III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DELEGATED DECISION

No 42/19/COL

of 17 June 2019

to exempt the operation of public bus transport services in Norway from the application of Directive 2014/25/EU of the European Parliament and of the Council [2019/…]

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Act referred to at point 4 of Annex XVI to the EEA Agreement laying down the procedures for the award of public contracts in the utilities sector (Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ([1]) ('the Directive')), and in particular Articles 34 and 35 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('the Surveillance and Court Agreement'), in particular Articles 1 and 3 of Protocol 1 thereto,

After consulting the EFTA Procurement Committee,

Whereas:

1. **FACTS**

(1) On 27 November 2018, following pre-notification discussions, the EFTA Surveillance Authority ('the Authority') received a request from Nettbuss AS, now Vy Buss AS ('the Applicant') pursuant to Article 35(1) of Directive 2014/25/EU ('the Request') ([2]).

(2) The Request concerns the operation of public bus transport services in Norway. Public transport management activities carried out, in practice, by public transport authorities are not covered by the Request ([3]).

(3) The Applicant is a 'public undertaking' within the meaning of the Directive as the Norwegian Ministry of Transport and Communications indirectly holds 100 % of its subscribed capital, through its ownership of NSB AS, now Vygruppen AS (a transportation group of which the Applicant forms part) ([4]).

(4) The Applicant pursues one of the activities falling under the Directive and is therefore a 'contracting entity' within the meaning of the Directive.

([1]) OJ L 94 28.3.2014, p. 243. Incorporated into the EEA Agreement by Joint Committee Decision No 97/2016 (OJ L 300, 16.11.2017, p. 49 and EEA Supplement No 73, 16.11.2017, p. 53).

([2]) Document No 1040381.

([3]) So, for example, the award by a municipality of a contract to operate bus services to a bus operator would not be covered by the present Request. By contrast, a contract awarded by that operator to (for example) a cleaning company for the cleaning of buses or to a company providing buses for use by the operator, would fall within the scope of the Request. This distinction has been clarified by the CJEU in Case C-388/17, *SJ*, EU:C:2019:161 ('*SJ*'), paragraph 53 (see further recital 31 below). The Authority will in the present decision refer to the concept of an 'activity' as set out in Directive 2014/25/EU.

([4]) Page 3 of the Request.

(5) Pursuant to Section 2-9 of the Norwegian Regulation of 12 August 2016 No 975 on procurement by entities operating in the water, energy, transport and postal services sectors ([5]), contracting entities may submit requests under Article 35 of the Directive.

(6) The Request was accompanied by a reasoned and substantiated position adopted by the Norwegian Competition Authority on 29 June 2018, concluding that the Applicant was directly exposed to competition in its provision of public bus transportation services, and that access to the market for the award of contracts to operate public bus transportation services in Norway was unrestricted ([6]).

(7) The Authority informed Norway of its receipt of the Request on 30 November 2018 ([7]).

(8) In accordance with point 1 of Annex IV to Directive 2014/25/EU, the Authority has 130 working days to adopt a decision on the Request, with a deadline of 18 June 2019 ([8]).

(9) Pursuant to Delegated Decision No 37/19/COL of 23 April 2019 ([9]), the Authority asked the EFTA Procurement Committee to provide its opinion under the advisory procedure set out in Article 2 of Standing Committee Decision No 3/2012 ([10]).

(10) The EFTA Procurement Committee delivered a positive opinion by unanimous vote on the Authority's draft decision under the written procedure on 22 May 2019 ([11]).

2. **LEGAL FRAMEWORK**

(11) The Directive applies, *inter alia*, to the award of contracts for the pursuit of activities related to the provision or operation of networks providing a service to the public in the field of transport by bus ([12]).

(12) Pursuant to the second paragraph of Article 11 of the Directive, a network is considered to exist where the service is provided under operating conditions laid down by a competent authority of a State, such as conditions on the routes to be served, the capacity to be made available, or the frequency of the service.

(13) In *SJ* ([13]), in interpreting Article 5(1) of Directive 2004/17/EC of the European Parliament and of the Council ([14]) (the wording of which is identical to Article 11 of the Directive), in the context of railway networks, the Court of Justice stated that '… it must be held that the activity of the "operation of networks" refers to the exercise of the right to use of the railway network for the provision of transport services, while the activity of "provision of networks" refers to the management of the network' ([15]). The Court concluded that '[t]he first subparagraph of Article 5(1) of Directive 2004/17 must be interpreted as meaning that the activity pursued by a railway undertaking, which consists of providing transport services to the public in exercising a right of use of the railway network, is an "operation of networks" for the purposes of that directive' ([16]). The 'operation of public bus transport services' in Norway is the equivalent in the field of transport by bus to the activity pursued by a railway undertaking referred to in *SJ* in the field of transport by railway, thus is an activity to which the Directive applies.

([5]) Forskrift om innkjøpsregler i forsyningssektorene (forsyningsforskriften) https://lovdata.no/dokument/SF/forskrift/2016-08-12-975.
([6]) Document No 1040380.
([7]) Document No 935075.
([8]) Pursuant to Regulation (EEC, EURATOM) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ L 124, 8.6.1971, p. 1), public holidays are excluded from the time period. See Public holidays in 2018 and 2019: EEA EFTA States and EEA institutions, OJ C 429, 14.12.2017, p. 25 and EEA Supplement No 81, 14.12.2017, p. 1 and OJ C 422, 22.11.2018, p. 7 and EEA Supplement No 77, 22.11.2018, p. 1.
([9]) Document No 1056012.
([10]) In accordance with Article 4 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13), as adapted.
([11]) See Document No 1070910 on the outcome of the written procedure.
([12]) Article 11 of the Directive.
([13]) Cited at footnote 3 above.
([14]) Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1), incorporated into the EEA Agreement by Joint Committee Decision No 68/2006 (OJ L 245, 7.9.2006, p. 22 and EEA Supplement No 44, 7.9.2006, p. 18).
([15]) SJ, paragraph 53 of the judgment.
([16]) SJ, paragraph 54 and paragraph 2 of the operative part of the judgment.

(14) Article 34 of the Directive provides that contracts intended to enable the performance of one of the activities to which the Directive applies are not to be subject to the Directive if, in the State in which it is carried out, the activity is directly exposed to competition on markets to which access is not restricted. Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned.

(15) Article 35 of the Directive sets out the procedure for establishing whether the exemption in Article 34 is applicable. As adapted, it provides that a State or, where the legislation of the State concerned provides for it, a contracting entity may submit a request to the Authority to establish that the Directive does not apply to the award of contracts or the organisation of design contests for the pursuit of the activity in issue. The Authority is to take a decision on whether the activity is directly exposed to competition on markets to which access is not restricted (on the basis of the criteria set out in Article 34).

(16) This decision is without prejudice to the application of the rules on competition ([17]) and other fields of EEA law. In particular, the criteria and the methodology used to assess direct exposure to competition under Article 34 of Directive 2014/25/EU are not necessarily identical to those used to perform an assessment under Article 53 or 54 of the EEA Agreement or Council Regulation (EC) No 139/2004 ([18]), as adapted to the EEA Agreement ([19]).

(17) The aim of the present decision is to establish whether the activity concerned by the Request is exposed to a level of competition (in markets to which access is not restricted within the meaning of Article 34 of the Directive) which will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in the Directive, procurement for the pursuit of the activity concerned will be carried out in a transparent, non-discriminatory manner based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous.

3. **ASSESSMENT**

3.1. **Free access to the market**

(18) In the present case, the relevant activity is the operation of public bus transport services. This activity is performed under contracts awarded by public transport authorities (PTAs). In Norway, different types of bus services exist (see recital 41 below) and the relevant activity is referred to at a national level as the operation of scheduled bus transport services.

(19) As regards the operation of public bus transport services, there is no relevant EEA legislation on the basis of which free access to the market can be presumed pursuant to Article 34(3) of the Directive. It is therefore necessary to make the relevant assessment based on the regulatory framework and the practice of PTAs, which should demonstrate that access to the market is free *de facto* and *de jure*.

(20) It should be kept in mind that the aim of the present decision is to establish whether the activity concerned by the Request is exposed to a level of competition (in markets to which access is not restricted within the meaning of Article 34 of the Directive) which will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in the Directive, procurement for the pursuit of the activity concerned will be carried out in a transparent, non-discriminatory manner based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous. The assessment undertaken for these purposes does not entail reviewing whether each individual contract for the operation of public bus transport services has been awarded in full compliance with EEA law but rather whether the regulatory framework and/or practice of PTAs restricts access to the market *de facto* or *de jure*.

([17]) Article 34(1) of the Directive. See also Recital 44 of the Directive.
([18]) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).
([19]) See judgment in *Österreichische Post AG* v *Commission*, T-463/14, EU:T:2016:243, paragraph 28.

(21) With regard to potential legal restrictions regarding access to the market of operating public bus transport services, the Authority notes that there are licence requirements and that services are performed under contract. However, in the Request, the Applicant took the view that the licence requirements could not amount to a restriction of access to the market ([20]) and, moreover, that there were no special or exclusive rights attached to the licences ([21]). The Applicant further stated that tenders comply with Regulation (EC) No 1370/2007 of the European Parliament and of the Council ([22]) and the Directive and therefore do not, *de jure* or *de facto*, restrict market access ([23]).

(22) It is settled case-law that a system of prior authorisation cannot legitimise discretionary decisions taken by the national authorities which are liable to negate the effectiveness of provisions of EEA law ([24]). In order for a system of prior authorisation to be justified even though it derogates from the fundamental freedom to provide services, it must be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily ([25]).

(23) Scheduled bus transport services in Norway are governed by the Act of 21 June 2002 No 45 on Occupational Transport by Motor Vehicle or Vessel ([26]) ('the Occupational Transport Act') and the Regulation on Occupational Transport adopted on the basis of that act ([27]).

(24) Section 4 of the Occupational Transport Act requires companies intending to operate public bus transport services to obtain a general licence ('transportløyve'), issued by the Norwegian Public Roads Administration (Statens vegvesen) ([28]). Whilst the wording of the Occupational Transport Act suggests a possibility for discretion on the part of the Public Roads Administration since it uses the word 'may', it is common in Norwegian law to use this word even though in practice there is little or no discretion. It follows from the preparatory works of the act that the licence scheme is a tool to control the quality of the provided services ([29]). Section 4 of the Regulation on Occupational Transport clarifies that if particular reasons do not weigh against it, a licence may be given to an applicant that fulfils the requirements. Furthermore, the Norwegian Competition Authority has stated that anyone who meets the objective conditions is given such a licence ([30]). The Authority has received no information that would contradict the above findings.

(25) In addition, for the operation of scheduled bus transport services, a licence under Section 6(1) of the Occupational Transport Act, issued by the relevant county municipalities, is generally required ([31]). Management companies are exempt from the requirement for a licence and where the PTA is a management company and remains responsible vis-à-vis the public and the operator acts as its subcontractor, no licence is required as the management company's exemption also applies to the operator ([32]).

(26) Section 8 of the Occupational Transport Act provides that licences for transport services subject to compensation payments or to an exclusive right shall be awarded in competitive tenders if mandated by the Occupational Transport Act, the Public Procurement Act, or relevant regulations adopted on the basis of either of these acts. Where a licence under Section 6 is required, it is awarded to the winner of the contract ([33]).

([20]) See, for example, page 40 of the Request.
([21]) Page 11 of the Request.
([22]) Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1) and incorporated into the EEA Agreement by Joint Committee Decision No 85/2008 (OJ L 280, 23.10.2008, p. 20 and EEA Supplement No 64, 23.10.2008, p. 13).
([23]) Page 30 of the Request.
([24]) Judgments in *Smits and Peerbooms*, C-157/99, EU:C:2001:404, paragraph 90; *Müller-Fauré and van Riet*, C-385/99, EU:C:2003:270, paragraph 84; *Watts*, C-372/04, EU:C:2006:325, paragraph 115; Opinion of the Advocate General in *Watts*, C-372/04, EU:C:2005:784, paragraph 70.
([25]) Judgments in *Analir and Others*, C-205/99, EU:C:2001:107, paragraph 38; *Watts*, C-372/04, EU:C:2006:325 paragraph 116.
([26]) Yrkestransportloven.
([27]) Regulation on Occupational Transport of 26 March 2003 No 401 ('yrkestransportforskriften').
([28]) The Occupational Transport Act, Section 4, and the Regulation on Occupational Transport, Section 3.
([29]) Ot.prp. nr. 74 (2001-2002) chapter 2.
([30]) Page 4 of the Position adopted by the Norwegian Competition Authority on the conditions for the applicability of Article 34(1) of Directive 2014/25/EU.
([31]) The Occupational Transport Act, Section 6, and the Regulation on Occupational Transport, Section 3.
([32]) The Occupational Transport Act, Section 6(2).
([33]) Page 4 of the Position adopted by the Norwegian Competition Authority on the conditions for the applicability of Article 34(1) of Directive 2014/25/EU.

(27) In practice, public bus transport services falling under the Directive are performed under contracts awarded by PTAs. These contracts are subject to EEA public procurement rules, specifically ([34]):

(a) Regulation (EC) No 1370/2007;

(b) Directive 2014/25/EU; and/or

(c) Directive 2014/24/EU of the European Parliament and of the Council ([35]).

(28) Directives 2014/24/EU and 2014/25/EU entered into force in the EEA on 1 January 2017. Prior to this, Directive 2004/17/EC and Directive 2004/18/EC of the European Parliament and of the Council ([36]) were applicable.

(29) All three current instruments generally require open, transparent, non-discriminatory competitive tendering with limited exceptions. Thus, contracts and licences for scheduled public bus transport services must be awarded by way of competitive tendering procedures unless an exemption under the relevant EEA act applies or the contract falls below the threshold values for application of the relevant act. The same applied under the previous directives.

(30) According to the Request, PTAs have increasingly used competitive tendering in the award of contracted bus services. While only 43 percent of contracted regular bus services were awarded by competitive tendering in 2010, in 2018 that share had increased to more than 98 percent and will be close to 100 percent by 3 December 2019 ([37]). The Applicant further stated that derogations from competitive tendering are rarely used, no PTAs provide public bus transport services themselves under the exception in Article 5(2) of Regulation (EC) No 1370/2007 and direct awards below the thresholds in Article 5(4) of Regulation (EC) No 1370/2007 are used to a very limited extent.

(31) The Authority compared the information provided by the Applicant in relation to the situation in 2018 against information received by the Authority from the Norwegian Government on 9 November 2018 ([38]) in the context of a general examination of public service obligation contracts on the basis of Regulation (EC) No 1370/2007 ([39]). That assessment broadly confirmed the information provided by the Applicant. The Norwegian Government provided details of a total of 27 directly awarded contracts, of which 13 were due to be replaced in the course of 2019 with contracts which had already been subject to tendering. The total annual value of directly awarded contracts was specified to be around NOK 275 million, which amounts to only a fraction of the entire value of public service obligation contracts in public road transport in Norway (estimated to be NOK 11,6 billion in 2017). Furthermore, the only directly awarded contracts anticipated to remain in force after 10 August 2019 are contracts fulfilling the conditions of Article 5(4) of Regulation (EC) No 1370/2007 (which allows for direct awards of contracts under certain value or distance thresholds).

(32) An examination of the legal provisions applicable to awarding contracts and issuing licences for operating public bus transport services in Norway shows that such contracts and licences are currently granted on a non-discriminatory basis. The procedures for granting licences and awarding contracts, and the relevant criteria are the same for all market operators, therefore, this cannot amount to a restriction of access to the market for the purposes of this Decision.

(33) The free access to this activity was also confirmed by the Norwegian Competition Authority ([40]).

([34]) Which instrument applies is dependent on, *inter alia*, the nature of the contract awarded and whether the conditions of Article 11 of Directive 2014/25/EU regarding the provision or operation of a network are met. The Applicant has stated that PTAs generally follow Directive 2014/25/EU when awarding contracts for the operation of public bus transport services, however, some PTAs have awarded contracts under Directive 2014/24/EU and the tendering requirements under Regulation (EC) No 1370/2007 may apply to some contracts.

([35]) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65) and incorporated into the EEA Agreement by Joint Committee Decision No 97/2016 (OJ L 300, 16.11.2017, p. 49 and EEA Supplement No 73, 16.11.2017, p. 53).

([36]) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114), incorporated into the EEA Agreement by Joint Committee Decision No 68/2006 (OJ L 245, 7.9.2006, p. 22 and EEA Supplement No 44, 7.9.2006, p. 18).

([37]) Page 6 of the Request.

([38]) Document No 1037921, letter from the Norwegian Government dated 9 November 2018.

([39]) Case No 74680, Examination of Public Service Obligation contracts on the basis of Regulation (EC) No 1370/2007.

([40]) Page 4 of the Position adopted by the Norwegian Competition Authority on the conditions for the applicability of Article 34(1) of Directive 2014/25/EU.

(34) The Authority concludes that the activity of the operation of public bus transport services in Norway is overwhelmingly organised on the basis of public tenders, where there is also a sufficient number of bidders with 3,8 bidders on average ([41]). Participation in these tenders is possible in a non-discriminatory way.

(35) In view of the above, for the purposes of evaluating the conditions laid down in Article 34 of Directive 2014/25/EU and without prejudice to the application of competition law, the ability of the Authority to investigate Norway's compliance with Regulation (EC) No 1370/2007, Directive 2014/24/EU, Directive 2014/25/EU or any other provision of EEA public procurement law in the context of its general surveillance duties, or the application of any other field of EEA law, the access to the market for the activity of the operation of public bus transport services can be considered free *de facto* and *de jure*.

3.2. **Direct exposure to competition**

(36) To assess whether or not the second condition for exemption is met, namely that the activity covered by the Request, and which satisfies the condition of free access to the market *de jure* and *de facto*, is directly exposed to competition, the relevant product and respective geographic market is defined, and on that basis, a market analysis is performed.

(37) Direct exposure to competition should be evaluated on the basis of various indicators, none of which are, *per se*, decisive. In respect of the markets concerned by this decision, the market share of the main players on a given market constitutes one criterion, which should be taken into account. Given the characteristics of the markets concerned as bidding markets, further criteria should also be taken into account such as bidding patterns or the ability and willingness of market players to submit bids in current and future tender procedures.

(38) The present decision aims to establish whether the services concerned by the Request are exposed (in markets to which access is not restricted within the meaning of Article 34 of the Directive) to a level of competition ensuring that, also in the absence of the discipline brought about by the detailed procurement rules set out in the Directive, procurement for the pursuit of the activities concerned will be carried out in a transparent, non-discriminatory manner based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous one.

(39) In this context, it is important to keep in mind that, in the market concerned, not all market players are subject to the public procurement rules ([42]). Therefore, the companies that are not subject to those rules, when acting on those markets, have, in principle, the possibility to bring competitive pressure to bear on those other market players that are subject to public procurement rules.

(40) The Authority must determine whether the activities concerned are directly exposed to competition. To this end, it has examined the evidence provided by the Applicant as well as information provided by the Norwegian Competition Authority. The Authority has relied primarily on the market data provided by the Applicant and the Norwegian Competition Authority to assess market shares and concentration levels. In addition to the information provided by the Applicant, the Norwegian Competition Authority also relied on information from other bus operating companies in Norway and from nine PTAs ([43]).

([41]) See Page 14 of the Request.
([42]) Besides the Applicant, also Unibuss AS is subject to public procurement rules. Other operators such as Torghatten ASA, Tide AS, Boreal Bus AS or Nobina Norge AS are private operators which do not appear to fulfil the conditions to be bound by EEA public procurement rules.
([43]) Page 3 of the Position adopted by the Norwegian Competition Authority on the conditions for the applicability of Article 34(1) of Directive 2014/25/EU.

3.2.1. *Product market definition*

(41) In the Request, the Applicant defined the relevant product market as the market for the award of contracts to operate public bus transport services ([44]). The Applicant also set out its view that commercial long-distance bus services (such as express bus services), commercial short-distance services (such as airport express services) and touring coach services differ from contracted public bus transport services ([45]). Commercial bus services are governed only by the need of the market, and do not receive funding from state resources. All commercial bus services compete in the market on price, capacity, frequency or other service features. In contrast, the competition between public bus operators takes place at the level of the competitive tender procedures, namely the market for the award of contracts to operate public bus transport services, and not afterwards in the market on price, capacity, frequency or other service features. The Applicant described that accordingly, bus operators operating under a contract with a PTA usually have very little influence on basic parameters of competition for passengers, such as frequency, including timetables, fares or comfort of passengers as these features are usually determined by the awarding PTA ([46]).

(42) In the view of the Applicant, the different requirements of PTAs are not specific enough to conclude on separate product markets for the award of contracts to operate public bus transport services ([47]). In order to be awarded a contract to operate on the municipal or regional level, the bus operators have in principle to follow the same regulatory framework and can adapt their offer to the requirements of the respective PTA. According to the Applicant, the major bus operators' actual bidding patterns demonstrate such bus operators' ability and willingness to adapt their offers to the individual requirements laid down by the different PTAs, as these operators generally compete for all contracts subject to public tenders in Norway, regardless of any differences between them ([48]).

(43) The Norwegian Competition Authority considered that the relevant product market suggested by the Applicant was in accordance with established industry practice in Norway and proceeded with its assessment based on this definition proposed by the Applicant ([49]).

(44) The Commission has held in previous decisions concerning public transport (including bus services) that specific markets for the award of contracts to operate public bus services can be identified ([50]). The Commission also held that within concessionary (contracted) public bus services no distinction could be made between urban, inter-urban and long-distance contracted services, as they are usually regulated by the same regulatory framework and the requirements of PTAs had only a few distinct features that related to technical specifications ([51]).

(45) The Commission's practice also confirms the view that commercial bus services and (contracted) public bus services are part of different product markets due to the difference in the nature of competition. Competition between public bus operators takes place at the level of bidding for contracts, namely the market for the award of contracts to operate public transport bus services, and not afterwards in the market on price, capacity, frequency or other service features ([52]). Compared to commercial services, (contracted) public bus operators usually have very little influence on basic dimensions of competition such as frequencies, fares or the comfort of passengers as those features are set by the PTAs awarding the contract to provide the service. Bus operators are obliged to provide their services according to the contract with the PTA and they cannot adapt their services according to the need from passengers as commercial operators would normally do ([53]).

([44]) Page 25 of the Request.
([45]) Page 26 of the Request.
([46]) Ibid.
([47]) Ibid.
([48]) Ibid.
([49]) Page 3 of the Position adopted by the Norwegian Competition Authority on the conditions for the applicability of Article 34(1) of Directive 2014/25/EU.
([50]) See in this regard case COMP/M.1768 — Schoyens/Goldman Sachs/Swebus, paragraphs 10 and 14; case COMP/M.5557 — SNCF-P/CDPQ/Keolis/EFFIA, paragraphs 16-23; case COMP/M.5855 — DB/Arriva, paragraph 21; case COMP/M.6794 — Caisse des Depots et Consignations/Veolia Transdev, paragraphs 19-21; case COMP/M.6818 — DB/Veolia, paragraphs 19 and 56.
([51]) Case COMP/M.6818 — DB/Veolia, paragraphs 19-21; case COMP/M.5855 — DB/Arriva, paragraphs 23-24.
([52]) Case COMP/M.5557 — SNCF-P/CDPQ/Keolis/EFFIA, paragraph 17; case COMP/M.6818 — DB/Veolia, paragraphs 22 and 58; case COMP/M.5855 — DB/Arriva, paragraph 22.
([53]) Case COMP/M.6818 — DB/Veolia, paragraph 23; case COMP/M.5855 — DB/Arriva, paragraph 22.

(46) Taking into account specificities of the Norwegian bus market as referred to in recitals 41 to 42, for the purposes of evaluating the conditions laid down in Article 34 of Directive 2014/25/EU, and without prejudice to the application of competition law, the relevant product market is hereby defined as the market for the award of contracts to operate public bus transport services. The Authority has not identified in this specific case, and for the purposes referred to above, any circumstances that would justify determining the separate tenders of PTAs as separate relevant markets.

3.2.2. *Geographic market definition*

(47) As to the geographic market, the Applicant considered that the relevant market for the award of contracts to operate public bus transport services is at least national in scope, covering all contracted bus services in Norway ([54]). The Applicant argued that the Professional Transport Act provides a common regulatory framework for competitive tendering of bus services throughout Norway ([55]). The Applicant also noted that virtually all (98 percent of) ongoing contracts for public bus transport services have been awarded after competitive tendering, and most are operated as gross contracts, sharing the same main characteristics ([56]). Accordingly, any difference in the tendering procedures and contracts of different PTAs are minor and easy to overcome for bus operating companies.

(48) The Applicant emphasised that the existence of a common regulatory framework for competitive tendering of bus services throughout Norway is also reflected in the actual bidding pattern of bus operating companies currently active in the market ([57]). Bus operators Torghatten, Boreal and Nobina operate nationwide, and there is nothing preventing other bus operating companies from competing for all contracts. The Applicant asserted that with few exceptions, there has been considerable competition for all contracted bus services awarded since 1 January 2015 irrespective of any existing regional presence ([58]).

(49) However, the Applicant concluded that for the purpose of the Request, the precise geographic market definition could ultimately be left open ([59]). In its view, under any potential geographic market definition where the Applicant has ongoing contracts and/or bids for contracts, access to the market is unrestricted and fully exposed to competition.

(50) The Norwegian Competition Authority found that the precise definition of the relevant geographic market could be left open as the result of the analysis remained the same regardless of whether it was based on a narrow or broad market definition ([60]).

(51) The Applicant's position is in line with the Commission practice. In previous decisions, the Commission, while most often leaving the exact geographic market definition open, considered the relevant geographic market for the award of contracts to operate public bus transport services to be an area in which there is a common regulatory framework for competitive tendering of bus services ([61]).

(52) To conclude, for the purposes of evaluating the conditions laid down in Article 34 of the Directive, and without prejudice to the application of competition law or any other field of EEA law, the Authority considers that the relevant geographical dimension of the relevant product market is at least national in scope. This is because of the existence of a common regulatory framework, only minor differences in the tendering procedures of PTAs and the ability and willingness of bus operators to participate in award procedures all over Norway.

([54]) Page 28 of the Request.
([55]) Ibid.
([56]) Ibid.
([57]) Ibid.
([58]) Ibid.
([59]) Page 29 of the Request.
([60]) Page 3 of the Position adopted by the Norwegian Competition Authority on the conditions for the applicability of Article 34(1) of Directive 2014/25/EU.
([61]) Case COMP/M.6818 — DB/Veolia, paragraph 29; case COMP/M.5855 — DB/Arriva, paragraph 27. See also case COMP/M.5557 — SNCF-P/CDPQ/Keolis/EFFIA and case COMP/M.6794 — Caisse des Depots et Consignations/Veolia Transdev paragraph 31.

3.2.3. *Market analysis*

(53) It is considered that in respect of the market for the award of public contracts to operate public bus transport services, one indicator for the degree of competition is the market share of the biggest operator and the total market share of the most important operators in the market. According to the data submitted by the Applicant in its Request, it has the biggest market share in the relevant market with [25-30 %] based on turnover and 28 % based on volume ([62]). However, there are several strong competitors with double-digit market shares based on turnover, such as Torghatten [15-20%], Tide [15-20 %] or Unibuss [12-17 %], followed by smaller but still not insignificant market players, such as Boreal [5-10 %] and Nobina [5-10 %] ([63]). The remaining market share is split between 29 smaller bus operators. The market share figures provided by the Applicant are in line with the calculations made by the Norwegian Competition Authority ([64]).

(54) As explained in recital 45 above, the nature of competition is different in the case of public bus transport services, as companies are competing for the market and not in the market based on price, schedules or service quality. On the Norwegian market for the award of contracts to operate public bus transport services, competition for the award of contracts takes place in the form of public tenders organised by PTAs. According to the Applicant, 98 % of all ongoing contracts have been awarded through competitive tendering, and this figure will be close to 100 % by 3 December 2019 ([65]). Given these circumstances, the competitive assessment and market analysis has to examine bidding patterns and market players' ability and willingness to compete in current and upcoming tenders.

(55) The most important competitors of the Applicant are large companies often forming part of transportation companies with multinational operations. Torghatten is one of the largest transportation companies in Norway and the provider of public transportation by ferry, express boat, bus and air transport. It also operates commercial bus services and has an overall consolidated revenue of more than NOK 9 billion. Tide forms part of the transportation group DSD, operating both public and commercial bus services in Norway and with a presence also in Denmark. The consolidated revenue of the DSD group is almost NOK 6 billion. Unibuss is owned by the municipality of Oslo. The Unibuss group offers both public and commercial services in several Norwegian cities. Boreal Buss is part of the Boreal Group with extensive transport operations both in public and commercial form. Boreal's current final owner is a private equity fund from Hong Kong targeting infrastructure investment opportunities globally. Boreal's consolidated revenue is almost NOK 3 billion. Finally, Nobina forms part of the Swedish Nobina group that provides public transport services all over Scandinavia. These companies participate in tender procedures all over Norway, they have the capabilities and experience to submit bids in any Norwegian tender procedure.

(56) The Applicant has observed that from 1 January 2015, in the 58 competitive tenders in Norway, there were on average 3,8 competitors submitting bids ([66]). This figure has been confirmed by the estimations prepared by the Norwegian Competition Authority ([67]). While the number of providers varies greatly between the different contracts, from one to eight in the 46 contracts the Norwegian Competition Authority looked at, the Norwegian Competition Authority also found that PTAs are generally satisfied with respect to the number of providers ([68]). The Applicant also provided detailed information on tender procedures in the various regions of Norwegian PTAs confirming the general competitive nature of awarding public bus transport contracts in Norway ([69]). The detailed data and the Applicant's internal data also showed that there was a change of operator in approximately 40 % of all contracts subject to competitive tendering ([70]). This confirms the ability of different operators to compete efficiently.

([62]) Page 30 of the Request.
([63]) Ibid.
([64]) Page 5 of the Position adopted by the Norwegian Competition Authority on the conditions for the applicability of Article 34(1) of Directive 2014/25/EU.
([65]) Page 6 of the Request. See also the Authority's procedure mentioned in recital 31 above.
([66]) Page 14 of the Request.
([67]) Page 5 of the Position adopted by the Norwegian Competition Authority on the conditions for the applicability of Article 34(1) of Directive 2014/25/EU.
([68]) Ibid.
([69]) See pages 14 to 24 of the Request.
([70]) Page 24 of the Request.

(57) The Applicant also argued that the market for the award of public bus transport services in Norway is characterised by low barriers to entry and expansion and the Norwegian Competition Authority's assessment confirmed this finding ([71]). This finding was based on a stable and predictable income through the contracts with the PTAs, and easy access to necessary information and infrastructure as the PTAs provide the necessary infrastructure except buses ([72]). In addition, employees of the former holder of the relevant contract have the right to transfer to the new holder of the contract. Also, as tender specifications of PTAs normally require a new fleet of buses, therefore potential new operators do not enjoy any significant cost disadvantage with respect to acquisition of buses ([73]).

(58) For the purposes of this Decision and without prejudice to the application of competition law, the factors listed in recitals 53 to 57 should be taken as an indication of exposure to competition of the operation of public bus transport in Norway. This is also in line with the opinion of the Norwegian Competition Authority. It is likely that companies active in this market are subject to sufficient competitive pressure. There is nothing to indicate that the sector is not functioning in a market-driven fashion. The Authority therefore concludes that the market for the award of public contracts to operate public bus transport services is directly exposed to competition within the meaning of the Directive.

(59) The Authority takes note of the fact that the current competitive pressure in the market for the award of contracts to operate public bus transport services is essentially driven by the regulatory framework in place and PTAs organising competitive tenders, rather than providing services in-house or using the exceptions for direct award provided by the relevant EEA public procurement rules, other than limited use of direct awards for low value and/or low distance contracts. This means that changes to those policies or practices may modify the market dynamics and the overall competitive pressure on contracting entities pursuing the activity of the operation of public bus transport services concerned by this decision.

4. **CONCLUSIONS**

(60) For the purposes of this decision and without prejudice to the application of competition law, the findings of the market analysis listed in recitals 53 to 57 should be taken as an indication of exposure to competition within the meaning of Article 34 of the Directive of the activity of the operation of public bus transport services in Norway. Consequently, since the conditions set out in Article 34 of Directive 2014/25/EU are met, it should be established that Directive 2014/25/EU does not apply to contracts intended to enable the pursuit of this activity in Norway.

(61) This decision is based on the applicable law and the factual situation between January 2015 and June 2019, as it appears from the information submitted by the Applicant and by the Norwegian Competition Authority. The Authority reserves the right to revise the present decision, should the conditions for the applicability of Article 34 of Directive 2014/25/EU be no longer met, or following significant changes in the legal or factual situation,

HAS ADOPTED THIS DECISION:

1. The Act referred to at point 4 of Annex XVI to the EEA Agreement laying down the procedures for the award of public contracts in the utilities sector (Directive 2014/25/EU shall not apply to contracts awarded or design contests organised by contracting entities pursuing or having as one of their activities the operation of public bus transport services where such contracts or design contests are intended to enable them to carry out the operation of public bus transport services in Norway (such activity relating to the operation of a network providing a service to the public in the field of transport by bus).

2. This Decision is addressed to the Kingdom of Norway.

3. This Decision shall be authentic in the English language.

([71]) Page 31 of the Request and page 5 of the Position adopted by the Norwegian Competition Authority on the conditions for the applicability of Article 34(1) of Directive 2014/25/EU.
([72]) Ibid.
([73]) Page 31 of the Request.

Done at Brussels, 17 June 2019.

For the EFTA Surveillance Authority, acting under Delegation Decision No 19/19/COL

Högni S. KRISTJÁNSSON
Responsible College Member

Carsten ZATSCHLER
Countersigning as Director, Legal and Executive Affairs