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Brussels, 30 October 2024  
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Ministry of Transport  
Postboks 8010 Dep  
0030 Oslo  
Norway

Dear Sir/Madam,

**Subject: Request for Information concerning Norway - Incorrect Application of Article 5(3a) of Regulation 1370/2007**

On 29 October 2024, the Internal Market Affairs Directorate (“the Directorate”) of the EFTA Surveillance Authority (“the Authority”) opened an own initiative case to investigate the application of Regulation 1370/2007, as amended by Regulation 2016/2338 (‘the PSO Regulation’), in Norway. The Norwegian Government is requested to clarify the position and current practices of the Norwegian authorities responsible for the application of the Regulation and in particular to provide information on application of Article 5(3a) of the PSO Regulation in Norway.

On 22 October 2024, the Ministry of Transport published an announcement on its website with the title “Vy direktetildeles kontrakt på Sørlandsbanen, Jærbanen og Arendalsbanen fra 2027”.<sup>1</sup> According to that announcement, the Ministry has instructed the Railway Directorate as the Competent Authority to award a temporary railway PSO contract for the so-called South bundle, Jær line and the Arendal line to the railway operator Vy for a period of up to five years. This award shall be carried out under Article 5(3a) of the PSO Regulation.

Attached to the announcement is a mandate of the Ministry to the Railway Directorate.<sup>2</sup> Both the announcement and the mandate seem to indicate that the Ministry deems there is a need for a re-evaluation of the scope and the division of the current PSO structure in Norway and that the Railway Directorate needs additional time for that task. In that context, the contract for the South bundle expires in December 2027.

This matter was discussed during the annual package meeting in Oslo, which took place on 24 and 25 October. During the technical meeting regarding railway PSOs, the representatives of the Ministry provided a short presentation on the matter. The representatives of the Directorate expressed concerns of the announced award and informed the representatives of the Ministry that the Directorate would follow up with a request for information, which is this letter.

As was expressed during the meeting, Article 5(3a) of the PSO Regulation provides that for public service contracts for public passenger transport services by rail awarded on the basis of a competitive tendering procedure, the competent authority may decide to temporarily award new contracts directly where the competent authority considers that the direct award is justified by exceptional circumstances.

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<sup>1</sup> <https://www.regjeringen.no/no/aktuelt/vy-direktetildeles-kontrakt-pa-sorlandsbanen-jarbanen-og-arendalsbanen-fra-2027/id3064821/>

<sup>2</sup> Mandat fra Samferdselsdepartementet til Jernbanedirektoratet om trafikkavtalegjennomgang og sikring av persontogtrafikken på Sørlandsbanen, Jærbanen og Arendalsbanen

The provision also requires that the competent authority issues a substantiated decision on the award and inform ESA of that decision without undue delay. The maximum duration of the award must not exceed five years, and the duration shall be proportionate to the exceptional circumstances in question.

It is clear from the wording of the provision that to be applied, an assessment has to be carried out on the existence of exceptional circumstances and that assessment is to be carried out by the competent authority.

It is well established case law of the Court of Justice that the burden of proving the existence of exceptional circumstances justifying the derogation to those rules lies on the person seeking to rely on those circumstances.<sup>3</sup> Furthermore, it is also well established under the case law of the European Courts that provisions that provide for a derogation from applicable rules must be interpreted strictly.<sup>4</sup> This was furthermore stressed during the meeting Norway had with the Directorate and representatives of DG Move, which took place on 21 May of this year.

The Directorate, therefore, request the Norwegian Government to provide answers to the following questions:

1. According to the announcement of 22 October 2024 and the mandate attached to that announcement, it appears that the Ministry has in a binding way instructed the Railway Directorate on the use of Article 5(3a) of the PSO Regulation. The Ministry is invited to provide information if any assessment to establish the exceptional circumstances was carried out before those instructions were issued. If affirmative, to provide a copy of that assessment and clarify if that assessment was carried out by the Ministry of Transport or the Railway Directorate.
2. If no such assessment has been carried out, the Government is invited to provide clarification and information on how it considers it compliant with the Regulation to issue binding instructions to the Railway Directorate to award a temporary contract on the basis of Article 5(3a).
3. During the discussion at the package meeting, the representatives of the Government referred to market interest to provide some of the services covered by the South bundle on market terms. The Norwegian Government is invited to provide further information on that interest and, subsequent to market interest, the grounds for Government's conclusion in the mandate that the scope of the temporarily awarded PSO shall be the same as under the current PSO contract.
4. The Norwegian Government is invited to provide information on the current contract for the South bundle, in particular if the agreement provides for extension, how that provision can be applied and if there is any deadline for invoking that provision.

The Norwegian Government is invited to submit the above information, as well as any other information it deems relevant to the case, so that it reaches the Authority by 27 November 2024.

Yours faithfully,

Valgerður Guðmundsdóttir  
Deputy Director  
Internal Market Affairs Directorate

*This document has been electronically authenticated by Valgerdur Gudmundsdottir.*

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<sup>3</sup> CJEU, C-410/14 – ANAV, Paragraph 26.

<sup>4</sup> CJEU C-337/06 Bayerischer Rundfunk and Others, paragraph 64.