



ROYAL NORWEGIAN
MINISTRY OF TRANSPORT

EFTA Surveillance Authority (ESA)
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Your ref
90137 - 1459153

Our ref
23/17-

Date
26 August 2024

Supplementary information on the direct award of rail PSO contracts to Vygruppen AS

Dear Sir/Madam,

Reference is made to the letter from the Authority of 7 June 2024, your case No 90137, and the subsequent correspondence regarding the extension of the deadline for the answers to the questions raised.

1. Cancellation of Trafikkkpakke 4 and the national legal framework

1. The Ministry is invited to provide further information on the compliance of the decision to cancel the process of the award of Trafikkkpakke 4. In particular, the Ministry is invited to provide further information on the decision, if the Ministry was aware of offers already received within that process. Furthermore, the Ministry is invited to provide further justification regarding the compatibility of the measure with fundamental principles of the EEA Agreement, including the principles of non-discrimination, equal treatment, transparency and legitimate expectations in reference to the observations mentioned above.

The Ministry was not aware of the contents of the bids or the identity of the bidders. The Railway Directorate as the competent authority for awarding rail PSO contracts has the sole responsibility for the award procedures. The Ministry, also being the owner of Vygruppen AS and having other roles in the governance of the railway sector, has been careful not to involve in the tender award procedures in order to avoid any conflict of interests. This is also reflected in the internal organisation of the Ministry, where the ownership of Vygruppen and regulatory issues are handled by separate departments.

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As explained in the letter from the Ministry of 23 February 2024 on page 5, the Norwegian authorities consider the decision to cancel the process of the award of Trafikkpakke 4 to comply with the fundamental principles of EEA law. All the principles referred to by the Authority have been considered.

With regard to the principle of transparency, the decision to cancel the procedure was announced to all the bidders¹. Furthermore, the notifications from the Railway Directorate according to Article 7 (2) and (3) of the PSO Regulation regarding the subsequent direct award of the PSO contracts in question ensured transparency². It is not a requirement to notify the name of the operator subject to the direct award in the first notification under Article 7 (2) of the Regulation.

All the participants in the competitive tender procedure for Trafikkpakke 4 received the same information of the cancellation³.

Finally, all the participants in the tender procedure for Trafikkpakke 4 were aware of the possibility that the Railway Directorate could at any time cancel the procedure, as this was mentioned specifically in point 3.10 in the invitation to tender. The invitation to tender is enclosed as Annex 1. Please note that this is the public version, as the documents contain certain confidential information.⁴

Annex 1: Tilbudsforespørsel for konkurranse om Trafikkpakke 4 (public version)

With regard to the tender procedure for Trafikkpakke 4, several different circumstances could have justified an abortion of the procedure. This could be in case of too few bids received or other unforeseen circumstances, and is not unusual in such procedures. It is also settled practice under the legal framework for public procurements that on-going competitive procedures may be aborted due to new political priorities.⁵ Furthermore, the bidders must be presumed to be aware of the underlying legal framework for public procurements that the competent authority has a wide margin of manoeuvre to cancel on-going procedures until a contract is signed. Therefore, the principle of legitimate expectations cannot be considered to be broken in this case.

2. The Ministry is invited to provide the Directorate with a copy of the internal assessment carried out by the Railway Directorate on the cancellation of Trafikkpakke 4, following the supplementary mandate of the Ministry of 19 November 2022.

Firstly, the Ministry would like to clarify that the internal assessment in question was not carried out in relation to the supplementary mandate from the Ministry of 19 November 2022,

¹ See on page 5 of the letter of 23 February 2023 and annexes 1 and 2 to that letter.

² See point 2.7 of the Interpretative guidelines: [EUR-Lex - 52023XC0626\(01\) - EN - EUR-Lex \(europa.eu\)](#)

³ See on page 5 of the letter of 23 February 2023 and annexes 1 and 2 to that letter.

⁴ Some information is redacted. The national legal basis for this is § 13 of the Freedom of Information Act, together with § 13 of the Public Administration Act.

⁵ KOFA-sak 2004/11 [Hemne kommune \(klagenemndssekretariatet.no\)](#)».

but in advance of the decision to cancel the tender procedure for Trafikpakke 4 in October 2021. The assessment was carried out in order to reply to certain questions raised by the ministry, namely the legal possibility to abort on-going tender procedures and if the competent authorities could be liable for any compensation in case of any such decision. The competent authority may incur such a liability regardless the lawfulness of the abortion/cancellation of an on-going competitive tender procedure, depending on certain criteria. The internal assessment made by the Railway Directorate discusses the national legal framework for abortion of on-going tender procedures and the procedural risks with regard to liability for costs incurred by the bidders in case of such an abortion, and must be read with this in mind. The assessment is enclosed as Annex 2. We underline that this document is exempted from public disclosure in its entirety, as it should be regarded as a document intended for the internal case-handling.⁶

Annex 2: Internal assessment for the Railway Directorate

3. The Ministry is invited to elaborate further on how the subsequent process of direct award was distinct from the competitive process, beyond the form of the award and how the policy aims referred to in the press release of 19 November are reflected in the differences between Trafikpakke 4 and Østlandet 1 bundles.

As a preliminary remark, the Ministry would like to reiterate that with regard to the selection of operators with which the Railway Directorate entered into negotiations for the two directly awarded PSO contracts, that is, Vygruppen and Flytoget, the selection of these two operators for direct award negotiations cannot be regarded as any form of discrimination against third parties. Direct award of the two PSO contracts in question ensures national control of the train services covered by the contracts, both by means of contractual obligations and ownership with the operators.

As explained in our letter of 31 March 2022, the Ministry of Transport issued a mandate for a distinct process for procuring the PSO contracts Østlandet 1 and Østlandet 2 as direct awards. This mandated the Railway Directorate to directly award the contracts to Vygruppen and/or Flytoget. The Railway Directorate subsequently evaluated these two operators on quality/user satisfaction, expected value for money and performance risk (Nw: *oppfyllesrisiko*) to determine who was to be the preferred contract party for each of the contracts. This is expressed in an e-mail from the Railway Directorate to Vygruppen.

Annex 3: Mail to Vy of 20 May 2022

For Østlandet 1 this was determined to be Vygruppen, mostly based on the differences observed in the bids from these two operators in Trafikpakke 4, as well as the fact that Vygruppen already was running the services in question. The Railway Directorate then went

⁶ The national legal basis for confidentiality is § 15 in the Freedom of Information Act: <https://lovdata.no/lov/2006-05-19-16/§15>

into exclusive negotiations with Vygruppen on Østlandet 1 with the intention to award the contract, given successful negotiations.

The direct award process allows for more thorough discussions between the parties on how to best specify the public service obligations in question, and thereby improving the possibility to achieve the policy objectives for the PSO. For Østlandet 1 this has allowed the Railway Directorate to receive a bid which should lead to improved quality of the services by means of train performance (regularity and punctuality) and thus better customer satisfaction. In addition, as mentioned under question 1 and to be elaborated under question 6, choosing a state-owned operator establishes further means of ensuring national control of the services in question.

The press release of 19 November 2021 should not be regarded as a comprehensive and final expression of the relevant policy aims for the direct award of the two PSO contracts in question, but merely a public announcement of the decision to abort the competitive tender procedure and instead enter into direct award procedures. The relevant policy aims are reflected in the mandate, the applicable national transport plan and other statutory documents such as budget proposals, white papers and proposals for Parliamentary Acts. As stated in the Interpretative guidelines, policy objectives applicable in the Member States may be expressed in various formats and on various levels of detail.⁷

The main source for accessing the current transport policy aims is the new National Transport Plan for 2025-2036, which was endorsed by the Parliament in June this year⁸. The new plan replaced the national transport plan for the former period⁹. In brief, and as touched upon in our letter of 23 February this year, a well-integrated and attractive public transport system is essential to meet the long-term transport policy objectives. Rail transport is also vital for achieving the “zero growth” objective for passenger transport by cars in the major urban areas, and to ensure a certain level of public transport services in the entire nation, with coordinated ticketing, fares, network structures, schedules and stopping patterns.

Further, the newly adopted national transport plan underlines the role rail transport services, both for freight and passengers, play as a fundamental national function. Rail passenger services in particular are vital for the daily functioning of the civil society. Rail freight transport is vital both for serving civil society’s needs (foodstuffs between different parts of the country, raw materials such as iron ore in the north), and is considered by the military services as an

⁷ Interpretative Guidelines point 2.2.3: “policy objectives stated in public transport policy documents in the Member States. Member States have a wide margin of manoeuvre in determining the content and format of such documents and the procedures for consulting relevant stakeholders. Such documents should define the objectives of public transport policy, such as for instance territorial connectivity, including cross-border connections, and the development of sustainable transport and identify the means to attain them across the different transport modes. As stated in recital 10 of Regulation (EU) 2016/2338, stakeholders to be consulted may include transport operators actually or potentially present in the geographical area concerned, infrastructure managers and representative passenger organisations, employee organisations and environmental organisations.”

⁸ <https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=98233>.

⁹ Meld. St. 20 (2020–2021) *Nasjonal transportplan 2022–2033*: <https://www.regjeringen.no/no/dokumenter/meld.-st.-20-20202021/id2839503/>

important part of the “total defense”. The latter is even more important now after the accession by Finland and Sweden to NATO. Under national law, particularly the Act relating to national security (the Security Act)¹⁰, the responsible ministries are required to ensure that their sectors fulfill the requirements concerning protective security for the fundamental national functions. Control with the PSO operators through state ownership serves as a strong tool for ensuring certain vital services in certain circumstances, possibly on top of contractual obligations. Direct award of certain PSO contracts could therefore serve as a tool for achieving this policy aim. This is elaborated below in the reply to question 6.

4. The Ministry is invited to clarify if a regulation has been adopted pursuant to Article 8a of the Railway Act on competitively awarded PSO contracts. In the absence of more specific provisions, what general rules applied to the process, e.g. the national Administrative Act or ‘Forsyningsforskriften’, and if no general laws or regulations applied, to provide the justification for the lack of procedural rules on competitive awards.

There has not been adopted any national regulations under Article 8a of the Railway Act. Supplementary regulations which could differ in scope has been considered, but never given any priority to draft or propose. At the time when chapter IIA of the Railway Act was adopted, the PSO Regulation was not adopted. At the time when the PSO Regulation was taken into the Norwegian legal framework, it was not adopted with its legal base in chapter IIA of the Railway Act, but in a new Article 7d, alongside the Professional Transport Act to cover the entire scope of the PSO Regulation.¹¹ The Railway Directorate, being the competent authority for rail PSO contracts, has not indicated any need for supplementary national legislation for the procedures for the award of and entering into rail PSO contracts. Instead, the general rules on public procurement, state aid etc. are applied.¹²

5. The Ministry is invited to provide the Directorate with the tender specifications, so-called ‘konkurransesgrunnet’, for Trafikpakke 4, published by the Railway Directorate on 5 March 2021.

The tender specifications for Trafikpakke 4 are enclosed as Annex 1.

6. The Ministry is invited to provide further information on what the term “national control” in the context of the Ministry’s press release of 19 November 2022 entails and the objective reasoning behind that policy aim. In that context, the Ministry is invited to provide further information as to whether national control means to control the extent of the operations, e.g. by imposing the service level and quality standards, or whether it entails having effective control of the operators, e.g. ownership and control. Furthermore, the Ministry is invited to clarify whether that policy aim applies to all railway operations in Norway, in particular in the context of the liberalisation of the market.

¹⁰ <https://lovdata.no/NLE/lov/2018-06-01-24>

¹¹ <https://lovdata.no/lov/2002-06-21-45>

¹² See the invitation to tender (Annex 1).

As mentioned briefly under question 3, the Security Act requires the respective ministries to ensure protective security for the fundamental national functions under their responsibility. It is considered particularly important to ensure the continued function of PSO rail passenger services, as these serve to provide transport services considered necessary for the basic public transport functions.

The term “national control” in this context means having effective control of the operators through state ownership as a supplementary and strong tool for ensuring certain vital services in certain circumstances. This tool comes in addition to the contractual obligations for the operator under the PSO contracts, which should be considered to be sufficient under normal circumstances. Direct award of certain PSO contracts may therefore provide an additional tool for ensuring control with the resilience of certain transport services.

The authorities should be restrictive with the use of this tool, as the contractual obligations should be sufficiently clear and strong for the operator to perform the transport services in question. Additionally, there is national legislation in place which also may be used to instruct operators to perform certain transport services under special circumstances¹³. However, it cannot be excluded that certain circumstances might occur when it may prove necessary to exploit ownership prerogatives to ensure sustainable transport services.¹⁴

Rail and other public transport is important for the functioning of other fundamental national functions, to ensure the ability for workers and others to commute to work and ensure the functioning of those functions. As an example: Under the pandemic, it was necessary to maintain a certain public transport capacity with high-frequent services for people to be able to go to work, school etc. During the pandemic, it was also necessary to provide extra remuneration to the operators for income losses. This was applied by means of emergency measures under Article 5.5 of the PSO regulation. However, it is not certain that this provision is applicable in any future extra-ordinary event.

In order to ensure compliance with the Security Act, the Ministry is currently assessing whether the current PSO contract system is sufficient in all circumstances to ensure resilient rail transport services. A possible result of this, is that future PSO contracts might contain stronger obligations on the operators to perform services under certain circumstances. It is especially important that the operators are loyal and can fulfil the contract throughout the entire duration, even if extraordinary situations as mentioned should arise. Direct award to a state-owned operator is one way of achieving this goal.

¹³ <https://lovdata.no/forskrift/2022-01-20-102>

¹⁴ This perspective follows from the [chapter on societal security in the new national transport plan](#): «Opprettholdelse av et robust persontogtilbud er viktig for samfunnets grunnleggende funksjonalitet. Under koronapandemien var det f.eks. avgjørende å opprettholde persontogtilbudet for å sikre muligheten for folk til å komme seg på jobb for å betjene kritiske samfunnsfunksjoner. Stortinget, på bakgrunn av forslag fra regjeringen, sluttet seg derfor til å bevilge ekstra midler for å kunne opprettholde et grunnleggende persontogtilbud gjennom en periode med redusert reiseaktivitet som følge av virusutbruddet i perioden 2020–2022. Dette er videre et eksempel på at det i visse situasjoner kan oppstå behov for å bruke kraftfulle virkemidler for å sikre at visse transporttjenester av strategisk betydning blir opprettholdt.»

7. The Ministry is invited to provide clarification on the abovementioned circular on award of railway PSO's and if it has been amended, either before or after 19 November 2022. Furthermore, the Ministry is invited to clarify the legal nature of circulars in Norwegian law.

The circular in question has not been updated after the first version, even after the amendments to the PSO Regulation or the revised interpretative guidelines. However, the circular is mostly intended for the use of the regional municipalities, being competent authorities for local and regional public transport (except rail passenger services). As the revised PSO Regulation and updated guidelines for the major part affects rail passenger PSO contracts and therefore only the Railway Directorate, the task of updating the circular letter has not been given priority. However, it is foreseen that the circular will be updated at the first possible opportunity.

The legal status of circulars will differ. Some may have formally binding effect as instructions, while others may be of a more informative nature. Binding legislation should in any case be adopted in the form of legal acts or regulations. It is stated clearly on the website where the circular is published that it serves as a guidance¹⁵, and therefore does not impose any other legal obligations or rights than those established under EEA law, particularly the PSO Regulation.

The reason for the Ministry to issue the circular letter in question, was that it was primarily directed to competent authorities for local and regional public transport (except rail passenger services). At the time of adoption, the Ministry itself was the competent authority for awarding rail PSO contracts.

2. On the market analysis for the Østlandet 1 and Østlandet 2

8. Regarding the table at page 7 in the Ministry's letter (average compensation per year required for the routes in Trafikkpakke 4/Østlandet 1), the Ministry is invited to explain whether the route-level profit figures are an average across all the bids received in the context of the tendering procedure. In the affirmative, the Ministry is invited to provide the profit figures of each bidder which have been used to calculate the average in that table.

The route level figures for average yearly required compensation in the table on page 7 in our letter of 23 February 2024 are average across all bids received in the tendering procedure.

The individual bids have the following average yearly required compensation per route. The bidders are anonymised according to the lettering system used in the bidding process (B, D, H, M, Q and W):

Bidder B

¹⁵ <https://www.regjeringen.no/no/dokumenter/n-12016/id2527174/>: «Dette rundskrivet er ei rettleiing til lov- og forskriftsendringar som gjennomfører forordning (EF) nr. 1370/2007, kollektivtransportforordninga, i norsk rett.»

Route	Average required compensation per year (million 2021-kroner)
R-tog Oslo S - Hakadal/Jaren and RE-tog Oslo S – Gjøvik	112,0
RE-tog Oslo S - Halden	37,7
R-tog Oslo S – Mysen/Rakkestad	75,0
R-tog Stabekk – Moss	89,3
R-tog Oslo S - Ski	18,3
L-tog Stabekk/Oslo S - Ski	367,6
L-tog Spikkestad/Asker - Lillestrøm	371,3

Bidder D

Route	Average required compensation per year (million 2021-kroner)
R-tog Oslo S - Hakadal/Jaren and RE-tog Oslo S – Gjøvik	178,1
RE-tog Oslo S - Halden	-14,2
R-tog Oslo S – Mysen/Rakkestad	36,2
R-tog Stabekk – Moss	119,1
R-tog Oslo S - Ski	6,4
L-tog Stabekk/Oslo S - Ski	179,3
L-tog Spikkestad/Asker - Lillestrøm	267,1

Bidder H

Route	Average required compensation per year (million 2021-kroner)
R-tog Oslo S - Hakadal/Jaren and RE-tog Oslo S – Gjøvik	138,9
RE-tog Oslo S - Halden	-9,0
R-tog Oslo S – Mysen/Rakkestad	46,2
R-tog Stabekk – Moss	92,1
R-tog Oslo S - Ski	19,2
L-tog Stabekk/Oslo S - Ski	328,1
L-tog Spikkestad/Asker - Lillestrøm	262,0

Bidder M

Route	Average required compensation per year (million 2021-kroner)
R-tog Oslo S - Hakadal/Jaren and RE-tog Oslo S – Gjøvik	163,3
RE-tog Oslo S - Halden	75,4
R-tog Oslo S – Mysen/Rakkestad	77,2
R-tog Stabekk – Moss	173,1
R-tog Oslo S - Ski	-87,1
L-tog Stabekk/Oslo S - Ski	269,5
L-tog Spikkestad/Asker - Lillestrøm	345,6

Bidder Q

Route	Average required compensation per year (million 2021-kroner)
R-tog Oslo S - Hakadal/Jaren and RE-tog Oslo S – Gjøvik	144,6
RE-tog Oslo S - Halden	154,7
R-tog Oslo S – Mysen/Rakkestad	106,9
R-tog Stabekk – Moss	167,0
R-tog Oslo S - Ski	16,0
L-tog Stabekk/Oslo S - Ski	341,4
L-tog Spikkestad/Asker - Lillestrøm	360,5

Bidder W

Route	Average required compensation per year (million 2021-kroner)
R-tog Oslo S - Hakadal/Jaren and RE-tog Oslo S – Gjøvik	146,0
RE-tog Oslo S - Halden	- 33,5
R-tog Oslo S – Mysen/Rakkestad	54,7
R-tog Stabekk – Moss	123,3
R-tog Oslo S - Ski	16,8
L-tog Stabekk/Oslo S - Ski	231,5
L-tog Spikkestad/Asker - Lillestrøm	287,8

9. The Ministry states in the letter that “Jernbanedirektoratet does not consider it relevant to test individual services below the level of service level groupings. This is to secure an integrated offering throughout the day”. From this statement, the Directorate understands that the Norwegian authorities find it relevant to test the interest of the market to operate individual routes at commercial terms, but not e.g. to operate individual routes at different times of the day. The Ministry is invited to confirm if that understanding is correct and clarify if it is not.

That is correct with regards to the services covered by Østlandet 1 and Østlandet 2. As explained on page 16 of our letter of 23 February 2024, the Norwegian authorities considers that there are substantial network effects to be gained from providing an integrated offering throughout the day. This requires that services are provided at regular intervals with the same stopping patterns throughout the day on the same route, and that all services on that route is available using the same (seasonal) ticket. Further, as the different routes are part of an integrated high frequency/high-capacity service in the core sections, they need to be coordinated at a route level.

10. Regarding the market testing of Østlandet 2, the Ministry is invited to elaborate on the assumptions underlying the calculations of the profitability of the contract, in particular:

a. The Ministry has referred to the fact that market prices are based on previous tender procedures. However, as no tender procedure ever took place for the Østlandet 2 contract, please clarify which tender procedure the Ministry is referring to and whether the routes tendered in that procedure are comparable to those included in the Østlandet 2 contract.

In a net cost contract, the net cost to the government equals the expected cost of operations plus expected profit less the expected income from ticket sales and other income streams. For the market testing of Østlandet 2, the Railway Directorate has estimated expected ticket income based on historical data and expected future growth for the PSO-services adjusted for the changes to income allocation that were introduced with Trafikkpakke 4. For expected costs, the Railway Directorate has used reported 2019-costs for Østlandet 2, adjusted for the observed savings in received bids for Trafikkpakke 4 compared to reported 2019-costs for the same services. As both Østlandet 1 and Østlandet 2 covers services in and around Oslo, they are directly comparable and the Railway Directorate would expect the competitive effects to be the same in a potential tendering exercise. Further, the Railway Directorate adjusted the expected costs for observed changes in input prices due to the pandemic and the Ukraine war, as explained below. For expected profits, the Railway Directorate has used the observed margins from the bids received in Trafikkpakke 4. To account for the uncertainty in cost increases due to the pandemic and the Ukraine war, the Railway Directorate estimated these to get a band of expected net cost/compensation required for the contract.

b. Based on the information provided, Norway applied adjustments for the pandemic and the Ukraine war. Please elaborate on these adjustments, how they have been implemented and provide evidence to justify them (e.g. market data, industry reports etc.).

The adjustments for the pandemic and Ukraine war covered electricity, rail replacement transport and maintenance costs. Both electricity costs and costs for rail replacement transport were expected to increase substantially due to the impact of the Ukraine war on energy markets.^{16 17} In 2022, the market for rolling stock maintenance observed substantial cost rises due to the Ukraine war.¹⁸

The adjustment for electricity prices was based on Bane NOR Energi's prognosis for future electricity costs.¹⁹ The final contract includes provisions for adjusting the compensation payments to Vygruppen according to the actual electricity costs annually.

¹⁶ https://www.ecb.europa.eu/press/economic-bulletin/focus/2022/html/ecb.ebbox202204_01~68ef3c3dc6.en.html

¹⁷ <https://www.fleetnews.co.uk/news/fleet-industry-news/2022/05/16/diesel-hits-record-high-as-ukraine-war-impacts-supply>

¹⁸ See page 53 of Mantena's annual report for 2022: https://mantena.org/wp-content/uploads/Mantena_annual-report_2022.pdf

¹⁹ <https://www.banenor.no/om-bane-nor/vare-tjenester/stromforsyning/prognose-for-energikostnader/>

The adjustment for rail replacement transport costs was based on the observed increase in fuel prices.²⁰

The adjustment for maintenance costs was based on the winning bid in Vygruppens competitive tender for rolling stock maintenance for Østlandet 2.

11. On page 10 in the reply from the Ministry, it is stated that “the compensation per train service grouping in the contract with Vygruppen [...] is similar to the results of a competitive tender”. The Ministry is invited to clarify and elaborate on this statement, since the Østlandet 2 was never exposed to a competitive tender.

This comparison is done with regard to the estimates the Railway Directorate made based on previous tender procedures and adjustments for covid-19 and Ukraine, as described above. This was presented as a band between 617 and 678 million kroner in average yearly compensation, but was only done for the entirety of Østlandet 2, not the individual routes. The final average yearly compensation came in at 697,7 million kroner, which is marginally above this band. The Norwegian authorities thus view the average yearly compensation per route in the final contract as representative for what would have been the case if Jernbanedirektoratet estimated the required compensation on a route basis with the same economies of scale.

12. Regarding the table at page 11 in the reply from the Ministry, the Ministry is invited to confirm that the profit figures refer to Vygruppen and not to an average across multiple companies.

The Ministry confirms that this is correct. The table refers to the average yearly compensation per route in the final contract with Vygruppen.

13. On page 12 in the reply from the Ministry, it is stated that “[a]s soon as one service is unavailable to travellers using commuter tickets [...], the service will not be perceived as part of an integrated offering, and an important network effect would be lost”. The Directorate’s understanding of this statement is that: If commercial services were to be operated in (part of) the network, the commercial operator would not be part of the commuter ticketing system, thus jeopardizing the network effect. Therefore, PSOs are necessary to make sure all the routes in the network share the same fare system.

a. Please confirm if the Directorate’s understanding is correct and if the following assumptions are correct:

²⁰

<https://www.ssb.no/statbank/table/09654/tableViewLayout1/?loadedQueryId=10098855&timeType=top&timeValue=76>

i. In the scenario where a part of the network is commercially operated, a passenger would choose not to travel rather than to buy two separate tickets, one for the commercial services and another for the PSO service.

ii. A commercial operator cannot join an integrated ticketing system together with PSO operators. If this was possible, the same benefits in terms of integration of the fare system would be achieved, without restricting commercial operations.

The Ministry is invited to provide its views on these assumptions, as well as any evidence or arguments to justify them or to provide further clarification if these assumptions are not correct.

a. The Ministry confirms that the understanding is correct.

i) The Norwegian authorities considers that a substantial number of passengers would choose not to travel or use other modes than the train/public transport if they were forced to buy two separate tickets. This is due to the fact that a majority of the passengers on these routes are commuters, who rely on season tickets to get to and from work. Having to buy two separate tickets would increase the cost of commuting by train/public transport substantially. The estimated ticket price elasticity for journeys within city areas has been estimated to between -0,2 in the short term and -0,5 in the long term²¹. Although these estimates have been done using relatively small price changes, this indicates that a doubling of the price could lead to 20 – 50 percent reduction in demand. Further, the number of available services with one ticket is reduced considerably. For frequency, the elasticity is estimated to be between 0.2 and 0.4.²²

If one of those season tickets were to be priced commercially, it would probably have a substantially higher price, and the cost of buying two seasonal tickets would increase by more than 100 percent. This is due to the commercial operator would have to consider the opportunity cost of losing the sale of a single ticket. Single tickets have considerably higher yield than seasonal tickets.

Lately both Vygruppen and Ruter have introduced tickets with increasing discounts relative to the number of journeys taken within a 30-day period. As these discounts are connected to the ticket type (and thus operators with a PSO), having two operators with different ticket types would increase costs, and reduce the likelihood of travelling by train/public transport. The Norwegian authorities would like to point out that securing an attractive train service for commuters in and out of Oslo is an important tool to achieve the policy objectives described in section 1 of our letter of 23 February 2024. Without an attractive train service for these, the Oslo area would be likely to see increased car traffic, congestion and pollution.

²¹ See page 17 of this document: <https://www.jernbanedirektoratet.no/content/uploads/2023/11/beregning-av-elastisiteter-for-togreiser.pdf>

²² See page 21 of *ibid*.

ii) It is correct that commercial operators are not able to join the integrated fare and ticketing agreement between the Railway Directorate and Brakar, Østfold Kollektivtrafikk and Ruter in the Oslo area.

However, the network benefits from only integrating the fare system would likely be less than the current set up. As explained in our letter of 23 February 2024, the integrated fare system is only part of what makes the Oslo-area public transport system perceived as an integrated network. To be perceived as a truly integrated system, the individual routes and services must be planned and controlled accordingly, to enable predictable:

- High frequency services in the core sections
- High capacity
- Network frequency
- Local connections from public transport hubs
- Geographical coverage
- Distribution of services throughout the day

Integrating only the fare systems risks commercial operators adapting any of the points above to serve their own commercial interests (what gives the highest revenue for the lowest costs), rather than what makes a public transport network perceived as integrated and predictable. Further, such a limited integration would allow commercial operators to cherry pick markets through subsidised tickets, leaving the state to bear both the costs of these tickets and the costs of covering markets that are left underserved or entirely unserved by commercial operators.

14. Regarding the capacity that Flytoget is currently using, the Directorate understands that Flytoget is operating a PSO contract which does not regulate prices. The Directorate also understands that the Norwegian authorities have simulated the effect of introducing the same tariffs as in Østlandet 2 contract in place of the prices that Flytoget is currently charging. The result of this simulation is that the routes currently operated by Flytoget would not be profitable, making it impossible to run them at commercial terms. The Ministry is invited to:

a. Confirm that the Directorate's understanding is correct.

b. Provide further information on why PSO prices are the relevant prices to test the interest of the market to perform the PSO services at commercial terms. The Directorate understands that PSO prices are determined as a combination of a distance-based fare table (based on the prices of the previous contracts for the same PSO) and a matrix of fare distances. Are the PSO prices also justified by a societal cost-benefit analysis? Have the Norwegian authorities considered consulting the market on the prices they would charge and then make an assessment on whether a PSO (including price regulation) is necessary and proportionate to address societal transport needs?

a) The Ministry can confirm that the understanding is correct.

b) As explained in our letter of 23 February 2024 and earlier correspondence, the train paths currently used by Flytoget are to be used to improve the general rail service in the Oslo-area. This means that they will be part of the integrated public transport network in the area. Consequently, they should be part of the same integrated fare system as the other train services that make up part of the same network. More than 90 percent of the respondents in Jernbanedirektoratets market analysis which stated they used Flytoget, also stated that their entire journey happened within the Ruter travel area. On the rest of the route, the services will also be part of the integrated train service offering. Given that the Norwegian authorities consider that it is necessary to have an integrated fare system, and that the terms of this fare system are agreed with the regional government, it would not be appropriate to test a commercial operators willingness to operate the same services with different fares.

As explained on page 9 of our letter of 23 February 2024, the authority to set the fares within the Ruter-area rests entirely with the local authorities. The local authorities also have the responsibility for procuring local and regional buses, tram and metro services.²³ As the analysis of market offer only is required when open access rights have been introduced, the Norwegian authorities consider these fares not to be subjected to the same market testing as pure rail fares.²⁴ However, as explained in the same letter, the Norwegian authorities consider the social benefits of having these fares also covering rail passenger transport in the Oslo area to be far greater than the costs of doing so.

15. The Directorate understands that the Norwegian authorities view network benefits as advantages stemming from the availability of frequent transport services across a wide network, which reduces the transportation costs for passengers (e.g. lower waiting times, less time standing vis-à-vis seating, geographical reach of the network, availability of services at early/late hours of the day). While acknowledging that these are indeed network benefits, the Ministry is invited to explain why a PSO is necessary or the most appropriate instrument to achieve them, i.e. why these network benefits would be lost in the scenario where a commercial operator provides parts of the services in parallel with another operator performing a PSO for the non-commercially attractive services.

As explained above, and in our letter of 23 February 2024, the Norwegian authorities consider that for the train services to be perceived as a truly integrated part of the entire public transport network in the Oslo-area, the individual routes and services must be planned and controlled accordingly, as well as being part of the public transport fare system. Leaving

²³ Professional Transport Act § 6 second paragraph: "Løyve til persontransport i rute over ei viss lengd skal ikkje behovsprøvast. Departementet fastset i forskrift den nedre grensa for persontransport i rute som ikkje skal behovsprøvast. Den nedre grensa kan ikkje setjast lågare enn 80 km. Departementet kan fastsetje i forskrift at særlege former for persontransport i rute ikkje skal behovsprøvast utan omsyn til lengda på ruta.» [Regulation on Professional Transport § 35a](#): "Følgende løyver skal ikke behovsprøves: 1. Løyve til å drive persontransport mot vederlag med motorvogn i rute lengre enn 80 kilometer en veg. 2. Løyve til å drive persontransport mot vederlag med motorvogn i rute av passasjerer med på- eller avstiging ved flyplasser, uten hensyn til rutens lengde.»

²⁴ Interpretitive guidelines point 2.2.3.

individual services or routes in the hands of commercial operators in their entirety, would likely lead to the commercial operators prioritising routes and stopping patterns that maximises private profit, rather than social benefits. This might mean omitting stops, reducing the number of departures, changing departure times so that they're less suited for local connections or losing network frequency. Given the limited capacity on the infrastructure in the Oslo area such changes would lead to welfare losses, and thus market failure. Further, our analysis of the profitability of the routes given the conditions in the current integrated fare agreement, shows that the routes would not be profitable²⁵.

Currently there are no other instrument than PSO contracts that are able to regulate all of these factors, and simultaneously cover private losses from providing the socially optimum service levels and the integrated fare system. The Norwegian authorities thus consider PSO contracts to be justified for the services in question.

3. On the general application of Regulation 1370/2007 in Norway and future PSO awards

16. The Ministry is invited to provide clarification on the context of this correspondence, such as why it took place and the purpose of the letter and in particular in context of the quoted text above. The Ministry is invited to clarify what was the applicable provision of the PSO Regulation, and to share any preceding assessment with the Directorate.

The letter referred to by the Authority was a response from the Minister to several statements from the Director of SJ AB in Norwegian media on the future prospects for the rail passenger services covered by the PSO "trafikkpakke 2 Nord". A response was received by the Ministry on 30 May that year.

Annex 4: Letter from SJ

There have also been several bilateral meetings with SJ regarding the rail services provided by SJ in the remaining part of the PSO contract in question.

Although the reference to the new national transport plan in the Authority's letter is correct, it must be understood as a statement on the preferred way of awarding rail passenger PSO contracts. No decisions have yet been made on those PSO contracts. Together with the statement in the letter of 2 May 2023 to the Director of SJ AB and other statements in media and the national Parliament, it is an expression of the political ambitions of the current government. These ambitions are summarised in the Hurdal platform²⁶. The decision to abort the on-going competitive procedure on Trafikkpakke 4 and direct award the two PSO contracts Østlandet 1 and 2 was made to substantiate the ambitions in that political platform. However, no decision has yet been made on the method for awarding the PSO contracts for Trafikkpakke 1-3 when they are to be renewed. The Ministry has now explored the legal possibilities for direct award of rail PSO contracts in order to clarify the relevant legal

²⁵ See pages 8-10 in our letter of 23 February 2024.

²⁶ [Hurdalsplattformen - regjeringen.no](https://www.regjeringen.no) on page 42 and 80.

framework before the issuing of a mandate to the Railway Directorate. The announcement of a political ambition to direct award those contracts because that is the preferred option for the current government cannot be seen as a formal decision to award them directly.

Such decisions must also be in line with the relevant legislative framework. This is the background for the assignment to the Railway Directorate to assess the different possibilities for direct award under the revised PSO Regulation, and for the dialogue with DG MOVE and the Authority on the correct understanding and application of the PSO Regulation in May this year²⁷. The Ministry has in particular been assessing the provisions on and criteria for direct award of rail PSO contracts in the revised PSO Regulation, in order to explore the possibilities to fulfill the political ambitions mentioned above. As expressed in the meeting referred to above, the Norwegian authorities have all the intention of awarding rail PSO contracts in a lawful manner. The correct application of the PSO Regulation is also about finding the best way to achieve the transport policy targets.

17. The Ministry is also invited to inform the Directorate if similar statements have been sent to other operators concerning other bundles.

As mentioned above, the letter to SJ AB mentioned under question 16, was related to the political ambitions for the future award of the PSO contract for Trafikkpakke 2 Nord. There has been no similar exchange of letters or ambitions for the other rail PSO contracts.

18. Furthermore, the Ministry is invited to provide the Directorate with the assessment carried out by the Railway Directorate concerning manoeuvres to directly award railway PSO contracts (referred to as "Oppdrag Nr. 5 – av EØS rettslig handlingsrom", referred to in the Statsbudsjettet 2023 - Tildelingsbrev til Jernbanedirektoratet).

As explained on earlier occasions, the assessment made by the Railway Directorate has not yet been subject to public disclosure, as the Ministry has not yet taken any decision on the mandate for the award of the new PSO contract for the southern lines (Trafikkpakke 1 Sør). However, the assessment will be made public and shared with the Authority as soon as this decision has been made. This is foreseen before October this year.

²⁷ Meeting in Brussels on 21 May with representatives from the Ministry of Transport, DG MOVE and ESA

Further information

The Ministry stand ready to provide any other information that the Authority may find necessary. Except for certain information in Annex 1 and the entire annex 2 as indicated above, there is no confidential information in this letter or its annexes.

Yours sincerely

Cecilie Taule Fjordbakk
Deputy Director General

Erik Syvertsen
Assistant Director General

This document is signed electronically and has therefore no handwritten signature

4 Annexes