JUDGMENT OF THE COURT
21 March 2018

(Failure by an EFTA State to fulfil its obligations – Directive 2004/18/EC – Public procurement – Public contract – Public works concession)

In Case E-4/17,

EFTA Surveillance Authority, represented by Carsten Zatschler, Erlend Leonhardsen, Maria Moustakali, Michael Sánchez Rydelski, Øyvind Bø and Marlene Lie Hakkebo, members of its Legal & Executive Affairs Department, acting as Agents,

applicant,

v

The Kingdom of Norway, represented by Torje Sunde, advocate, Office of the Attorney General (Civil Affairs), and Ingunn Jansen, senior adviser, Ministry of Foreign Affairs, acting as Agents,

defendant,

APPLICATION for a declaration that by incorrectly classifying a public contract, having as its subject matter the construction and operation of an underground car park under Torvet in Kristiansand, as a "service concession" rather than as a "works concession", and by carrying out a tender procedure which is not in line with the requirements under the EEA rules on public procurement, the Kingdom of Norway has breached provisions of the Act referred to at point 2 of Annex XVI to the Agreement on the European Economic Area (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) in conjunction with the Act referred to at point 6a of Annex XVI to the Agreement (Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV)),

THE COURT,

composed of: Páll Hreinsson, President and Judge-Rapporteur, Per Christiansen and Nicole Kaiser (ad hoc), Judges,

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by Michael Sánchez Rydelski and Erlend Leonhardsen, and the defendant, represented by Torje Sunde, at the hearing on 12 December 2017,

gives the following

Judgment

I Introduction

1 In April 2015, the Municipality of Kristiansand ("the municipality" or "the contracting authority") in Norway launched a tender procedure in the form of a services concession for the construction and operation of an underground car park. The EFTA Surveillance Authority ("ESA") has brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), contending that the project ought to have been tendered out as a public works concession. The project would then have been subject to the rules laid down for public works concessions in 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 2004 L 134, p. 114, as corrected by OJ 2004 L 351, p. 44, and Norwegian EEA Supplement 2009 No 34, p. 216) ("the Directive"). ESA argues that Norway has incorrectly described the subject matter of the public contracts, failed to publish an EEA-wide contract notice, and that it did not respect the minimum time limit for the submission of applications in an award procedure.

2 Norway contests the action and argues that the contracts did not constitute a public works concession.

II Legal background

EEA law

3 Article 65(1) of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *Annex XVI contains specific provisions and arrangements concerning procurement which, unless otherwise specified, shall apply to all products and to services as specified.*

4 The Directive was incorporated into the EEA Agreement at point 2 of Annex XVI to the Agreement by Joint Committee Decision No 68/2006 of 2 June 2006, which entered into force on 18 April 2007 (OJ 2006 L 245, p. 22, and Norwegian EEA Supplement 2006 No 44, p. 18). The Directive applied in the EEA at the relevant time. It has since been repealed and replaced by 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 2014 L 94, p. 65).

5 Recital 10 in the preamble to the Directive reads:

> *A contract shall be deemed to be a public works contract only if its subject matter specifically covers the execution of activities listed in Annex I, even if the contract covers the provision of other services necessary for the execution of such activities. Public service contracts, in particular in the sphere of property management services, may, in certain circumstances, include works. However, insofar as such works are incidental to the principal subject-matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the contract as a public works contract.*

6 Recital 36 in the preamble to the Directive reads:

> *To ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community. The information contained in these notices must enable economic operators in the Community to determine whether the proposed contracts are of interest to them. For this purpose, it is appropriate to give them adequate information on the object of the contract and the conditions attached thereto. Improved visibility should therefore be ensured for public notices by means of appropriate instruments, such as standard contract notice forms and the Common Procurement Vocabulary (CPV) provided for in Regulation (EC) No 2195/2002 of the European Parliament and of the Council as the reference nomenclature for public contracts. In restricted procedures, advertisement is, more particularly, intended to enable contractors of Member States to express their interest in contracts by*

seeking from the contracting authorities invitations to tender under the required conditions.

7 Article 1(2) of the Directive reads:

(a) 'Public contracts' are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) 'Public works contracts' are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

[…]

(d) 'Public service contracts' are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

A public contract having as its object both products and services within the meaning of Annex II shall be considered to be a 'public service contract' if the value of the services in question exceeds that of the products covered by the contract.

A public contract having as its object services within the meaning of Annex II and including activities within the meaning of Annex I that are only incidental to the principal object of the contract shall be considered to be a public service contract.

8 Article 1(3) of the Directive reads:

'Public works concession' is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.

9 Article 1(4) of the Directive reads:

'Service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

10 Article 1(14) of the Directive reads:

> *The 'Common Procurement Vocabulary (CPV)' shall designate the reference nomenclature applicable to public contracts as adopted by Regulation (EC) No 2195/2002, while ensuring equivalence with the other existing nomenclatures.*
>
> *In the event of varying interpretations of the scope of this Directive, owing to possible differences between the CPV and NACE nomenclatures listed in Annex I, or between the CPV and CPC (provisional version) nomenclatures listed in Annex II, the NACE or the CPC nomenclature respectively shall take precedence.*

11 Article 17 of the Directive reads:

> *Without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4).*

12 Article 36(2) to (8) of the Directive reads:

> *2. Notices sent by contracting authorities to the Commission shall be sent either by electronic means in accordance with the format and procedures for transmission indicated in Annex VIII, paragraph 3, or by other means. In the event of recourse to the accelerated procedure set out in Article 38(8), notices must be sent either by telefax or by electronic means, in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII.*
>
> *Notices shall be published in accordance with the technical characteristics for publication set out in point 1(a) and (b) of Annex VIII.*
>
> *3. Notices drawn up and transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII, shall be published no later than five days after they are sent.*
>
> *Notices which are not transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII, shall be published not later than 12 days after they are sent, or in the case of accelerated procedure referred to in Article 38(8), not later than five days after they are sent.*
>
> *4. Contract notices shall be published in full in an official language of the Community as chosen by the contracting authority, this original language version constituting the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.*
>
> *The costs of publication of such notices by the Commission shall be borne by the Community.*

5. Notices and their contents may not be published at national level before the date on which they are sent to the Commission.

Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission or published on a buyer profile in accordance with the first subparagraph of Article 35(1), but shall mention the date of dispatch of the notice to the Commission or its publication on the buyer profile.

Prior information notices may not be published on a buyer profile before the dispatch to the Commission of the notice of their publication in that form; they shall mention the date of that dispatch.

6. The content of notices not sent by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII, shall be limited to approximately 650 words.

7. Contracting authorities must be able to supply proof of the dates on which notices are dispatched.

8. The Commission shall give the contracting authority confirmation of the publication of the information sent, mentioning the date of that publication. Such confirmation shall constitute proof of publication.

13 At the relevant time, Article 56 of the Directive provided that Chapter I of Title III applied to all public works concession contracts concluded by the contracting authorities where the value of the contracts was equal to or greater than EUR 5 186 000. According to ESA's notice on Thresholds referred to in Directive 2004/17/EC and Directive 2004/18/EC, as amended by Regulation (EU) No 1336/2013, expressed in the national currencies of the EFTA States (OJ 2014 C 227, p. 9, and EEA Supplement 2014 No 41, p. 1), that amount corresponded to NOK 39 266 836.

14 Article 58(1) to (3) of the Directive reads:

1. Contracting authorities which wish to award a public works concession contract shall make known their intention by means of a notice.

2. Notices of public works concessions shall contain the information referred to in Annex VII C and, where appropriate, any other information deemed useful by the contracting authority, in accordance with the standard forms adopted by the Commission pursuant to the procedure in Article 77(2).

3. Notices shall be published in accordance with Article 36(2) to (8).

15 Article 59 of the Directive reads:

> *When contracting authorities resort to a public works concession, the time limit for the presentation of applications for the concession shall be not less than 52 days from the date of dispatch of the notice, except where Article 38(5) applies.*
>
> *Article 38(7) shall apply.*

16 Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (OJ 2002 L 340, p. 1, and Norwegian EEA Supplement 2006 No 15, p. 236) ("the CPV Regulation") was incorporated into the EEA Agreement at point 6a of Annex XVI to the Agreement by EEA Joint Committee Decision No 180/2003 of 5 December 2003, which entered into force on 6 December 2003 (OJ 2004 L 88, p. 61, and Norwegian EEA Supplement 2004 No 15, p. 18).

17 Recital 1 in the preamble to the CPV Regulation reads:

> *The use of different classifications is detrimental to the openness and transparency of public procurement in Europe. Its impact on the quality of notices and the time needed to publish them is a de facto restriction on the access of economic operators to public contracts.*

18 Recitals 3, 4 and 5 in the preamble to the CPV Regulation read:

> *(3) There is a need to standardise, by means of a single classification system for public procurement, the references used by the contracting authorities and entities to describe the subject of contracts.*
>
> *(4) The Member States need to have a single reference system which uses the same description of goods in the official languages of the Community and the same corresponding alphanumeric code, thus making it possible to overcome the language barriers at Community level.*
>
> *(5) A revised version of the CPV therefore needs to be adopted under this Regulation as a single classification system for public procurement, the implementation of which is covered by the Directives on the coordination of procedures for the award of public contracts.*

19 Article 1(1) and (2) of the CPV Regulation reads:

> *1. A single classification system applicable to public procurement, known as the 'Common Procurement Vocabulary' or 'CPV' is hereby established.*
>
> *2. The text of the CPV is set out in Annex I.*

National law

20 The Norwegian rules for tender procedures at the relevant time were set out, inter alia, in the Act of 16 July 1999 No 69 on Public Procurement (*lov om offentlige anskaffelser*) and the Regulation of 7 April 2006 No 402 on Public Procurement (*forskrift om offentlige anskaffelser*).

III Facts and pre-litigation procedure

21 On 20 April 2015, the Municipality of Kristiansand published an invitation to tender in *Doffin*, which is the Norwegian national public procurement notification database, using the Common Procurement Vocabulary code ("CPV code") equivalent for "parking services" to classify the contract. The deadline for submitting tenders was set as 12.00 on 15 May 2015.

22 In the invitation to tender, the municipality stated that it "has prepared and adopted a zoning plan for a parking facility under the market places centrally in the city area called Kvadraturen". The municipality considered that developing the facility under its own management and/or ownership was not an option. Therefore, the municipality published the invitation to tender seeking a private contractor to design, build, finance and operate a parking facility under private management.

23 According to the invitation to tender, the municipality would provide the land through a lease contract with a duration of 50 years. The invitation to tender also provided a draft of the lease contract and a draft contract for a concession for parking services. Section 1.3.2 of the invitation to tender set out an obligation for the contractor to establish an underground car park underneath Torvet, the main town square in Kristiansand, including building the necessary infrastructure on the contractor's own account and at its own risk.

24 The invitation to tender also stated that the lessee would be awarded a service concession conferring the right to offer parking services in the facility to be constructed, with a lease period of 50 years. The municipality's only obligations were to lease out the land, under which the car park would be built, and to make a one-off payment not exceeding NOK 16 800 000 for the construction of a passage connecting the car park with the library and the town hall. Moreover, the lessee would have neither the right to transfer the lease nor any putative right to ownership of the land. In the event of a termination of the lease contract, the municipality would become the owner of the structures without any remuneration.

25 According to the contract notice on *Doffin*, the value of the contract was estimated to be between NOK 24 000 000 and NOK 100 000 000. Only one tender was submitted within the deadline prescribed. The tenderer was Torvparkering AS ("Torvparkering" or "the contractor"). On 29 June 2015, the municipality and Torvparkering entered into two contracts, one of which was entitled "Service Concession Contract" whereas the other contract was entitled "Ground Lease Contract". The former contract was for a period of 50 years, with the possibility

for Torvparkering to demand extension of the contract for an additional 10 years in accordance with certain conditions, as stipulated in its Article 2. However, according to Article 3 of the "Ground Lease Contract", it may not be extended after 50 years. This means that Torvparkering may have to rent the infrastructure from the municipality during the final 10 years of operating the car park.

26 According to the second paragraph of Article 1 of the "Service Concession Contract" and the second paragraph of Article 1 of the "Ground Lease Contract", the municipality was seeking a private contractor to design, build, finance and operate a parking facility under private management. Taken as a whole, Articles 1 and 2 of the "Service Concession Contract" and Articles 1 and 2 of the "Ground Lease Contract" set out an obligation for Torvparkering to establish an underground car park beneath Torvet in Kristiansand, including building the necessary infrastructure, with a maximum of two tiers of contractors in a direct line under the principal contractor.

27 Torvparkering is required to provide parking services to the public for the duration of the "Service Concession Contract", according to, inter alia, its Article 3.2. Furthermore, according to the eighth paragraph of Article 2 of that contract, Torvparkering bears the full operating risk for the underground car park for the duration of the contract.

28 According to Articles 7.6 and 11 of the "Ground Lease Contract", Torvparkering is responsible for ensuring that buildings and structures maintain a so-called grade 1 standard, as formulated by Standards Norway in NS 3424:2012. Furthermore, when the lease eventually expires, the municipality agrees to take over buildings, structures and other fixed installations on the site. According to Articles 3 and 11, no form of compensation may be demanded from the municipality in connection with the takeover. According to Article 4 of the "Ground Lease Contract", the ground rent is NOK 1 per year. It follows, inter alia, from the third paragraph of Article 1 of the "Service Concession Contract" and the third paragraph of Article 1 of the "Ground Lease Contract", that they are mutually dependent.

29 On 13 August 2015, ESA received a complaint against Norway concerning the tender that was published by the municipality on 20 April 2015.

30 On 9 February 2016, ESA sent a letter of formal notice to Norway, concluding that Norway had breached several provisions of the Directive. In its reply of 22 April 2016, Norway contested ESA's conclusions.

31 On 13 July 2016, ESA delivered a reasoned opinion maintaining the conclusions set out in its letter of formal notice. ESA required Norway to take measures necessary to comply with the reasoned opinion by no later than 13 September 2016.

32 By a letter of 3 October 2016, Norway responded to the reasoned opinion, maintaining its position and providing some additional comments. Subsequently,

ESA brought the matter before the Court pursuant to the second paragraph of Article 31 SCA.

IV Procedure and forms of order sought

33 By an application registered at the Court on 2 June 2017, ESA lodged the present action. Norway submitted a statement of defence, which was registered at the Court on 7 August 2017. The reply from ESA was registered at the Court on 11 September 2017. The rejoinder from Norway was registered at the Court on 12 October 2017.

34 ESA requests the Court to declare that:

> *1. The Kingdom of Norway has breached provisions of the Act referred to at point 2 of Annex XVI to the EEA Agreement, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts by incorrectly classifying a public contract and by carrying out a tender procedure for the construction and operation of an underground car park under Torvet in Kristiansand which is not in line with the requirements under the EEA rules on public procurement. Specifically, the Kingdom of Norway has:*
>
> *i. incorrectly described the subject matter of the public contract by failing to use the correct, or at any rate a complete and sufficiently precise set of CPV codes, in breach of Article 58(2) of the Directive, in conjunction with Article 1(14) of the Directive and the Act referred to at point 6a of Annex XVI to the EEA Agreement (Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the CPV);*
>
> *ii. failed to publish a contract notice EEA-wide in the Official Journal of the European Union and the TED database in accordance with the legal requirements laid down in Article 58 of the Directive and;*
>
> *iii. not respected the minimum time limit for the submission of applications in an award procedure, as prescribed by Article 59 of the Directive.*
>
> *2. The Kingdom of Norway bears the costs of the proceedings.*

35 Norway requests the Court to declare that:

> *1. The application is unfounded.*
>
> 2. *The EFTA Surveillance Authority bears the costs of the proceedings*.

36 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written pleadings submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

V Assessment

Arguments submitted to the Court

37 *ESA* submits that Norway's breaches appear to be the consequence of an incorrect legal classification of the public contracts in question as a "service concession" within the meaning of Article 1(4) of the Directive. If the tender procedure had in fact involved such a concession, this would have the effect, pursuant to Article 17 of the Directive, that the provisions of the Directive would not, except for its Article 3, apply to the contracts. ESA argues, however, that the contracts should have been classified as a "public works concession" within the meaning of Article 1(3) of the Directive.

38 According to ESA, the contracts should fall within Article 1(3) of the Directive because (i) they conferred the right to exploit the work; (ii) they consisted of a financial transfer of risk; (iii) the estimated value of the project exceeded the relevant threshold; and (iv) the contracts were of the same type as a public works contract within the meaning of Article 1(2)(b). It follows that public contracts, such as these, which have as their subject matter both the construction and operation of an underground car park, constitute a public works concession.

39 Elaborating on this, ESA submits that by granting Torvparkering the right to provide parking services in return for remuneration in the form of fees to be paid by the users of the car park, the contractor has received the right to economically exploit the work, within the meaning of Article 1(3) of the Directive.

40 ESA maintains that another condition of Article 1(3) is that a public contract must necessarily encompass the execution, or both the design and execution, of works related to one of the activities referred to in Article 1(2)(b) and specified in Annex I to the Directive. In this regard, the contract notice clearly refers to the design and the construction as an essential aspect of the contract. The type of construction works to be executed therefore correspond to the activity described under Division 45 in Annex I to the CPV Regulation, which includes a subcategory described as "underground car park construction work".

41 With regard to the determination of whether a contract is a service concession or a works concession, ESA contends that, contrary to Norway's submissions, the centre of gravity is not the determining factor. Rather, the relevant test is whether the works carried out are "only incidental to the principal object of the contract" pursuant to Article 1(2)(d) of the Directive. That is not the case in the present proceedings. Public works concession contracts generally imply both the construction of a physical structure and that this construction is carried out for the

purpose of economic exploitation by the concessionaire in the form of services to be provided to the public in general. Consequently, the concept of a works concession necessarily comprises both a service and a works element, thereby rendering a distinction between works and services pointless.

42 Furthermore, ESA argues that in the present case the design and execution of works was essential for the achievement of the objective of providing parking services. Without first constructing the underground car park, it would be impossible to provide parking services underneath Torvet.

43 At the hearing, ESA also stated that it is not relevant how the contracting authorities label a certain award or contract since, otherwise, contracting authorities could avoid the application of public procurement law by simply labelling a contract as a service concession, even though in reality it constitutes a works concession.

44 As to the duration of the concession, ESA submits that whether a works concession is granted for 50 years or a different period of time cannot be of relevance for its classification under the Directive. Otherwise, contracting authorities could circumvent EEA rules on works concessions by a simple transfer of property for a limited, but yet sufficiently long period of time. With regard to the issue of ownership, ESA further argues that not only does the contracting authority retain ownership of the land, it will also eventually obtain ownership of the structures built on it. This indicates that the contracts should be classified as a public works concession. In any case, a transfer of ownership to a contracting authority is not a requisite for finding a public works or a works concession contract to be at hand (reference is made to the judgment in *Auroux and Others*, C-220/05, EU:C:2007:31, paragraph 47).

45 ESA submits that there is nothing unusual about the services element having a greater value than the works element in any public works concession. As already noted, the right to exploit the services is the remuneration for carrying out the works from the point of view of the contractor. Assuming that the contractor wishes to make a profit, the services must necessarily be more valuable than the cost of the works. If Norway's approach were to be applied, this would imply that contracting authorities could circumvent EEA law by simply awarding a works concession for a particularly lengthy period with the aim of rendering the services element more valuable compared with the construction element.

46 Referring to the case law of the Court of Justice of the European Union ("ECJ"), ESA submits that in order for a contract to be classified as a works concession, the concessionaire has to bear the main or at least the substantial financial risk of operation (reference is made to the judgments in *Eurawasser*, C-206/08, EU:C:2009:540, paragraphs 59 and 77, and *Müller*, C-451/08, EU:C:2010:168, paragraphs 65, 67 and 75). The contracts in question foresee that the financial risk resulting from the construction and operation of the underground car park will be borne entirely by the contractor. In this regard, the payment made by the contracting authority to cover the cost of the construction of corridors, which

connect the underground car park with the town hall and the library, is not sufficient to eliminate the financial risk involved in the project. Consequently, the criterion of there being a transfer of financial risk to the contractor is fulfilled.

47 ESA submits that the contracts in question fulfil the condition of Article 56 of the Directive, since their estimated value exceeds the applicable threshold for public works concessions. At the relevant time, that threshold was NOK 39 266 836 (EUR 5 186 000). Although the contract notice estimated the value of the contracts to be between NOK 24 000 000 and NOK 100 000 000, Norway has later acknowledged in its reply to ESA's letter of formal notice that the total value of the contracts is above the threshold of Article 56 and may amount to NOK 233 000 000 for parking services with an additional NOK 175 000 000 for the construction.

48 Having concluded that the contracts in question concern a "public works concession" within the meaning of Article 1(3) of the Directive, ESA submits that the contracting authority used an incorrect CPV code in its contract notice. More precisely, the contracting authority should have used CPV code 45223310-2 related to "underground car park construction work". By not doing so, ESA submits that Norway failed to specify the subject of the tender by referring to the correct CPV code. ESA adds that the Commission's Guide to the CPV states that up to 20 codes may be used in a single contract notice (reference is made to Commission Guide to the Common Procurement Vocabulary (CPV), point 6.2, available on the website of the European Union). However, the contracting authority only referred to the CPV code that corresponds to "parking services". ESA concludes that Norway has therefore incorrectly applied the CPV Regulation in breach of Article 58(2) of the Directive, in conjunction with Article 1(14) of the Directive.

49 ESA adds that it is undisputed that the contracting authority failed to publish a contract notice throughout the EEA. Instead, it only advertised the tender in *Doffin*. ESA maintains that in the case of works concessions the cross-border interest is automatically inferred by the fact that the estimated value of the award is equal to or greater than the applicable threshold. Accordingly, Article 58(3) of the Directive in conjunction with its Article 36(2) to (8) require a publication throughout the EEA of tender procedures above the threshold. It follows that the failure by the contracting authority to submit the tender invitation for publication in the Official Journal of the European Union and in the Tenders Electronic Daily database (TED) constitutes a breach of those provisions.

50 Furthermore, ESA maintains that the deadline for the submission of tenders, which the contracting authority set at only 26 days, was in breach of Article 59 of the Directive. That provision stipulates that the time limit for the presentation of applications for the concession shall not be less than 52 days, unless Article 38(5) of the Directive applies. In that case, the deadline may be shortened by seven days to a minimum of 45 days. Consequently, Norway has breached Article 59 of the Directive by not respecting the minimum time limit laid down in this provision.

51 ESA contests Norway's argument that the contracts in question do not constitute a public works contract according to the third alternative of Article 1(2)(b) of the Directive, which concerns the requirements specified by the contracting authority. Contrary to Norway's submissions, ESA argues that the requirements and specifications in the contracts in question need to be read in conjunction with the requirements set out in the zoning plan. Moreover, nothing in the applicable legislation or the case law suggests that the specifications in the present proceedings were too few for the contracts to fall within the scope of the Directive. Regardless of this, the contract would always have to be considered "of the same type as a public works contract", within the meaning of Article 1(3) of the Directive, as it falls within the ambit of the first or second alternative of Article 1(2)(b) of the Directive.

52 *Norway* submits that the contracts in question do not constitute a public works contract covered by the Directive. The object of the contracts is not the execution, design or realisation of a work, which is required for a public works contract to be at hand. Rather, the object is on the one hand to lease out land by way of a ground lease contract and on the other hand to ensure an obligation on the lessee that, in the lease period of 50 years, it undertakes to provide parking services to the public on a stable basis and within certain general interest criteria.

53 Thus, Norway argues that there is no public works contract and, consequently, no public works concession at hand. The only part that may qualify as a public works contract relates to two pedestrian access ways from the underground car park. However, the value of those works is well below the applicable threshold of the Directive.

54 Norway maintains that no consideration has been granted in the form of a right to exploit works, which is an integral part of the definition of a public works concession. Through the lease contract, Torvparkering has only been granted a right to exploit land – not to exploit a work. The underground car park is the property of Torvparkering and its exploitation of that car park is made in its capacity as an owner. This also leads to the conclusion that no public works concession is at hand.

55 Norway emphasises that ESA carries the burden of proof in this case (reference is made to the judgment in *Commission* v *Spain*, C-306/08, EU:C:2011:347, paragraph 94). Thus, ESA must prove that the contracts in question constitute a public works concession.

56 According to Norway, none of the three alternatives in the definition of a "public works contract" in Article 1(2)(b) of the Directive is fulfilled in the present case. The first and second alternatives prescribe that the object of a public works contract must be "the execution, or both the design and execution of" works related to an activity in Annex I or a work. Norway argues that a proper examination of the case file reveals that the object of the contracts was not the execution or design of works. This conclusion is supported by, first, the content of both the contracts and the tender documents; second, what was not written in the contracts, namely the

fact that they contain hardly any requirements relating to the execution or design of the underground car park; third, the fact that the municipality did not pay any consideration for the works, with the possible exception of the two pedestrian access ways, which in any case have a value below the threshold of Article 7(c) of the Directive; fourth, the fact that the municipality acquired no immediate ownership in the underground car park, nor will it do so in the foreseeable future, which indicates that the object of the contracts is not the execution or design of works; and fifth, the case history and documents from the municipal case file (for the second and third points, reference is made to the judgment in *Gestión Hotelera Internacional*, C-331/92, EU:C:1994:155, paragraph 24).

57 Furthermore, Norway argues that the third alternative in the definition of a "public works contract" in Article 1(2)(b) of the Directive is also not satisfied. This requirement classifies as public works contracts "public contracts having as their object [...] the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority". Norway maintains that, according to the case law of the ECJ, the contracting authority must have taken measures to define the characteristics of the work or, at the very least, had a decisive influence on its design (reference is made to the judgments in *Müller*, cited above, paragraph 67, and *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 44). Furthermore, it is not sufficient that the construction is carried out in accordance with the requirements set by a contracting authority in the exercise of its regulatory urban-planning powers (reference is made to the judgment in *Müller*, cited above, paragraphs 64 to 69). Norway submits that the municipality specified very few requirements with regard to the underground car park. Those requirements simply ensure typical public interest objectives. Moreover, the zoning plan leaves a wide discretion to the contractor. In fact, the implementation of the zoning plan was a private initiative.

58 Norway concludes that the contracts in question constitute neither a public works contract nor a public works concession covered by the Directive.

59 In any event, Norway states that for the contracts in question to be considered a public works concession, the contracting authority must pay consideration for works. More precisely, a public works concession is only at hand if the contracting authority has paid consideration for the works and that consideration, at least partly, consists in a right for the concessionaire to exploit the works.

60 Elaborating on the first of these two conditions, Norway maintains that if the lease fee of NOK 1 constitutes consideration, then it is consideration paid to Torvparkering for providing parking services on a stable basis and within certain public service criteria. As regards Torvparkering's use of the underground car park, Norway argues that if this constitutes consideration, then it is for the service provided and not for works.

61 As to the second of these two conditions, Norway submits that Article 1(3) of the Directive only refers to the right to exploit the work. The right to exploit land, as granted for instance by a land lease, is not covered by that definition. Thus, if a

company rents or leases a plot of land and thereby receives the right to exploit that land, such a situation does not satisfy the criteria in Article 1(3) of the Directive. Consequently, Torvparkering has not been granted any right to exploit the underground car park. On the contrary, Torvparkering is able to exploit the underground car park because it owns it (reference is made to the judgment in *Müller*, cited above, paragraphs 72 to 74). In this regard, the transfer of the underground car park to the municipality after 50 years is merely a practical consequence of the termination of the land lease.

62 Norway concludes that there is no public works concession at hand.

63 In the alternative, Norway submits that the contracts at hand must be deemed to be a mixed contract under Article 1(2)(d) of the Directive, in which case the legal classification of the contract depends on its main object. The main object of the contracts at issue, taken as a whole, is not the execution, design or realisation of a work, but rather the leasing out of land to a lessee which undertakes to provide parking services, as explained above. Thus, no public works concession is at hand.

64 While Norway acknowledges that Article 1(2)(d) of the Directive uses the wording "only incidental", the case law of the ECJ nonetheless demonstrates that the relevant legal test is to determine the main object or main purpose of the contract. If its main object is the element of service, then the contract cannot constitute a public works contract or a public works concession (reference is made to the judgments in *Commission* v *Spain*, cited above, paragraphs 90 and 91; *Gestión Hotelera Internacional*, cited above, paragraphs 21 to 23 and 26; *Commission* v *Italy*, C-412/04, EU:C:2008:102, paragraph 47; *Auroux and Others*, cited above, paragraphs 37 and 38; *Club Hotel Loutraki and Others*, Joined Cases C-145/08 and C-149/08, EU:C:2008:306, paragraphs 48 and 49; and *Impresa Pizzarotti*, cited above, paragraph 41).

65 In this regard, Norway submits further that the ECJ has emphasised that the assessment of what constitutes the main object of the contract is irrespective of whether or not this would lead to the contract falling outside the scope of secondary legislation on public procurement. Thus, there are no grounds for interpreting the definitions in the Directive widely. Furthermore, the situation must be assessed as a whole and the determination must be made in light of the essential obligations which predominate and which, as such, characterise the transaction (reference is made to the judgments in *Club Hotel Loutraki and Others*, cited above, paragraphs 48 and 49, and *Commission* v *Spain*, cited above, paragraph 91).

66 Taking these criteria into account, Norway maintains that the main object of the contracts is not the element of works. This is the case because, first, it is clear from the purpose of the two contracts; second, the element of works does not constitute the essential obligations which predominate and which, as such characterise the transaction; and third, with the exception of the two pedestrian access ways, no consideration has been paid for any works.

67 To conclude, Norway submits that the main object of the contracts, taken as a whole, was the leasing out of land by way of a ground lease contract, and to impose an obligation on Torvparkering that, during the lease period of 50 years, it undertakes to provide parking services to the public on a stable basis and within certain general interest criteria. Thus, the main object of the contract was not the element of works and no public works concession is at hand.

Findings of the Court

68 At the outset, the Court recalls that one of the main objectives of the Directive is to ensure the development of effective competition in the field of public contracts. For this reason, it was considered necessary, as confirmed by recital 36 in the preamble to the Directive, that contract notices drawn up by the contracting authorities of EEA States be advertised throughout the EEA and, furthermore, that the information contained in such notices would enable economic operators to determine whether the proposed contracts are of interest to them.

69 However, the rules of the Directive do not extend to all public contracts. In particular, Article 17 of the Directive states that without prejudice to the application of Article 3, which contains a non-discrimination clause, the Directive shall not apply to service concessions as defined in its Article 1(4).

70 The primary issue under consideration in the present proceedings is whether the two contracts for the project in Torvet in Kristiansand constitute a public works concession within the meaning of Article 1(3) of the Directive, as argued by ESA, or a different type of contract, as Norway maintains. Before turning to the assessment of the two contracts, the Court notes that they must be considered together, as follows, inter alia, from the third paragraph of Article 1 of the "Service Concession Contract" and the third paragraph of Article 1 of the "Ground Lease Contract".

71 According to Article 1(3) of the Directive, a public works concession is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment. It follows that, for the contracts in question to constitute a public works concession, they must be of the same type as a public works contract. The definition of public works contracts in Article 1(2)(b) of the Directive in turn requires the presence of a public contract as defined in Article 1(2)(a). The Court will therefore first assess whether the two contracts constitute a public contract.

72 Article 1(2)(a) of the Directive defines public contracts as contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of the Directive.

73 With regard to the requirement of pecuniary interest, the Court notes that the contracts entitle Torvparkering to a one-off payment from the municipality not

exceeding NOK 16 800 000 for the construction of a passage connecting the car park with the library and the town hall. Furthermore, the two contracts are structured in such a manner that secures Torvparkering the right to exploit the underground car park for a certain number of years. It is therefore clear that the contracts are of pecuniary interest to Torvparkering.

74 Moreover, Articles 3 and 11 of the "Ground Lease Contract" ensure that the municipality will become the owner of the underground car park "free of charge" after 50 years. This transfer of ownership entails that the municipality will be able to exploit the underground car park, inter alia for economic gain, for an unlimited period. The project is thus also of direct economic benefit to the municipality (compare the judgment in *Müller*, cited above, paragraphs 49 and 50).

75 Furthermore, the contracts are in writing and have as their object the execution of works, the supply of products or the provision of services. The Court therefore concludes that the contracts constitute a public contract within the meaning of Article 1(2)(a) of the Directive.

76 The definition of public works contracts in Article 1(2)(b) of the Directive covers, inter alia, public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I. Class 45.21 under Division 45 of Annex I to the Directive includes the subject "General construction of buildings and civil engineering works", which refers expressly to the construction of "all types of buildings". The construction of underground car parks does not feature in its list of excluded operations. In addition, one of the corresponding CPV codes for the "General construction of buildings and civil engineering works" is CPV code 45223310-2, which covers "underground car park construction work". It follows that the construction of an underground car park falls under Annex I and thus constitutes "works" within the meaning of Article 1(2)(b) of the Directive.

77 When determining whether the construction of an underground car park is the object of the contracts, the titles given to the contracts – in the present case "Service Concession Contract" and "Ground Lease Contract" – cannot be decisive, instead such a determination is a matter of EEA law, as ESA correctly submitted (compare the judgment in *Impresa Pizzarotti*, cited above, paragraph 40 and case law cited).

78 The second paragraph of Article 1 of the "Service Concession Contract" and the second paragraph of Article 1 of the "Ground Lease Contract" confirm that the municipality was seeking a private contractor to design, build, finance and operate a parking facility under private management. Taken as a whole, Articles 1 and 2 of the "Service Concession Contract" and Articles 1 and 2 of the "Ground Lease Contract" set out an obligation for Torvparkering to establish an underground car park beneath Torvet in Kristiansand, including building the necessary infrastructure, with a maximum of two tiers of contractors in a direct line under the principal contractor, and at its own risk. This was also what had been required by section 1.3.2 of the invitation to tender. In its written submissions and at the

hearing, Norway also confirmed that the municipality had wanted to build an underground car park but could not carry out that project itself due to budgetary considerations.

79 It is thus clear that a crucial objective of the two contracts was the construction of works falling under Annex I to the Directive. However, Torvparkering is also required to provide parking services to the public for the duration of the "Service Concession Contract", according to, inter alia, its Article 3.2. Consequently, there is an element of services inherent in the contracts. Since the possibility to provide parking services constitutes consideration for the construction of the car park, it appears that the services element could not have been singled out in a separate procedure. The works and services elements of the contracts therefore form an indivisible whole (compare the judgment in *Club Hotel Loutraki and Others*, cited above, paragraph 48).

80 When contracts include elements of both works and services, as is the case in the present proceedings, the question arises whether they should be considered public works contracts or public service contracts under the Directive.

81 In this regard, the Court recalls that recital 10 in the preamble to the Directive states that public service contracts may, in certain circumstances, include works. The third subparagraph of Article 1(2)(d) specifically provides that a public contract, which has as its object services within the meaning of Annex II to the Directive and includes activities within the meaning of Annex I to the Directive that are only incidental to the principal object of the contract, must be considered a public service contract.

82 Thus, where a public contract contains elements relating both to a public works contract and another type of contract, it is the main object of the contract which determines which body of EEA rules on public contracts is, in principle, to be applied (compare the judgments in *Commission* v *Spain*, cited above, paragraph 90 and case law cited, and *Impresa Pizzarotti*, cited above, paragraph 41 and case law cited). That determination must be made in light of the essential obligations which predominate and which, as such, characterise the transaction, as opposed to those which are only ancillary or supplementary in nature and are required by the very object of the contract (compare the judgment in *Commission* v *Spain*, cited above, paragraph 91 and case law cited).

83 The Court has already concluded that an important object of the contracts in question was the execution of public works, which entailed the construction of an underground car park. Another important and closely related objective was to ensure that parking services would be provided for a minimum of 50 years. However, at the time when the contracts were concluded, the construction works had not even started. In those circumstances, the main object of the contracts is the construction of the underground car park, which the subsequent provision of parking services necessarily presupposes (compare the judgment in *Impresa Pizzarotti*, cited above, paragraph 42 and case law cited).

84 The services element of the contracts is simply a consequence of Torvparkering's right to exploit the building for a limited period before the transfer of ownership to the municipality takes place. That objective does not outweigh the public works objective of the project. It follows that were it not for the construction of the underground car park, Torvparkering would not have been able to provide car park services.

85 The Court thus concludes that the contracts awarded by the municipality meet the criteria of a public works contract under Article 1(2)(b) of the Directive.

86 It remains to be assessed whether the contracts constitute a public works concession as defined by Article 1(3) of the Directive, that is, a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment. An essential characteristic of a concession is that the concessionaire bears the main or substantial operating risk (compare the judgment in *Müller*, cited above, paragraph 75 and case law cited).

87 According to the eighth paragraph of Article 2 of the "Service Concession Contract", Torvparkering bears the full operating risk for the underground car park for the duration of that contract. Moreover, there can be no doubt that consideration for the works that were to be carried out consists in the right to exploit the work together with payment. In response to Norway's argument that Torvparkering was only granted a right to exploit land, rather than being granted the right to exploit a work, it should be noted that without the "Service Concession Contract" with the municipality, Torvparkering could not exploit the car park. The Court therefore concludes that the two contracts in question constitute a public works concession within the meaning of Article 1(3) of the Directive.

88 At the relevant time, Article 56 of the Directive provided that Chapter I of Title III of the Directive applied to all public works concession contracts concluded by the contracting authorities where the value of the contracts was equal to or greater than EUR 5 186 000, which corresponded to NOK 39 266 836. In the contract notice, the value of the contract was estimated at between NOK 24 000 000 and NOK 100 000 000. In Norway's reply of 22 April 2016 to ESA's letter of formal notice of 9 February 2016, Norway stated that, due to the classification of the contracts as a service concession, the estimate only included the services element and not the projected cost for construction. In the same letter, Norway estimated the value of the construction works at NOK 175 000 000. Moreover, the estimated value of the parking services was increased to NOK 233 000 000. In light of these revised estimates, it is clear that the value of the public works concession exceeds the threshold in Article 56 of the Directive.

89 It follows that the municipality was bound to observe the rules in Chapter I of Title III of the Directive concerning public works concessions. Among those rules is the obligation on contracting authorities under Article 58(3) of the Directive to make known their intention by means of a notice published throughout the EEA in

accordance with Article 36(2) to (8) of the Directive. Since the municipality only published its notice in *Doffin*, Norway breached Article 58(3) of the Directive.

90 Moreover, contracting authorities are obliged to ensure that notices of public works concessions contain the information stipulated in Article 58(2) of the Directive, including the condition that this must be done in accordance with the standard forms adopted by the Commission pursuant to Article 77(2) of the Directive. The relevant Commission form requires contracting authorities to state the CPV code for the main object of the contract along with the CPV codes for additional objects of the contract. In the context of the present proceedings, this would have required the municipality to use CPV code 45223310-2 on "underground car park construction work" in its notice, in addition to the CPV code that the municipality did, in fact, use, which was the one concerning "parking services". As the municipality failed to include a complete and sufficiently precise set of CPV codes in its notice, the Court must conclude that Norway breached Article 58(2) of the Directive, in conjunction with Article 1(14) of the Directive and the CPV Regulation.

91 Contracting authorities must also respect the time limit for the submission of applications in response to a contract notice. According to the first paragraph of Article 59 of the Directive, this time limit shall be not less than 52 days from the date of dispatch of the notice, except where Article 38(5) applies. The latter provision allows contracting authorities under certain conditions to reduce the time limit by seven days to a minimum of 45 days. It is undisputed that the municipality published the contract notice on 20 April 2015, with the deadline for submitting tenders set for 15 May 2015. Regardless of whether Article 38(5) of the Directive applies, it suffices to note that this time limit is less than 45 days. The Court must therefore conclude that Norway breached Article 59 of the Directive.

92 In light of the above, the Court concludes that Norway, in relation to a tender procedure carried out by the Municipality of Kristiansand in 2015 for the construction and operation of an underground car park under Torvet in Kristiansand, failed to fulfil its obligations under the Directive by failing to: (i) publish a contract notice throughout the EEA in accordance with the legal requirements laid down in Article 58(3) of the Directive; (ii) use a complete and sufficiently precise set of CPV codes, in breach of Article 58(2) of the Directive, in conjunction with Article 1(14) of the Directive and the CPV Regulation; and (iii) respect the minimum time limit for the submission of applications in an award procedure, as prescribed by Article 59 of the Directive.

VI Costs

93 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has requested that Norway be ordered to pay the costs, the latter has been unsuccessful and none of the exceptions in Article 66(3) apply, Norway must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that the Kingdom of Norway has, in relation to a tender procedure carried out by the Municipality of Kristiansand in 2015 for the construction and operation of an underground car park under Torvet in Kristiansand, failed to fulfil its obligations under 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, referred to at point 2 of Annex XVI to the Agreement on the European Economic Area, by failing to:**

   (i) publish a contract notice throughout the EEA in accordance with the legal requirements laid down in Article 58(3) of the Directive;

   (ii) use a complete and sufficiently precise set of CPV codes, in breach of Article 58(2) of the Directive, in conjunction with Article 1(14) of the Directive and Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV), referred to at point 6a of Annex XVI to the EEA Agreement; and

   (iii) respect the minimum time limit for the submission of applications in an award procedure, as prescribed by Article 59 of the Directive.

2. **Orders the Kingdom of Norway to bear the costs of the proceedings.**

Páll Hreinsson Per Christiansen Nicole Kaiser

Delivered in open court in Luxembourg on 21 March 2018.

Gunnar Selvik
Registrar

Páll Hreinsson
President