) The exception in Article 5(6) does not apply in this case because the award on 29 June 2023 to VY was not “given”, nor was it made without “any prior” competitive tendering procedure. In fact, the evidence demonstrates that the award was exactly the result of a “comparative assessment” of the competing bids from VY and Flytoget.
- (422) First, the mandate and instructions adopted on 31 March 2023 were explicitly based on the premise of equal treatment of the two operators: “The process must provide equal treatment of the two relevant operators”.<sup>298</sup>
- (423) On 18 August 2022, based on that equal treatment requirement, the Norwegian authorities selected Flytoget as their “preferred operator”, after comparing both companies against the same criteria.<sup>299</sup> However, the status as “preferred operator” did not entail that Flytoget was *then* the “given” operator to which the Norwegian authorities would award the contract. According to the mandate and instructions adopted on 31 March 2022, the Norwegian authorities could stop the negotiations and instead turn to VY if the negotiations should not progress timely or be considered unlikely to lead to a satisfactory result.<sup>300</sup>
- (424) In fact, from the very first meeting and throughout the preparations of the mandate and instructions for the process, in December 2021-March 2023, the Norwegian authorities explicitly stated that “**we need some form of competition**” and referred to the models considered as “**mini-competition**”.<sup>301</sup> After the mandate and instructions were adopted on 31 March 2022, the Norwegian authorities informed VY and Flytoget at the start that it was not given who the contracts would be awarded and how the process would be run to decide this. When the decision then was made to select Flytoget as their “preferred operator” for East 2, the Norwegian authorities made a reasoned decision, which was provided also to VY.<sup>302</sup>
- (425) Then, on 16 January 2023, the Minister of transport went even one step further when he instructed the Railway directorate to depart from these premises and invite VY to make

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<sup>297</sup> See Judgement of 24 October 2019, *Autorità Garante delle Concorrenza e del Mercato v Regione Autonoma della Sardegna*, Case C-515/18, EU:C:2019:983, paras. 28-30.

<sup>298</sup> See Section 4.6(d) above.

<sup>299</sup> See Section 4.6(f) above.

<sup>300</sup> See Section 4.6(d) above.

<sup>301</sup> See Sections 4.6(a) to (c) above.

<sup>302</sup> See Sections 4.6(g) to (h) above.

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a binding offer also for East 2, although VY had not been the “preferred operator”.<sup>303</sup>The directorate attempted to warn the ministry of the risks in doing so but was not heard.<sup>304</sup>

- (426) Therefore, when on 1 March 2023, the directorate presented its recommendation of who should be awarded East 2, it did so based on a *comparative assessment* of the three binding offers it had received from VY and Flytoget: one from Flytoget on East 2; one from VY on both East 1 and East 2; and one from VY for East 1 alone.<sup>305</sup>
- (427) The comparative assessment was made against the same set of five criteria to conclude whether to recommend an award of East 2 to Flytoget, which then would mean that East 1 would have to be awarded to VY due to the instruction by the minister on 2 December 2022 to award at least one of the contracts to VY, or whether to recommend an award of both East 1 and East 2 to VY. The directorate summarized its comparative assessment of each of the criteria for the ministry on 1 December 2023.<sup>306</sup>
- (428) Notably, the directorate itself found reason to note the obvious:

*“East 2 (E2) contains elements of competition between the two suppliers. Here, there is a certain risk that the suppliers base their offers on unrealistic assumptions, in order to reduce the compensation. For East 1 (E1), there is a certain risk that Vygruppen, as the only supplier, puts the cost estimates high, the revenue forecasts low and thus demands too high compensation. We have tried as far as possible to prevent such unfortunate adaptations but observe that the bid compensation on E1 is significantly further from our expectations than both offers on E2 do”.*<sup>307</sup>

- (429) Indeed, the explanation for the divergence between the bids was that the process which, to the outside world had been presented as a direct award, was effectively a competitive procedure, albeit restricted to only include VY and Flytoget and to discriminate against all other cross-border suppliers.
- (430) Consequently, the process from which the award to VY emerged on 29 June 2023 was not a direct award as defined by Article 2(h) but a competitive tendering procedure that falls under Article 5(3).
- (431) Article 5(3) requires 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. Following the submission of tenders and any pre-selection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements”.*

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303 See Section 4.6(n) above.

304 See Section 4.6(m) above.

305 See **Annex 137**.

306 *op.cit.*

307 *op.cit.*, page 2.

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(432) Furthermore, Recital 20 also notes 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 on public contracts and concessions, as established by Articles 43 to 49 of the Treaty, and the principles of transparency and equal treatment*”.

(433) Consequently, for the decision to cancel the long-planned Tender 5 and instead embark on the new process that led to the award of East 2 on 29 June 2023 to be lawful, it would need to satisfy the criteria of being “fair” and complying with the principle of non-discrimination.

(434) In this case, the evidence demonstrates the exact opposite. The decision to cancel Tender 5 and then embark on the new process, into which only Flytoget and VY were invited was chiefly motivated by the risk that the two national operators could lose the tender, as repeated time and again by the new minister and laid out non-exhaustively in Sections 4.5(d) and Section 5.1 above.

(435) Consequently, the decisions made in this case that led to the award to VY of East 2 not only constitute a flagrant violation of the fairness and non-discrimination criteria in Article 5(3) but also of the prohibition against discrimination based on nationality in Article 4 EEA. No objective justification can be invoked for such discrimination or has even been attempted by the Norwegian authorities before ESA, in their response to the RFI on 28 April 2023.

(436) Therefore, the decision by the Norwegian authorities to award East 2 to VY on 29 June 2023 must be declared unlawful.

**5.3 Norway has, in any event, unlawfully circumvented Article 8(2)(iii) of Regulation 1370/2007 on 29 June 2023 by including in East 2 from 1 February 2028 the slots currently reserved for Flytoget for its *commercial* shuttle service**

(437) The complainant submits that Norway, in any event, unlawfully circumvented Article 8(2)(iii) of Regulation 1370/2007 on 29 June 2023 by awarding the 10-year contract on East 2 to VY which includes the slots of the commercial airport shuttle from the time the existing contract with Flytoget expires on 31 January 2028, almost four and a half years after the award of East 2 on 29 June 2023.

(438) The complainant is aware that ESA has already started investigating this issue by virtue of question 7 in the RFI sent to Norway on 29 March 2023.<sup>308</sup> Although the contract the Norwegian authorities signed on 29 June 2023 has not yet been made publicly available, their answers to the RFI on 28 April 2023 confirm that East 2 includes the slots currently used by Flytoget until 31 January 2028.

(439) This constitutes an unlawful circumvention of Article 8(2)(iii).

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See **Annex 105**.

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(440) Article 8(2)(iii) provides:

“Article 5(6) and Article 7(3) shall cease to apply from 25 December 2023”.

(441) As confirmed by the Commission’s interpretative guidelines, awards made before that cut-off date should not result in circumvention of the PSO Regulation:

“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.***”<sup>309</sup>

(442) In this case, the almost four and a half year-gap between the award and the use of the slots, and likely operation of a redesigned airport shuttle service, is clearly not because VY needs such a long mobilization period. The objective is simply because the minister from before he took office had adopted the stance to stop all competitive rail tendering.

(443) The evidence demonstrates that the Norwegian authorities for years planned to integrate the airport shuttle in Tender 5 or run a stand-alone Tender 6 for the airport shuttle.<sup>310</sup> A decision was on 30 October 2020 announced to come “at the latest in connection with the publication” of Tender 5:

***“A possible competitive tendering of the transport service to/from Oslo Airport Gardermoen will be clarified at a later date, at the latest in connection with the publication of Traffic Package 5”.***<sup>311</sup>

(444) Indeed, on 25 May 2020, the directorate had submitted to the ministry a 93-page assessment of how the shuttle service could be integrated into the main rail service.<sup>312</sup> Then, the directorate advised that the choice would only have negligible effect on the design and progress of the competitive tenders, which could be run *both with and without* an integration of the shuttle service:

***“A future choice of solution for the shuttle service will have very little effect on the design and progress plan for the public tenders. The shuttle service can be prolonged as a separate rail service or be included in the public tender for the 10-minute system in the Oslo corridor (Tender 5). Flytoget AS has a concession on the shuttle service until 2028 and if the concession period is to be com-***

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309 Commission notice on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road, OJ C 222, 26.6.2023, page 12.

310 See Section 4.1(f) above.

311 See Section 4.4 above.

312 See **Annex 69**.

*pleted, Tender 5 can be expanded later to include these routes. In the event of an integrated solution, the rail offerings in the Oslo corridor will change, and the new service offering will form a natural part of Tender 5”.*<sup>313</sup>

- (445) Consequently, when the then newly appointed minister, five weeks after taking office, on 19 November 2021, instructed the directorate to cancel the long-planned Tender 5, he was chiefly motivated by the risk that the two national operators could lose the tender, not because that time was needed by the directorate to integrate the airport shuttle. This objective is illegitimate because it even constitutes discrimination based on nationality contrary to the prohibition in Article 4 EEA.
- (446) Therefore, there is no objective justification for the inclusion of the slots of the airport shuttle from 1 February 2028 in East 2 because the objective, to avoid the risk that the two national operators could lose the competitive tender, is illegitimate, and because, in any event, it was not necessary nor proportional when the Norwegian authorities could, in all events, have restricted the duration of East 2 to 31 January 2028 and arranged a competitive tender in accordance with Article 5(3) with an integrated service from 1 February 2028. In fact, no evidence in the internal communications between the ministry and the directorate from the cancellation of Tender 5 until the award of East 2 suggest that the award of East 2 to VY yielded a significantly better outcome than a competitive tender.
- (447) Indeed, the directorate *did* raise the issue that it by including in East 2 the slots used by Flytoget, could be unlawfully circumventing the PSO Regulation. However, when it did so, what is striking, is the shallow considerations included in the final recommendation sent to the ministry on 1 March 2023. The directorate merely noted:

*“There are few sources of law, and it is difficult to reach certain conclusions regarding the possibility to maneuver under the transitional arrangements in the PSO Regulation”.*

- (448) Nevertheless, the directorate elected to err on the wrong side of caution when it instead advised the ministry that the “litigation risk is acceptable”.<sup>314</sup>
- (449) Consequently, the inclusion into East 2 only from 1 February 2028 of the slots currently reserved for Flytoget constitutes an unlawful circumvention of Article 8(2)(iii).

**5.4 Norway has, in any event, unlawfully circumvented Article 8(2)(iii) of Regulation 1370/2007 on 29 June 2023, by including in East 1 the Gjøvik-line, although that line had been competitively tendered in 2006-2017 and was then re-awarded directly to VY in a transition contract set to expire in December 2024, more than 21 months after the award was announced**

- (450) At the outset, the complainant has taken note of the fact that, based on the evidence then available to ESA, this issue was apparently not included in the RFI sent to Norway on

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<sup>313</sup> See **Annex 70**, page 4.

<sup>314</sup> See **Annex 137**, page 4.

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28 March 2023.<sup>315</sup> The complainant therefore respectfully requests that the issue be included in the ongoing investigation.

(451) The Gjøvik-line was already in 2005 *competitively tendered* on a 10-year contract that VY won, from June 2006 to 31 December 2017.<sup>316</sup> On 28 February 2018, the line was directly rewarded to VY in two contracts, the first, with retroactive effect from 1 January 2018 to 31 December 2018, and the second contract from 1 January 2019 until December 2024.<sup>317</sup> The last two contracts were awarded to serve as *transition contracts* while the Norwegian authorities completed the competitive tenders following the 2015 decision to open the entire market.

(452) On 29 June 2023, the Norwegian authorities awarded East 1 to VY, which included the Gjøvik-line. This constitutes an unlawful circumvention of Article 8(2)(iii).

(453) Article 8(2)(iii) provides:

“Article 5(6) and Article 7(3) shall cease to apply from 25 December 2023”.

(454) As confirmed by the Commission’s interpretative guidelines, awards made before that cut-off date should not result in circumvention of the PSO Regulation:

“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.***”<sup>318</sup>

(455) In this case, the reason for the award of East 1 on 29 June 2023, more than 21 months before the expiry of the existing contract on the Gjøvik-line, is not rooted in the need for a mobilization phase. Indeed, since June 2006, VY has serviced the line for more than 17 years and will continue to do so until the existing contract expires in December 2024. In fact, a 21-month mobilization phase would even exceed the time afforded new entrants to service entire regions under the competitively tendered contracts, which were afforded a 12-month mobilization phase.

(456) Furthermore, the Gjøvik-line was included in Tender 4 which the then newly appointed minister, merely three weeks after taking office, on 19 November 2021, instructed the

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<sup>315</sup> See **Annex 105**.

<sup>316</sup> See Section 4.1(a) above.

<sup>317</sup> See section 4.1 of the *first* contract at **Annex 114** and section 4.1 of the *second* contract at **Annex 117**.

<sup>318</sup> *Commission notice on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road*, OJ C 222, 26.6.2023, page 12.

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directorate to abort after the time limit to submit bids had expired and VY and Flytoget had failed to submit the lowest bid.

- (457) Consequently, there is no objective justification for the premature inclusion of the line. As borne out by the evidence already laid out above, the objective is illegitimate because it even amounts to discrimination based on nationality in violation of the prohibition in Article 4 EEA. Nor was it necessary nor proportional when the Norwegian authorities could simply have completed Tender 4. No evidence in the internal communications between the ministry and the directorate from the abortion of Tender 4 until the award of East 1 suggest that the award of East 1 to VY yielded a significantly better outcome than a competitive tender. In fact, the evidence strongly shows that even the Norwegian authorities were of the view that awarding East 1 to VY yielded a poor result, indeed.<sup>319</sup>
- (458) Therefore, the premature inclusion into East 1 of the Gjøvik-line more than 21 months between the announcement of the award and the expiry of VY's contract constitutes an unlawful circumvention of Article 8(2)(iii).

**5.5 Norway has, in any event, unlawfully circumvented Article 8(2) of Regulation 1370/2007 and the fundamental principle of proportionality, by awarding a total contract period to VY exceeding 10-years through the use of a series of short-term contracts**

- (459) At the outset, the complainant has taken note of the fact that, based on the evidence then available to ESA, this issue was apparently not included in the RFI sent to Norway on 28 March 2023.<sup>320</sup> The complainant therefore respectfully requests that the issue be included in the ongoing investigation.
- (460) The PSO Regulation entered into force on 3 December 2009. Subsequently, the Ministry of transport and from 2018, the Railway directorate, awarded the following consecutive contracts to VY:
- On 22 December 2010 for the entire market with a duration of *one year*, from 1 January 2011 to 31 December 2011.<sup>321</sup>
  - On 21 December 2011 for the entire market (save for the Gjøvik-line in 2006 was awarded on a tendered contract until the end of 2017) with a duration of *six years*, from 1 January 2012 to 31 December 2017.<sup>322</sup>
  - On 28 February 2018 for the entire market (save for the Gjøvik line), which was given retroactive effect, with a duration of *one year*, from 1 January 2018 until 31 December 2018.<sup>323</sup>

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<sup>319</sup> See Section 4.6 above.

<sup>320</sup> See **Annex 105**.

<sup>321</sup> See section 3 of the contract at **Annex 129**.

<sup>322</sup> See section 4 of the contract at **Annex 128**.

<sup>323</sup> See section 4.1 of the contract at **Annex 114**.

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- On 28 February 2018 for Gjøvik line, which also was given retroactive effect, with a duration of *one year*, from 1 January 2018 until 31 December 2018.<sup>324</sup>
  - On 28 February 2018 for the entire market (save for the Gjøvik line and subject to gradual phasing out by tendered contracts), with a duration of *four years*, from 1 January 2019 until December 2022.<sup>325</sup>
  - On 28 February 2018 for the Gjøvik line, with a duration of *six years*, from 1 January 2019 until December 2024.<sup>326</sup>
  - On 13 January 2023 for the entire market in the Eastern region, with a duration of *one year*, which was given retroactive effect from 11 December 2022 until December 2022.<sup>327</sup>
  - On 3 March 2023 for East 1 (including the Gjøvik-line) with a duration of *10 years*, from the expiry of the 2022-contract in December 2023 until December 2033.<sup>328</sup>
  - On 3 March 2023 for East 2 (including the airport shuttle from 1 March 2028), with a duration of *10 years*, from the expiry of the 2022-contract in December 2023 until December 2033.<sup>329</sup>
- (461) None of the contracts required from VY significant investments in the rail infrastructure. From 1996, ownership of and investments in rail infrastructure were in the hands of the National Rail Administration until the responsibility was transferred on 1 January 2017 to Bane NOR.<sup>330</sup>
- (462) Furthermore, none of the contracts required significant investments from VY in rolling stock, for which VY was exposed to risk of losses from the asset depreciation periods exceeding the contract periods. In fact, all rolling stock was divested from VY to Norske Tog on 15 October 2016, and ownership to Norske Tog was transferred to the Ministry of transport in April 2017.<sup>331</sup> As part of this divestment, VY was granted a guarantee against losses (a residual value guarantee) in the 2016 and 2017 state budgets.<sup>332</sup>

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<sup>324</sup> See section 4.1 of the contract at **Annex 115**.

<sup>325</sup> See section 4.1 of the contract at **Annex 116**.

<sup>326</sup> See section 4.1 of the contract at **Annex 117**.

<sup>327</sup> See section 4 of the contract at **Annex 118**.

<sup>328</sup> The contract has not yet been released to the public.

<sup>329</sup> The contract has not yet been released to the public.

<sup>330</sup> See Section 4.1(a) above.

<sup>331</sup> See **Annex 85**.

<sup>332</sup> See **Annex 127**, page 160: "In 2016, the ministry granted residual value guarantee to NSB AS [VY] for the rolling stock covered by the ministry's traffic agreement with the company. NSB's rolling stock will be transferred to Togmateriell AS [Norske Tog] during the spring of 2017, which is owned by the state through the Ministry of transport. The ministry intends for the residual value guarantee to follow the assets for which such protection have been provided. For 2017, it is proposed that the ministry can

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- (463) Consequently, the Norwegian authorities have, after 3 December 2009, awarded directly to VY a series of consecutive contracts with a total duration of **23 years** in the Eastern region, in which VY was not required to make investments in infrastructure and rolling stock for which it was exposed to losses from uncompensated asset depreciations.
- (464) Article 8(3) and Article 8(2) apply independently of each other.<sup>333</sup>
- (465) Whereas Article 8(3) concern *existing* contracts that had been awarded when Regulation 1370/2007 entered into force, on 3 December 2009, Article 8(2) concern *new* contracts that have been awarded afterwards.<sup>334</sup> In this case, all the contracts listed above concern *new* contract awards, which therefore fall subject to Article 8(2).
- (466) Pursuant to the amendments made to Article 8(2), which for Norway entered into force on 1 June 2022, the duration of contracts awarded in accordance with Article 5(6) cannot exceed 10-years. This follows directly from the wording, which states:
- “The duration of contracts awarded in accordance with Article 5(6) between 3 December 2019 and 24 December 2023 **shall not exceed 10 years.**”
- (467) The wording does not allow for direct awards made under Article 5(6) to the incumbent operator of short-term contracts after 3 December 2019 followed by a 10-year contract shortly before the cut-off date. Indeed, the use of a series of direct awards in short order under Article 8(2) was not envisaged in the legislative process.
- (468) This is further supported by Article 8(2)(a) which provides:
- “Public service contracts for public passenger transport services by rail directly awarded on the basis of a procedure other than a fair competitive procedure as of 24 December 2017 until 2 December 2019 **may continue until their expiry date**. In derogation from Article 4(3), the duration of such contracts shall not exceed 10 years, except where Article 4(4) applies”.
- (469) A consistent reading of these provisions provides that when a contract, directly awarded before 2 December 2019, expires after that date it can be re-awarded under Article 5(6) but for no more than 10-years from that expiry date.
- (470) Moreover, according to the Commission’s Interpretive guidelines:

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provide residual value guarantee for the rolling stock included in the state's traffic agreement with NSB for 2012–2017, of up to NOK 6200 million for existing equipment, and NOK 2025 million for upgrades and new investments, cf. the proposal for Roman numeral resolution. The Railway directorate shall issue a guarantee-letter which specifies the terms of the guarantee and the state's obligations beyond the budget year”.

<sup>333</sup> Judgement of 19 March 2020, *Compañía de Tranvías de La Coruña, SA v Ayuntamiento de A Coruña*, Case C-45/19, EU:C:2020:224, para. 25.

<sup>334</sup> Opinion of Advocate General Saugmandsgaard Øe of 25 October 2018, *Mobit Soc. Cons. arl v Regione Toscana*, Joined Cases C-350/17 and C-351/17, EU:C:2018:869, para. 53.

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“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”.<sup>335</sup>

- (471) Therefore, it would also be inconsistent with this interpretation if the authorities could directly award under Article 5(6) a series of short-term rail contracts under Article 8(2) to get as close as possible to the cut-off date, and then award a 10-year contract shortly before 25 December 2023. There is no reason why the first event should be considered a circumvention but not second, which is at issue in this case.
- (472) Consequently, the last two awards made on 13 January 2023 (the one-year contract) and on 29 June 2023 (the 10-year contracts) to VY, unlawfully circumvented Article 8(2) by awarding an *11-year* consecutive contract period. The contract period in the last award should have been, at most, 9 years, with an expiry date in December 2032 rather than December 2033.
- (473) However, considering the circumstances, whereby the government in 2015 decided to open the entire rail market, and to that end awarded directly to VY in 2018 a set of four *transitional* contracts, the cancellation of that 2015 decision by the new government in 2021, which was ordered at the final stages of the transition, comes in direct conflict with the objective behind Article 8(2), which, as expressed in recital 11 is to provide for time “*to adapt*”.
- (474) Indeed, the new minister has made no secret out of his intention to close the market for competition for as long as possible, *also after* the expiry in December 2033 of the two contested contracts on East 1 and 2 that were awarded to VY on 29 June 2023, and even when the tendered contracts on Tender 1 (South), Tender 2 (North) and Tender 3 (West) expire.
- (475) Clearly, Article 8(2) was intended for a transition *towards* an opening of the rail market, and not to accommodate for Member States rowing in the opposite direction. Notably, in this case, the administrative and corporate reorganizations were completed already in 2016/2017, and region South, North, and West had already been tendered out in 2018-2020. The only remaining region was region East, where the time limit for submitting bids for Tender 4 (now East 1) had already expired at the time that tender was aborted.
- (476) For perspective, from the 2015 decision until the Railway directorate was at the cusp of awarding Tender 4, after the time limit expired on 31 August 2021, the transition took just over six years. The instruction of the new minister on 19 November 2021 to close the market and award to VY the one-year contract in 2022 and the two 10-year contracts

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<sup>335</sup> See section 2.2.5 of the 2023 Interpretative guidelines.

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in 2023, implies *an additional 11-year transition period* to complete the two tenders that the minister aborted on 19 November 2021.

- (477) Contrary to what the Norwegian authorities appear to assume, the transition period does not provide a “free-for-all” space from the EEA Agreement. On the contrary, the general and primary principles continue to apply, including the principles of proportionality and non-discrimination, see recitals 12 and 20:

*“It is immaterial from the viewpoint of Community law whether public passenger transport services are operated by public or private undertakings. **This Regulation is based on the principles of neutrality as regards the system of property ownership referred to in Article 295 of the Treaty, of the freedom of Member States to define services of general economic interest, referred to in Article 16 of the Treaty, and of subsidiarity and proportionality referred to in Article 5 of the Treaty [...]** 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. In particular, the provisions of this Regulation are to be without prejudice to the obligations applicable to public authorities by virtue of the directives on the award of public contracts, where public service contracts fall within their scope”.*

- (478) In this case, the evidence laid out above, including the statements by the minister, show that Tenders 4 and 5 were rolled-back to avoid the risk that VY and Flytoget would have lost the tenders to cross-border competitors with better prices and quality of service.
- (479) When the Norwegian authorities are not even nominally pretending to need the 10-years in the contested contracts to transition *towards* an open passenger rail market and lack an objective justification for their decision to reverse the 2015 decision of the previous government to open the entire market, the two awards to VY on 29 June 2023 must be considered as unlawful circumventions of Article 8(2).

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**6. CONFIDENTIALITY AND TREATMENT OF THE COMPLAINT**

- (480) The complainant has separately provided a non-confidential version of the complaint and all non-confidential annexes, for the purpose of allowing faster processing of the complaint.

For the complainant,

[redacted]

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**7. SUPPORTING DOCUMENTS**

1. Brev, Samferdselsdepartementet, 16.01.23
2. Meld. St. 27 (2014-2015) På rett spor – reform av jernbanesektoren
3. Ot. prp. nr. 54 (2004-2005)
4. St.meld. nr. 24 (2003–2004) Nasjonal transportplan 2006-2015
5. Lov om om anlegg og drift av jernbane, herunder sporvei, tunnelbane og forstadsbane m.m. (jernbaneloven), sist endret 11.06.21
6. Pressemelding, Samferdselsdepartementet, 30.05.05
7. TØI rapport 1104/2010 På sporet av konkurranse
8. Fase 2 i kjøp av persontogtjenester – forslag til endelig pakkeinndeling for det sentrale Østlandsområdet og fremdrift av konkurranseutsetting av de siste trafikkpakkene, Jernbane direktoratet, 13.06.19
9. Strategi for konkurranseutsetting av trafikkpakker, Jernbanedirektoratet, 13.06.19
10. Pressemelding, Jernbanedirektoratet, 30.06.20
11. Global credit rating, S&P, 17.11.21
12. Presentasjon, Jernbanedirektoratet, 28.04.22
13. Artikkel, NTB, 09.12.19
14. Pressemelding, Jernbanedirektoratet, 17.10.18
15. Pressemelding, Jernbanedirektoratet, 17.06.19
16. Pressemelding, Jernbanedirektoratet, 09.12.19
17. Anbudssammendrag, VY, 31.08.21
18. Anbudssammendrag, Go-Ahead, 31.08.21
19. Artikkel, Aftenposten, 23.01.22
20. Brev, Samferdselsdepartementet, 19.11.21
21. Pressemelding, Samferdselsdepartementet, 19.11.21
22. Artikkel VG/E24, 04.11.21
23. Artikkel VG, 27.10.21
24. Skriftlig spørsmål til Samferdselsministeren, Stortinget, 26.10.21
25. Brev, Samferdselsdepartementet, 31.03.22
26. Mandat, Samferdselsdepartementet, 31.03.22
27. Avtale, Flytoget/Samferdselsdepartementet, 01.02.13

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28. Pressemelding, Samferdselsdepartementet, 07.04.22
29. Presentasjon, Jernbanedirektoratet, 27.04.22
30. Pressemelding, Jernbanedirektoratet, 20.05.22
31. Pressemelding, VY, 20.05.22
32. Pressemelding, Jernbanedirektoratet, 19.08.22
33. Artikkel, NTB, 14.06.22
34. Pressemelding, Samferdselsdepartementet, 31.08.22
35. Pressemelding, BaneNor, 13.06.22
36. Brev, VY, 06.09.22
37. Artikkel, VG, 08.09.22
38. Artikkel, Klassekampen, 08.09.22
39. Artikkel, FriFagbevegelse, 05.09.22
40. Brev, Samferdselsdepartementet, 09.09.22
41. Brev, Jernbanedirektoratet, 13.09.22
42. Artikkel, Aftenposten, 05.11.21
43. Artikkel, Aftenposten, 06.07.22
44. Skriftlig spørsmål til samferdselsministeren, Stortinget, 24.01.23
45. Skriftlig spørsmål til samferdselsministeren, Stortinget, 31.01.23
46. Årsrapport, VY, 2021
47. Årsrapport-presentasjon, VY, 2021
48. Brev, Flytoget, 25.01.23
49. Artikkel, VG, 02.02.23
50. Brev, Kommisjonen, 18.07.22
51. St.prp. nr. 82 (2007–2008), 26.09.08
52. Prop. 113 L (2009–2010), 23.04.10
53. Forskrift nr. 1673, 17.12.10
54. Prop. 143 L (2015–2016), 06.10.16
55. Prop. 101 LS (2019 –2020), 07.05.20
56. TED-notice, Samferdselsdepartementet, 05.02.16
57. Handlingsprogram 2018-2029, Jernbanedirektoratet, 04.07.18
58. Meld. St. 33 (2016-2017), Nasjonal Transportplan 2018-2029
59. TED-notice, Samferdselsdepartementet, 05.02.16

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60. TED-notice, Samferdselsdepartementet, 08.04.16
61. TED-notice, Jernbanedirektoratet, 14.10.17
62. TED-notice, Jernbanedirektoratet, 03.09.19
63. TED-notice, Jernbanedirektoratet, 30.10.20
64. Konkurransesgrunnlag (Trafikkpakke 4), Jernbanedirektoratet, 05.03.21
65. Prop. 1 S (2018-2019), 21.09.18
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