# ATTORNEY GENERAL – CIVIL AFFAIRS

*Registered at the EFTA Court under No E-4/17-5*
*7th day of August 2017*

To the EFTA Court | Oslo, 7 August 2017

**STATEMENT OF DEFENCE**

**BY**

**THE KINGDOM OF NORWAY**

represented by Torje Sunde, Advocate at the Attorney General of Civil Affairs, and Ingunn Jansen, Senior Adviser at the Ministry of Foreign Affairs, acting as agents, in

**Case E-4/17 EFTA Surveillance Authority v. the Kingdom of Norway**

in which the EFTA Surveillance Authority has submitted an application pursuant to Article 31(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and where the Government of the Kingdom of Norway hereby submits a statement of defence pursuant to Article 35 of the Rules of Procedure of the EFTA Court.

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**POSTAL ADRESS:**
**P.O. BOX 8012 DEP**
**N-0030 OSLO, NORWAY**

**TELEPHONE: + 47 22 99 02 00 / + 47 +47 22 99 02 44**
**TELEFAX: + 47 22 99 02 50**
**E-MAIL: TSU@REGJERINGSADVOKATEN.NO**

**VISITING ADDRESS:**
**UNIVERSITETSGATA 8**
**OSLO**

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## 1 INTRODUCTION

1. By application to the EFTA Court ("the Court") of 2 June 2017, the EFTA Surveillance Authority ("ESA") is seeking a declaration that Norway has breached its obligations under Directive 2004/18/EC on the coordination of procedures for the award of public contracts, public supply contracts and public service contracts ("the Directive") by carrying out a tender procedure which, allegedly, was not in line with the requirements under the Directive.

2. More specifically, ESA alleges that the contracts at issue constitute a public works concession within the meaning of Article 1 (3) of the Directive, and that 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;
   (ii) failed to publish a contract notice EEA-wide in the Official Journal of the European Union and the TED database, and
   (iii) not respected the minimum time limit for the submission of applications in an award procedure.

3. The Norwegian Government ("the Government") was invited to lodge a statement of defence within 7 August 2017, cf. the Court's letter dated 7 June 2017.

4. By this statement, the Government respectfully requests the Court to conclude that the application of ESA is unfounded, and orders ESA to pay the costs of the proceedings. The main arguments of the Government may be summarized as follows:

5. First, the contracts at hand *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. The object is:

   i) to lease out land by way of a ground lease contract and
   ii) to ensure an obligation on the lessee that, in the lease period of 50 years, he undertakes to provide parking services to the public on a stable basis and within certain general interest-criteria.

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

7. Second, there has *not been granted consideration consisting in any right to exploit any works*, which is an integral part of the definition of a public works concession. The private undertaking Torvparkering has only, through the lease contract, been granted a right to exploit land – not any work. The underground car park is the property of Torvparkering, and their exploitation of that car park is made in the capacity of being owner. This also leads to the conclusion that no public works concession is at hand.

8. If the Court disagrees with any of the arguments above, the Government submits, in the alternative, that the contracts at hand must be deemed as a mixed contract, in which case the legal classification of the contract depends on its main object. The main object of that contract, taken as a whole, is not the execution, design or realisation of a work – but the object described in para. 5. Thus, no public works concession is at hand.

9. In the following, the Government will set out the facts of the case (see Section 2). Some time and space will be allowed for this. This is, first, because, the Application is very brief on this point. Second, in the opinion of the Government, this is a case where the full facts are vital for the correct legal assessment. Thereafter, the Government will return to the legal assessment of the case (Section 3) and the conclusion (Section 4).

## 2 THE FACTS OF THE CASE

### 2.1 Background for the case

10. The City of Kristiansand, in the municipality bearing the same name, is the provincial center of the South Coast region of Norway. The central area of Kristiansand is called "Kvadraturen", and the main square in that area is called "Torvet" (literally meaning "the Market").

11. For several years, the area of Kvadraturen experienced a decrease in the registered number of people making use of the area. This development was of particular concern among the businesses and economic operators in Kvadraturen. They worried that people

rather opted for shopping centers and business establishments outside the city center (in particular one called "Sørlandssenteret"), when carrying out their purchasing and other consumer activities.

12. This issue was also addressed in several meetings by the City Council of Kristiansand, and there was a growing political desire to take steps to "revitalise" the area of Kvadraturen. Different measures and initiatives were discussed to that effect, *inter alia* the increase of further parking spaces in the area.

## 2.2 The adoption of zoning plan 1279 of 6. November 2013

### *2.2.1 Introduction*

13. At 6. November 2013, the City Council of Kristiansand adopted a zoning plan ("reguleringsplan") for Torvet and its underground. The adoption also included appurtenant provisions ("reguleringsbestemmelser"), which supplement the zoning plan:

<u>Annex B.1:</u> Zoning plan (plan-ID 1279) for Torvet, map of the overground and underground

<u>Annex B.2:</u> Zoning plan (plan ID 1279), appurtenant provisions

14. The Government finds it appropriate to explain the zoning plan in more detail. First, the nature of a zoning plan will be described (Section 2.2.2), before describing the characteristics of the zoning plan at hand (Section 2.2.3).

### *2.2.2 What is a zoning plan?*

15. A zoning plan is a measure used by the municipalities in their tasks of regulating the development of land in the general interest. The use of a zoning plan is governed by the Planning- and Building Act (2008), [1] primarily by its Chapter 12:

<u>Annex B.3:</u> Chapter 12 of the Planning and Building Act (2008)

16. The Planning- and Building Act defines a zoning plan in the following manner:

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[1] Official name in Norwegian: Lov 27.06.2008 nr. 71 om planlegging og byggesaksbehandling (plan- og bygningsloven). The translated text of the full legislation is available here: www.regjeringen.no/en/dokumenter/planning-building-act/id570450/

*"The zoning plan is a land-use plan map with appurtenant provisions specifying use, conservation and design of land and physical surroundings."*[2]

17. There is a statutory duty for the municipality to adopt a zoning plan. Such duty exists *inter alia* where it is necessary to ensure "*proper planning clarification and implementation of building and construction projects, multi-use development and conservation in relation to affected private and public interests".* Furthermore, a zoning plan is required *"for the implementation of major building and construction projects and other projects which may have substantial effects on the environment and society".*[3]

*18.* Building permits may not, as a main rule, be granted if they do not correspond with the zoning plan.[4]

19. Thus, the practical rule is that, before any construction can take place in an area, a zoning plan must be in place. This is irrespective of whether the area is private or public and irrespective of whether any project foreseen in that area, is private or public.

*2.2.3 The specifics of the zoning plan for Tovet (plan-ID 1279)*

20. By adopting zoning plan 1279, the underground of Torvet was regulated for parking purposes. The practical consequence of that decision was that any future application for the construction of an underground car park would *not* be in violation of the relevant zoning plan.

21. The appurtenant provisions clarified that the underground car park could either be a conventional parking facility or an automatic one.[5] Thus, that choice was left to any potential applicant to take.

22. As regards the location of the parking facility, the appurtenant provisions stated a maximum number of floors in the case of a conventional facility. However, if an automatic parking facility was to be built, the number of floors was undecided.[6]

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[2] See Section 12-1 (1) of the Building and Planning Act (2008)
[3] See Section 12-1 (2) and (3) of the Building and Planning Act (2008)
[4] See Section 12-4 (1) and (3) of the Building and Planning Act (2008)
[5] See the appurtenant provisions, p. 1, third line
[6] See Section 4.1 of the appurtenant provisions

23. Neither the zoning plan nor the appurtenant provision required that the car park had a minimum or maximum number of parking spaces.

24. There are some provisions relating to the parking facility standard. By those provisions the Municipality ensured a well-functioning car park where aspects in the general interest were taken into consideration. The main provision reads:

*"The parking facility is to be built to a high standard for customer parking as indicated in the Norwegian Public Roads Administration's Guide 'Design and Operation of Parking Facilities' (Utforming og drift av parkeringsanlegg).*

*The parking lot rooms in any convention facility are to be without columns. Parking spaces are to be minimum 2,5 meters wide, with aisles minimum 6.3 meters wide.*

*Driving ramp incline should be maximum 1:12. Visibility, Increase of widths, and gentler incline for driving ramps in a curve should be as shown on the plan map."*

25. Furthermore, there are provisions about universal accessibility (wheelchair vans etc.),[7] about the cover (the minimum distance between the ceiling and the overground),[8] and a provision ensuring that ten per cent of parking spaces are to be suitable for electric cars[9]. There are also provisions addressing the public use of the overground and the public access to the underground car park.[10]

**2.3 The private initiative to build the underground car park**

26. The Municipality of Kristiansand decided that it was not an option to build the underground car park as a municipal undertaking. This was *inter alia* due to the financial constraints that such a project would entail.[11]

27. Consequently, in 2014, the Municipality was approached by different groups of market operators, which represented most of the private business interests in Kvadraturen. These investors expressed their desire to establish the underground car park underneath Torvet as a private initiative. In the words of these investors:

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[7] Section 4.3 of the appurtenant provisions
[8] Section 4.4 of the appurtenant provisions
[9] Section 4.5 of the appurtenant provisions (in the translation erroneously numbered 4.4)
[10] See *inter alia* Sections 1-3, 5, 7 and 8. Note that Section 6 relates to other building irrelevant to this case.
[11] See Annex B.8, p.2

*"Primarily we had hoped that the Council would understand that building robust urban infrastructure is a municipal task* […]. *The signals to date are that the Council does not wish to build the parking facility.*

*One way to resolve this important impasse might be that a limited company is set up, owned by those investors who, in some way or other, are stakeholders in fulfilment of the project. The company would then design, build and own the parking facility, and entrust operation to a professional operator who can run the car park."* [12]

28. Furthermore, that same letter points out that, since the land affected mainly was the property of the Municipality, a prerequisite for the project would be that the operators could lease the municipal land, underneath Torvet, through a land lease-agreement.[13]

Annex B.5: Letter, dated 12 May 2014 from private stakeholders

Annex B.6: Letter, dated 2 July 2014, by Kvadraturforeningen[14]

Annex B.7: Letter, dated 22 August 2014, by Kvadraturen Gårdeierforening AS[15]

## 2.4 The response of the Municipality and its case handling

29. The Municipality reacted positively to the private initiative. It was, however, tantamount for the Municipality this would remain a private initiative, which the Municipality would not partake in. This is clear from the municipal case file, see *inter alia* the explanatory proposal from the municipal administration to the City Council of Kristiansand titled *"Torvet Market Place Parking Facility - Private development, Ground Lease"*.

Annex B.8: Explanatory proposal – "Torvet Market Places Parking Facility – Private Development, Ground Lease", dated 7 April 2015

30. The document explains the case background in the following way:

[12] See Annex B.5, p. 3

[13] Contracts of land-lease ("tomtefeste") have been widespread in Norway for a long time. In 2002 there were, reportedly, between 300.000 and 350.000 land-lease agreements in Norway. See Proposal No 41 to the Odelsting (2003-2004) p. 11. The land-lease contract is a type of contract which confers a right to the lessee, to build and maintain a building on the lessor's land for a certain period of time. The land-lease is regulated by the Ground Lease Act (Official name in Norwegian: Lov 20 desember 1996 nr. 106 om tomtefeste). Chapter 7 of the Ground Lease Act is included as Annex B.4.

[14] Kvadraturforeningen is an organization representing most of the shopkeepers and merchants in Kvadraturen.

[15] Kvadraturen Gårdeierforening represents the interests of most of the estate owners in Kvadraturen.

*"The City Council has received an enquiry from Kvadraturen Gårdeierforening – the Kvadraturen Property Owners' Association, regarding the private development of an underground parking garage under the markets. The proposal was to set up a company that would design, build, operate and finance the underground car park. The Property Owners are asking to execute a Lease Contract with the Council for a volume for property under the markets.*

*The Chief Administration Officer (CAO) briefed on the plans to the Municipal Committee on 9 September 2014. It is not an option to build a municipal parking garage under the markets. Reference is made to the Council's debt ceiling and uncertainties regarding profitability of the project. Any development must take place in private hands. This matter concerns a potential lease of city ground to a private company, and the procedures and conditions to put this in place."*[16] *(emphasis added)*

31. Furthermore, the role of the Municipality was underlined as being merely a planning authority: "The Council is the planning authority, and this project will be dealt with in the regular manner for a private development entity."[17]

32. However, the zoning plan foresaw pedestrian access ways from the future car park to the Library and the City Hall block. These were municipal property and important buildings of public interest. Thus, in the case the car park would be constructed, the Municipality suggested a lump sum for those access ways, not to exceed NOK 7.5 Million and NOK 9.3 Million respectively.[18]

33. Given these circumstances, the Municipality sought external legal advice on how to proceed. They were advised that, possibly, the land-lease, given the above circumstances, could be seen as if *the Municipality* wanted to procure a service *consisting in the activity of providing parking services to the public from their plot of land*. Thus, the Municipality was advised to publish a service concession contract.

34. The Municipality has described this in the following manner:

[16] See Annex B.8, p. 2: "Background for the case – Introduction"
[17] See Annex B.8, p. 4: "Council's roles"
[18] See Annex B.8, p. 7

*"A Services Concession competition must be announced before a lease can be signed. A Services Concession cannot be awarded directly without breaking the basic principles of the European Economic Area Agreement. A direct award without competition would also be problematic in relation to the rules for government support* [state aid rules]."[19]

35. Subsequently, the City Council adopted a decision to enter into a land lease contract on the above mentioned conditions. Again, the title emphasises this to be a private and not a municipal project:

Annex B.9: Kristiansand City Council decision – "Tovet Market Place Parking Facility - Private Development, Ground Lease", dated 29 April 2015

**2.5 The tender procedure**

36. In order to ensure compliance with the basic principles of the EEA Agreement, hereunder the rules on State Aid, the Municipality published a contract notice in the Norwegian national data base Doffin on 20 April 2015. The details of the competition were given in the Invitation to Tender.

Annex B.10: Announcement of Tender Competition, 20. April 2015

Annex B.11: Invitation to Tender (only Section 1.3 and 5.1 in English translation)

37. The Invitation to Tender describes the scope of work in this way:

*"*[…] *Developing the facility under City management and/or ownership is not an option. Therefore the Council is seeking a private Contractor to design, build, finance and operate a parking facility under private direction. The Council will provide land through a lease contract with a term of 50 years* […].

*The selected Contractor will be awarded a Services Concession to operate the facility* […]."[20] (emphasis added)

38. The tender is described this way:

*"The procurement consists of the allocation of a Services Concession in addition to the execution of a lease contract for a land site.*

[19] See Annex B.8, p. 3: "Service Concession competition and contract"

[20] See Section 1.3.1 of the Invitation to Tender

*The Bidder who is awarded the Services Concession will be responsible to establish and operate the parking facility for his own account and risk. The compensation for the service to be provided consists of the right to utilise the underground car park. The responsibility for utilization will be transferred jointly with the right of use.* […]

*Kristiansand City Council will not accept any risk in connection with establishing infrastructure or construction of operation. The only provision that the Council undertakes to provide is the ground lease of the site for the duration of the lease period, and to make a fixed lump sum grant toward the access to the Library not to exceed NOK 7.5 million, and to the City Hall (Rådhus) block not to exceed NOK 9.3 million.*

*The principal purpose of the concession is to operate the parking facility, to actually offer parking opportunities for visitors."*[21] (emphasis added)

**2.6 The outcome of the competition**

39. The Municipality received one tender. The tender was from a private limited company named Torvparkering AS. Torvparkering is controlled by private investors, many being major property owners in Kvadraturen.

40. The tender from Torvparkering contained a proposal for the design, execution and operation of the underground car park. Torvparkering also informed that it had entered into a conditional turnkey contract with the private construction company Veidekke Agder AS, and a project description by that construction company was included among the tender documents.

41. In the Memorandum from the Tender competition, again it was emphasised the object and purpose of the tender:

*"The Services Concession will be granted for operation of a parking facility under Torvene in Kristiansand for a period of minimum 50 years. A ground lese contract will be concluded for the ground on which the facility will be established for an identical period."*[22]

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[21] See Section 5.1 of the Invitation to Tender
[22] See Section 1.4 of the Memorandum

*"The Service Provider/Bidder shall for his own account and risk establish the prerequisite infrastructure and for his own account and risk administer the operation of the facility. The compensation for the service to be provided will come from third parties.*

*The primary object of the procurement is the service to be provided, and it is assumed, following a concrete assessment, that the value of the service will exceed the value of the infrastructure to be established*. […]»[23] (emphasis added)

Annex B.12: Memorandum from Competition, dated 29 June 2015

**2.7 The contracts between the Municipality and Torvparkering**

*2.7.1 Introduction*

42. In accordance with the tender procedure, the Municipality and Torvparkering concluded two contracts:

Annex B.13: Services Concession Contract, dated 29 June 2015

Annex B.14: Ground Lease Contract, dated 29 June 2015

43. It is necessary to describe the characteristics of those contracts in more detail – first, the Services Concession Contract in Section 2.7.2, and then the Ground Lease Contract in Section 2.7.3.

*2.7.2 The Services Concession Contract*

44. The Services Concession Contract starts by explaining the factual background for the contract. It is *inter alia* reiterated that developing the facility under City management and/or ownership was not an option.[24]

45. The object of the contract is stipulated in the following way:

*"Torvparkering AS is hereby granted a Services Concession for operation of the parking facility under the market places in Kristiansand* […]

[23] See Section 2 of the Memorandum

[24] See Section 1, second paragraph, of the Services Concession Contract

*The Concessionaire undertakes to ensure satisfactory operation of the parking facility and bears the full operating risk. The City of Kristiansand accepts no risk whatsoever, nor will it in any way contribute to operations. The Services Concession is thus only a right to exploit commercially the infrastructure paid for by the Concessionaire during the concession period".*[25] (emphasis added)

46. Thus, Torvparkering undertook an obligation to provide parking services to the public. In addition thereto, the Municipality ensured a certain quality with regard to the parking service:

*"Operations are to be satisfactory at all times in accordance with public regulations, regulatory requirements and general quality standard in the business.*

*The parking facility is to be operated in a user-friendly way, with post-payment for parking fees, without any fines for overstaying the parking permit time. In addition, it shall offer full access to the public, and exclusive parking space reservations can only be made for up to 20 per cent of the number of parking spaces in the facility, though an exception is made for the first four years of operation where such agreements may be made for up to 35 per cent of the parking spaces.* […]"[26]

*2.7.3 The Ground Lease Contract*

47. The Ground Lease Contract also starts by setting out the factual background for the contract. In substance, it reiterates what is said in the Services Concession Contract.[27]

48. As regards the use of the building site/leasehold property, it inter alia specifies that "Lessee [i.e. Torvparkering] is to be the owner and title holder of building and structures erected on the building site".[28]

49. The leasehold period is to last for 50 years (until 29 June 2065),[29] and the lease is NOK 1 per year.[30]

[25] See Section 2, first and last paragraph, of the Services Concession Contract.
[26] See Section 3.2 of the Services Concession Contract
[27] See Section 1 of the Ground Lease Contract
[28] See Section 2, eighth paragraph, of the Ground Lease Contract
[29] See Section 3 of the Ground Lease Contract
[30] See Section 4 of the Ground Lease Contract

50. Furthermore, the Ground Lease Contract emphasises that Torvparkering is to cover all costs for the exploitation of the land.[31] However, the Municipality contributes with a lump sum for two pedestrian access ways to the Library and the City Hall block, not to exceed NOK 7.5 Million and NOK 9.3 Million respectively.[32]

51. The contract also regulates the consequences when the leasehold is terminated. This is due to the fact that the rules of the Ground Lease Act ("Tomtefesteloven") apply.[33] [34] According to Section 39 of that Act, the main rule in the case of termination of a ground-lease, is that the lessor has the right and duty to take way all his immovable and movable property on the land and put the land back into its original condition. However, if such restoration leads to an unnecessary waste of values, Section 40 of the Ground Lease Act states that both the lessor and lessee can require that the lessor assume ownership over that property against compensation. The Contract stipulates that the lessee (Torvparkering) may not take away the structures on the land, and that the lessor (Municipality) agrees to take them over, provided they maintain condition grade 1.[35]

## 3 THE LAW

### 3.1 Introduction

52. ESA has submitted that the contracts in this case, constitute a public works concession within the meaning of Article 1 (3) of Directive 2004/18/EU ("the Directive").

53. The Governments disagrees, and will explain its view in the following order:

- In Section 3.2, the Government will show that there is no public works contract at hand which is covered by the Directive. Consequently, nor can there be any public works concession in the case.
- In Section 3.3, the Government will show that the Municipality has not granted consideration for any work, consisting in the right to exploit any work. This will also lead to the conclusion that no public works concession is at hand.

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[31] See Section 6, first and second paragraph. Also, see Section 7.5, first paragraph
[32] See Section 6, third paragraph
[33] See Section 12 of the Ground Lease Contract.
[34] See description of the Ground Lease Act above, in footnote 13. The Ground Lease Act is attached as Annex B.4.
[35] See Section 11 of the Ground Lease Contract

- In Section 3.4, the Government will explain that, if the Court were to disagree with the Government with regard to the submissions in Section 3.2 and/or 3.3, the contracts in the case must, nevertheless, be deemed to constitute a mixed contract where the main object is not the works-element. Thus, no public works concession can be at hand.

54. Before going into the details, it should be emphasised that ESA carries the burden of proof in this case. Thus, ESA must prove that the contracts in question indeed constitute a public works concession. The Government refers, in particular, to C-306/08 *Commission v. Spain*, in which the ECJ dismissed the action from the Commission, due to the fact that the Commission had not proven that a public works contract was at hand. The ECJ stated that

*"According to settled case-law, in proceedings under Article 226 EC for failure to fulfil obligations, it is for the Commission to prove that failure. It is the Commission which must place before the Court all the information needed to enable the Court to establish that failure, and in doing so the Commission may not rely on any presumptions".* [36]

**3.2 The contract is not a public works contract covered by the Directive**

*3.2.1 Introduction*

55. An integral part of the definition of "public works concession" in Article 1 (3) of the Directive is the concept of "public works contract". A "public works contract" is defined by Article 1 (2)(b) of the Directive:

*"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 1, or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority".*

56. In the opinion of the Government, the contracts do not meet the conditions of the definition above. This will be explained in Section 3.2.2 and 3.2.3 below. The only part where a public works-contract may be at hand in this case, is with regard to the

[36] See C-306/08 *Commission v. Spain*, para. 94

construction of the two pedestrian access ways. This will be addressed in Section 3.2.4 below.

*3.2.2 No public works contract according to the third alternative*

57. The definition of a public works-contract in Article 1 (2)(b) of the Directive is sometimes seen as containing three alternatives. The Government finds it appropriate to start by examining the third alternative. This classifies as a public works contract "public contracts having as their object […] the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority". This alternative requires an assessment of whether requirements to any work have been specified by the Municipality, and, whether the work corresponds to this.

58. However, two clarifications must be made in that respect. First, not every involvement by the contracting authority suffices to meet those conditions. 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, has had a decisive influence on its design".[37] This has also been clarified in the definition of the new directive 2014/24/EU on public procurement, Article 1 (6) (c).[38]

59. Second, the ECJ has ruled that the conditions are not met, just because construction is carried out in accordance with requirements *set by a contracting authority in the exercise of its regulatory urban-planning powers*.[39]

60. In the opinion of the Government, it seems clear that the third alternative is not satisfied in the present case.

61. When examining the documents in the present case, it is striking how few requirements the Municipality has specified with regard to the underground car park. This becomes even more apparent, when one takes into account the complexity and magnitude of the project. In fact, not even the number of parking spaces in the underground car park has been specified. Indeed, one would assume that, if the realisation of the parking facility

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[37] C-451/08 *Helmut Müller*, para. 67. See also C‑213/13 *Impresa Pizzarotti*, para. 44
[38] Full text: «the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority *exercising a decisive influence on the type or design of the work*" (emphasis added)
[39] C-451/08 *Helmut Müller*, para. 64-69

was the object of the contract, the Municipality would have specified what number of parking spaces had been desirable.

62. ESA has submitted that the zoning plan contains requirements.[40] However, as specified above, the ECJ have ruled that there is no public works contract at hand, just because construction is carried out in accordance with requirements set by a contracting authority in the exercise of its regulatory urban-planning powers. That is exactly the case here. The zoning plan and appurtenant provisions merely contains requirements which would, so the Government submits, be relevant in any comparable zoning plan. Furthermore, the requirements ensures typical public interest-objectives – like providing universal access, facilitating the use of electric cars, ensuring sufficient access to the parking area from the public spaces etc. It should also be noted, that the zoning plan leaves wide discretion for any potential builder in the choice of what car park to build.

63. Consequently, the Government cannot see that there is a public works contract according to the third alternative of Article 1 (3) of the Directive.

*3.2.3 No public works contract according the first and second alternative*

64. The first and second alternative of the definition in Article 1 (2)(b) of the Directive, prescribes that the object of a public works contracts must be "the execution, or both the design and execution of" works related to an activity in Annex 1 or a work.

65. Whether that is the case, comes down to an assessment of the facts of the case, taken as a whole.

66. ESA has pointed out that the tender documents and contracts states that the Municipality is "*seeking a private Contractor to design, build, finance and operate a parking facility under private management".*[41] It is true, that the first part of this passage suggests that the contracts have the execution of work at least as part of its objective. However, that passage cannot be read in isolation. In the opinion of the Government, that passage merely provides the wider context for the object of the contract. When properly examining the documents of the case, it will be found that the object of the contracts was not the execution or design of works.

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[40] See para 65 of the Application

[41] See para. 64 of the Application

67. ESA has also submitted that a provision of parking services from the underground car park necessitated the construction of the parking facility. That might be true. However, that is not sufficient to meet the conditions of the definition of a public works-contract. The Directive requires that the "object" of the contract is the design or execution of works, not just that works is a "consequence" of the contract.

68. The Government submits that the object of the contracts, when taken as a whole, is:

(i) to lease out land by way of a ground lease contract, and

(ii) to ensure an obligation on the lessee that, in the lease-period of 50 years, he undertakes to provide parking services to the public on a stable basis and within certain general interest-criteria.

69. *First*, this follows from the both the contracts and tender documents.

70. The object of the Ground Lease Contract is to lease out the land underneath Torvet. This seems clear both from the wording of the contract, its purpose and its context.

71. The object of the Service Concession Contract is to ensure that the lessee provides parking services to the public. Indeed, already in the invitation to tender (and memorandum from the tender competition) it is emphasised that "*The principal purpose of the concession is to operate the parking facility, to actually offer parking opportunities for visitors."*[42] Furthermore, the obligation to offer parking services to the public is also stipulated explicitly in the Service Concession Contract: *"Torvparkering AS is hereby granted a Services Concession for operation of the parking facility under the market places in Kristiansand."* [43]

72. It is also stipulated that the obligation has to be carried out within certain general interest-criteria. See *inter alia* these following passages of the Services Concession Contract:

*"The Concessionaire undertakes to ensure satisfactory operation of the parking facility and bears the full operating risk."* […][44]

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[42] See para 38 and 41 above
[43] See para 45 above
[44] See para 45 above

*"Operations are to be satisfactory at all times in accordance with public regulations, regulatory requirements and general quality standard in the business.*

*The parking facility is to be operated in a user-friendly way, with post-payment for parking fees, without any fines for overstaying the parking permit time. In addition, it shall offer full access to the public, and exclusive parking space reservations can only be made for up to 20 per cent of the number of parking spaces in the facility, though an exception is made for the first four years of operation where such agreements may be made for up to 35 per cent of the parking spaces.* […]"[45]

73. By the latter provision the Municipality set a cap on the amount of "exclusive parking spaces", so that parking services were provided to the public. It also ensured that the parking services were offered on "consumer friendly" conditions.

*74.* *Second*, as important as the wording of the contracts and tender documents themselves, it is important to note what is *not* written in the contract. The Government submits that, *if* the object of the contracts were the execution or design and execution of the underground car park, the Municipality would have specified requirements in the contracts relating to the work in a greater extent than what has been done. However, as already pointed out above (see Section 3.2.2), there are hardly any relevant requirements related to the execution or design of the underground car park. According to the case law of the ECJ, [46] this strongly suggests, that the object of the contracts cannot be the design or execution of the works.

*75.* *Third*, as will be explained in Section 3.3 below, the Municipality has not paid any consideration for the works (with the possible exception of the two pedestrian access ways). Again – according to the case law of the ECJ; this strongly suggests that the object is not the design or execution of works.[47]

76. *Fourth,* the Municipality took no immediate ownership in the underground car park, nor in the foreseeable future.[48] Admittedly, this is not necessary for a public works-contract

[45] See para. 46 above
[46] C-331/92 *Gestión Hotelera,* para. 24
[47] See, again, C-331/92 *Gestión Hotelera,* para. 24
[48] ESA has made a point that the underground car park is to be transferred to the Municipality in 50 years' time (in 2065). However, that does not make works the object of the contract. See the Government's view in para. 119-121 below.

to be at hand. However, it indicates that the object is not the execution or design of works.

77. *Fifth,* the Government contends that the case history and the documents from the municipal case-file, support the view of the Government. As is clear, the initiative to build the underground car park did not come from the Municipality, but from private investors. Furthermore, the case history clearly shows that the Municipality did not want to partake in the project. The Municipality only wanted to accommodate the private initiative by leasing out its land, to ensure a stable parking service to the public if that work was put up, and to execute its normal role as a building and planning authority. The Government finds evidential support from this in the Municipal case file, which has been described in Section 2.4 above.

78. Consequently, the Government cannot see that the contracts at hand constitute a public works contract according to the first and second alternative of Article 1 (2)(b) of the Directive.

*3.2.4 As regards the pedestrian access ways ("corridors")*

79. The only part of the case where a public works contract appears to be at hand, is the part of the contracts concerning the two pedestrian access ways between the car park and the Library and City Hall Block (also named "corridors" by ESA[49]). Indeed, the contracts specify work to be carried out in that regard, which would seem to meet the conditions of Article 1 (2) (b) of the Directive.

80. However, the value of that public works contract is well below the threshold of the Directive, cf. Article 7 (c) of the Directive.[50] Thus, such a contract would not be covered by the Directive and would only be subject to the basic principles of the Agreement relating to transparency etc. As far as the Government can see, the tender procedure carried out by the Municipality has been in accordance with those principles.

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[49] See *inter alia* para. 65 of the Application

[50] See para. 50 above

*3.2.5 Conclusion*

81. On this basis, the Government cannot see that a public works contract is at hand, within the meaning of Article 1 (2)(b) of the Directive. That is with the exception with regard to the pedestrian access ways, which however is well below the threshold of the Directive.

82. Consequently, the contracts do not constitute public works contracts, or public works concessions, covered by the Directive.

**3.3 There has not been granted consideration consisting in any right to exploit any works**

*3.3.1 Introduction*

83. An alternative approach to this case is by analysing whether there has been granted any consideration by the Municipality. This will also lead to the conclusion that there is no public works concession at hand.[51]

*3.3.2 The law*

84. In order for a public works concession to be at hand, the contracting authority must pay consideration for works.

85. This follows from the definition of public contract in Article 1 (2) (a) of the Directive, where it is stipulated that the contract must be "for pecuniary interest". The ECJ has explained, in the context of a case concerning a public works contract, that the notion of "for pecuniary interest" requires that there must be paid consideration from the contracting authority, and this consideration *must be paid in exchange for the execution of works*.[52]

86. This also follows from the definition of public works concession in Article 1 (3) of the Directive. There it is stated that a public works concession is only at hand if there is "consideration for the works to be carried out".

87. Furthermore, as regards *public works concessions*, Article 1 (3) specifies that the consideration for the works may consist "solely in the right to exploit the work or in this right together with payment." The notion of "work" is defined in Article 1 (2) (b), second

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[51] This point of law has apparently not been analysed in the Application, see *inter alia* para. 59-60 of the Application

[52] See C-451/08 *Helmut Müller*, para. 48 (and para. 60)

paragraph, as “the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function”.

88. To sum up: A public works concession is only at hand, if

(i) the contracting authority has paid consideration for the works, and

(ii) that consideration, at least partly, consists in a right for the concessionaire to exploit the works.

*3.3.3 The first step – is there consideration for works?*

89. It should be assessed whether the Municipality has granted consideration for any works.

90. The first element to consider is the issue of the lease-fee of NOK 1. If this is consideration, it is consideration for the service provided by Torvparkering to the Municipality to provide parking services on a stable basis and within certain public service-criteria.

91. The second element to consider is the payment paid by the Municipality for the two pedestrian access ways to the Library and City Hall. Admittedly, this appears to be consideration for the construction of those access ways, which constitutes “works”.

92. ESA has claimed that consideration is also paid, consisting in Torvparkering’s right to exploit the underground car park.[53] There are, however, two problems with that approach. First, if this is consideration at all, it is consideration for the aforementioned service and not for works. The second problem will be explained below, in section 3.3.4.

93. Against this background, the Government submits that, at best, the only consideration paid for any works, is related to the pedestrian access ways.

*3.3.4 The second step – is there consideration consisting in the right for the concessionaire to exploit the work?*

94. ESA has claimed that this case is a public works concession, due to the fact that the Municipality has granted Torvparkering the right to exploit the underground car park.[54] The Government does not agree.

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[53] See para. 59 and 60 of the Application

[54] See para. 59 and 60 of the Application.

95. Torvparkering has, through the Ground Lease Contract, been granted a right to exploit the land underneath Torvet. However, that does not satisfy the criteria in Article 1 (3) of the Directive – since the "right to exploit the work" directly refers to the definition of "work" in Article 1 (2)(b) last sentence:

*"A work means the outcome of building or civil engineering works taken as a whole which is sufficient of itselt to fulfil an economic or technical function"*

96. The right to exploit *land*, being 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.

97. Thus, Torvparkering has not been granted any right to exploit the work (the underground car park). On the contrary, they are able to exploit the underground car park, because they own it.

98. The Government submits that this interpretation is supported by the case law of the ECJ. In C-451/08 *Helmut Müller*, the ECJ stated that:

*"In order for a contracting authority to be able to transfer to the other contracting party the right to exploit a work within the terms of that provision, that contracting authority must be in a position to exploit that work.*

*That will normally not be the case where the only basis for the right of exploitation is the right of ownership of the economic operator concerned.*

*The owner of land has the right to exploit that land in compliance with the applicable statutory rules. As long as an economic operator enjoys the right to exploit the land which he owns it is in principle impossible for a public authority to grant a concession relation to that exploitation."*[55]

99. The rationale of this ruling is applicable in our case: The Municipality has never been "in a position to exploit the underground car park" – because that car park is the property of

[55] See para. 72-74 of that judgement.

Torvparkering. Consequently, the Municipality could not grant, and has not granted, any consideration for any work consisting in the right for Torvparkering to exploit *that work*.

100. Another result would lead the Directive to find application on a number of different situations not envisaged by the Directive – for instance where a state body leases or rents out its own land to any private undertaking wanting to build infrastructure on it for its own exploitation. To extend the directive to such a situation is unfounded, and has been cautioned against.[56]

101. This is also now emphasised by Directive 2014/23/EU on the award of concession contracts. Although not being directly applicable to the case at hand, that directive provides some useful guidance on the notion of public concession contracts. The Government would like to draw the attention to the 15th recital in the Preamble of that Directive, which explicitly deals with our question:

"[…] *certain agreements having as their object the right of an economic operator to exploit <u>certain public domains or resources under private or public law, such as land or any public property</u>, in particular in the maritime, inland ports or airports sector, whereby the State or contracting authority or contracting entity establishes only general conditions for their use without procuring specific works or services, <u>should not qualify as concessions within the meaning of this Directive.</u> This is normally the case with <u>public domain or land lease contracts</u> which generally contain terms concerning entry into possession by the tenant, the use to which the property is to be put, the obligations of the landlord and tenant regarding the maintenance of the property, the duration of the lease and the giving up of possession to the landlord, the rent and the incidental charges to be paid by the tenant."*[57]

102. To conclude, the Municipality has not granted consideration for any work, consisting in the right to exploit the underground car park.

*3.3.5 Conclusion*

103. Given the reasons above, there is no public works concession contract at hand.

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[56] See *in particular* the Advocate General in C-306/08, para. 75-77

[57] Such a case would be governed by other EEA-rules.

## 3.4 In the alternative: the main object of the contract is not the procurement of works

### *3.4.1 Introduction*

104. If the Court disagrees with the Government with respect to the submissions set out above in Section 3.2 and/or 3.3, the Government submits that the contracts at hand, nevertheless, cannot be deemed to constitute a public works concession.

### *3.4.2 As to the law*

105. Article 1 (2), second paragraph, of the Directive states that

*"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."*

106. Furthermore, in the case law of the ECJ, the legal classification of a mixed contract has been formulated as a question of what is the *main object* of the contract. If the main object of the mixed contract is the service-element, then the contract cannot constitute a public works contract/concession. See *inter alia* C-306/08 *Commission v. Spain*:

*"It is clear, moreover, from the case-law of the Court that, where a 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 European Union rules on contracts is to be applied in principle* […]

*That determination must be made in the light of the essential obligations which predominate and which, as such characterize the transaction, as opposed to those which are only ancillary or supplementary in nature and are required by the very object of the contract".*[58]

107. The ruling in *Commission v. Spain* follows an already steady line of case law from the ECJ.[59] It should be noticed that the ECJ seems to apply the wording "main object" in the

[58] See C-306/08 *Commission v. Spain*, para. 90-91
[59] See *inter alia* C-331/92 *Gestión Hotelera,* para. 23; C-412/04 *Commission v. Italy* para 47; C-220/05 *Auroux*, para. 37 and 38; and Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others*, para. 48-49. See also C-213/13 *Impresa Pizzarotti*, para. 41.

sense of *purpose*. In fact, sometimes the ECJ writes "main purpose" instead of "main object".[60] Thus, legal theory summarizes the case-law in this way:

"[It is] *clear that, at least for the cases in which the contract has a principal object, classification is to be determined by considering what is the main object of the contract (in the sense of purpose) rather than* […] *applying a test based on the relative value of the different elements."*[61]

108. The ECJ has emphasised that the assessment of what is the main object/main purpose of the contract is irrespective of whether or not this would lead to the contract falling outside a procurement-directive.[62] Thus, there are no grounds for interpreting the definitions in the directive widely. It should be recalled that, if a contract falls outside a directive, it would still be covered by the basic principles of the Agreement.

109. Furthermore, the ECJ has emphasised that the situation must be assessed as a whole.[63] Furthermore, as is clear from the quotation from *Commission v. Spain* above, the determination must be made in the light of "the essential obligations which predominate and which, as such characterize the transaction".[64]

*3.4.3 The assessment of the case at hand*

110. In the opinion of the Government, the main object of the contracts at hand is not the works-element.

111. *First*, this is clear from the purpose of the contracts. Both the wording of the contracts, the tender documents, and the documents from the municipal case-file show that the Municipality had no interest in the works-element. The principal purpose was to lease out the land and to ensure that parking services were provided on a stable basis the next 50 years and in accordance with certain general interest-criteria. In fact, the exact wording in the invitation to tender (and the memorandum from the Tender competition") is:

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[60] See C-412/04 *Commission v. Italy* para 47; and C-220/05 *Jean Aroux and Others*, para. 37-38

[61] See Sue Arrowsmith, *The Law of Public and Utilities Procurement, Regulation in the EU and UK*, Volume 1, third Edition (2014), Section 6-80

[62] See Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others*, para. 49

[63] See Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others*, para. 48

[64] See C-306/08 *Commission v. Spain*, para. 91. See also Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others*, para. 48

*"The principal purpose of the concession is to operate the parking facility, to actually offer parking opportunities for visitors."*[65]

112. *Second*, the Government cannot see that the works-element constitutes "the essential obligations which predominate and which, as such characterize the transaction". Here, the Government refers to Section 3.2 above, where the Government, in detail, undertook an extensive analysis of the case. In light of that analysis, it should be held that the predominant nature of the transaction is not any works-element. The predominant nature is the land-lease and the service-element.

113. *Third*, with the exception for the two pedestrian access ways, no consideration has been paid for any works. The Government refers to Section 3.3.3 above. When ESA contends that "the right to exploit the service is the quid-pro-quo for carrying out the works from the point of view of the contractor",[66] that is a wrong assessment of the facts.

114. To conclude, the Government submits that the main object of the contract, taken as a whole, was the leasing out of land by way of a ground lease contract, and to ensure an obligation on the lessee that, in the lease period of 50 years, he 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 works-element, and no public works concession is at hand.

*3.4.4 Concerning some of the arguments by ESA*

115. The Government would like to address some of the arguments of ESA.

116. In the pre-litigation communication between ESA and the Government, it has been discussed whether the services or works-element is of greatest value, and whether such an approach is legally relevant at all.[67] The Government finds such an approach of little interest in the analysis. However, it should be pointed out that, the value of the contracts for Torvparkering, for a major part, seems to consist in the indirect consequences of the project – namely the increased trade for the businesses in Kvadraturen. As already pointed out, many of the owners of Torvparkering are

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[65] See para. 38 and 41 above
[66] See par a. 95 of the Application
[67] Also see para. 99 of the Application

stakeholders in Kvadraturen, thereby benefitting from this increased trade. This also explains why this private initiative was taken at all – and why the project came into being.

117. ESA has submitted that the provision of services necessitates the building of an underground car park, and thus, that the works-element must be held as the main object of the contract.

118. The Government has already partly addressed this argument above.[68] The Government agrees that the provision of services necessitates the building of the car park. However, that fact does not suffice to classify a mixed contract as a public works contract or a public works concession. In fact, there are many services which cannot be provided without an infrastructure. That does not mean that the construction of infrastructure necessary for the provision of a service converts a service contract into a public works contract. In the opinion of the Government, ESAs view has no basis in the case law of the ECJ, as explained above. The assessment of the main object and purpose of the contract, based on the criteria developed by the ECJ, would be irrelevant if all contracts requiring elements of construction with a subsequent economic exploitation in form of services should be defined as a "public works concession".

119. Furthermore, ESA has pointed out that the Municipality will become owner of the underground car park in 50 years, *i.e.* in 2065.[69] ESA submits that this shows that the main-object of the contracts is work. The Government does not agree.

120. In the opinion of the Government, the transfer of the underground car park to the Municipality in 50 years is merely a practical consequence of the termination of the land lease – and is as such merely incidental to the main object. Furthermore, the technical condition, status and value of an underground car park in 2065 are most uncertain. Also technological and political changes (*i.e.* the phase out of cars in city centers) underlines this.

121. Consequently, the Government cannot see that the transfer of ownership in 50 years changes the assessment carried out above. This conclusion is also supported by the 15th

[68] See para. 67 above

[69] See para. 88-89 of the Application

recital of directive 2014/23/EU, which excludes land-lease contracts from the public works concession-term, also when they regulate “*the giving up of possession to the landlord”*.

*3.4.5 Conclusion*

122. In conclusion, if the Court disagrees with the Government with respect to the submissions set out above in Section 3.2 and/or 3.3, the contracts at hand must be deemed to be a mixed contract. In accordance with the case-law of the ECJ, the classification of the contract depends on whether the main object of the contract is the provision of services or works. That main object is not the works-element. Thus, no public works concession is at hand.

## 4 CONCLUSION

123. The Government respectfully requests the Court to declare that:

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

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Oslo, 7. August 2017

Torje Sunde
Agent
Attorney General - Civil Affairs

Ingunn Jansen
Agent
Ministry of Foreign Affairs

## 5 SCHEDULE OF ANNEXES

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