

Brussels, 2 June 2017
Case No: 80421
Document No: 849279

*Registered at the EFTA Court under N°
E-4/17-01 on 2 day of June 2017*

EFTA SURVEILLANCE
AUTHORITY

IN THE EFTA COURT

APPLICATION

submitted pursuant to Article 31 (2) of the Agreement between the EFTA States on the
Establishment of a Surveillance Authority and a Court of Justice by

THE EFTA SURVEILLANCE AUTHORITY

represented by Carsten Zatschler,
Maria Moustakali, Øyvind Bø,
and Marlene Lie Hakkebo
Department of Legal & Executive Affairs,
acting as Agents,

applicant,

AGAINST

THE KINGDOM OF NORWAY

defendant,

Seeking 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 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*) in conjunction with 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*).

Table of Contents

1	INTRODUCTION	3
2	LEGAL FRAMEWORK	4
2.1	The EEA Agreement	4
2.2	Directive 2004/18/EC	4
2.3	Regulation No 2195/2002/EC	6
2.4	Relevant national law	7
3	THE FACTS OF THE CASE	9
4	THE PRE-LITIGATION PROCEDURE	10
5	ESA'S SUBMISSIONS	11
5.1	Introduction	11
5.2	The contract in issue constituted a "public works concession" rather than a "services concession"	11
5.3	The contracting authority has used the incorrect CPV code to describe the subject matter of the contract	22
5.4	The contracting authority failed to publish a contract notice EEA-wide	24
5.5	The contracting authority did not respect the minimum time limit for the submission of applications in an award procedure	25
6	CONCLUSION	26
7	SCHEDULE OF ANNEXES	27

1 INTRODUCTION

1. In April 2015, the Municipality of Kristiansand in southern Norway launched a tender procedure for the construction and operation of an underground car park underneath the main town square, known as “Torvet”, in Kristiansand. The very major construction works involved providing 400-450 new parking spaces on two underground levels and have entailed digging up central Kristiansand for more than a year. Notwithstanding the magnitude of these construction works, the project was not tendered out as a public works concession. Instead, the project was incorrectly described as being merely for the provision of “parking services” and the tender procedure did not comply with the detailed rules laid down in EEA law governing public works concession tenders, notably Directive 2004/18/EC *on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*.¹
2. By the present Application, the EFTA Surveillance Authority (“ESA”) seeks a declaration that the Kingdom of Norway has breached provisions of Directive 2004/18 by carrying out a tender procedure which is not in line with the requirements under the EEA rules on public procurement in three concrete ways. ESA submits 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 specific contract in issue was expressed as concerning the “design, construction, financing and the operation of an underground car park”.² The tender was published in the Norwegian national notification database for public procurement, Doffin, on 20 April 2015, using the CPV code equivalent for “parking services”.³ According to the contract notice, the value of the contract has been estimated to be between 24.000.000 and 100.000.000

¹ Act previously referred to at point 2 of Annex XVI to the EEA Agreement, incorporated by Decision of the EEA Joint Committee No 68/2006 of 2 June 2006 (*Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*. (“the Directive”)).

² See Point II.1.4) of the contract notice, containing a brief description of the subject matter of the contract, which states in Norwegian: “Kommunen søker derfor etter en privat leverandør som kan progettare, bygge, finansiere og drifte et parkeringsanlegg i privat regi” Available here: <https://www.doffin.no/Notice/Details/2015-530214>

³ CPV Code No 63712400.

NOK.⁴ Only one tender was submitted within the prescribed deadline on 15 May 2015. The tender was revised after negotiations, and the contract was eventually awarded on 24 June 2015 and signed by the parties on 29 June 2015.

4. As will be explained in further detail below, the breaches in issue here go hand-in-hand with an incorrect legal classification of the subject matter of the public contract in question as a “services concession” rather than a “works concession”. This classification is important as the provisions of Directive 2004/18 only apply to the latter type of contract. An incorrect classification could thus result in a breach of the Directive to the extent that the provisions of the Directive governing works concessions differ from the general EEA public procurement law applicable to services concessions.
5. A clarification from the EFTA Court is of particular importance in the present case, as Norway has consistently throughout the pre-litigation procedure challenged ESA’s interpretation of the applicable EEA rules on public procurement.
6. In the following sections of this application, ESA will describe the applicable legal framework before briefly setting out the facts of the case and the pre-litigation procedure. ESA’s substantive submissions will first focus on the key classification issue, detailing why the contract in issue is to be classified as a works concession rather than a services concession. Finally, ESA will explain the concrete breaches of the relevant EEA rules on public procurement which result from an incorrect classification.

2 LEGAL FRAMEWORK

2.1 The EEA Agreement

7. Article 65(1) of the EEA Agreement provides that Annex XVI to the Agreement contains specific provisions and arrangements concerning procurement which, unless otherwise specified, are to apply to all products and to certain specified services.

2.2 Directive 2004/18/EC

8. Directive 2004/18/EC *on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts* (“the Directive” or “the Public Procurement Directive”) was incorporated into the EEA Agreement on 18 April 2007, which was also the deadline for the transposition of the Directive by the EEA EFTA States.
9. Directive 2004/18 has been replaced by *Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18*

⁴ Point II.2.1) of the contract notice, available here: <https://www.doffin.no/Notice/Details/2015-530214>.

(“Directive 2014/24”), following its incorporation into the EEA Agreement by Decision of the Joint Committee No 97/2016, which has entered into force on 1 January 2017. However, Directive 2004/18 remains nonetheless the relevant EEA Act for the purpose of the assessment of compliance with the EEA rules on public procurement in the present case, since the Directive was still in force in Norway at the time that the Municipality of Kristiansand launched the tender procedure in question.⁵

10. Article 1(14) of the Directive provides:

“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”

11. Article 1(2)(b) of the Directive defines that:

“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.”

12. Article 1(2)(d) of the Directive provides:

“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.

13. Article 1(3) of the Directive defines:

“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.”

14. Article 1(4) of the Directive defines:

“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.”

⁵ Case C-337/98, *Commission v France*, EU:C:2000:543, paras. 36 and 37; Case C-576/10, *Commission v Netherlands*, EU:C:2013:510, para. 52.

15. Article 56 of the Directive provides that Chapter I, entitled “rules governing public works concessions”, shall apply to all public works concession contracts concluded by the contracting authorities where the value of the contracts is equal to or greater than the threshold set out in this provision, i.e. 39.266.836 NOK (5.186.000 EUR) at the relevant time.⁶
16. Article 58 of the Directive provides:
- “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). 4. Article 37 on the publication of notices shall also apply to public works concessions.”*
17. Article 58(2) of the Directive provides that 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).
18. Article 36(2) to (8) referred to in Article 58(3) define the form and manner of the publication of notices, which entails *inter alia* the obligation upon the contracting entity to send these notices to the European Commission for publication in the *Official Journal of the European Union* and the *Tenders Electronic Daily* (“TED”) database.
19. Article 59 of the Directive provides:
- “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.”*

2.3 Regulation No 2195/2002/EC

20. Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV)⁷ (“the CPV Regulation”) was incorporated into the EEA Agreement by Decision of the Joint Committee No

⁶ EFTA Surveillance Authority – Thresholds referred to in Directive 2004/17 and Directive 2004/18, as amended by Regulation (EU) No. 1336/2013, expressed in the national currencies of the EFTA States, OJEU C 227, 17 July 2014 (published in Norwegian in the [EEA Supplement to the OJEU No. 41, 17 July 2014](#)).

⁷ Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the CPV. Act referred to at point 6a of Annex XVI to the EEA Agreement.

180/2003.⁸ It entered into force on 6 December 2003, which was also the deadline for the incorporation of the Regulation by the EEA EFTA States.

21. Recital 1 of the CPV Regulation provides:

“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.”

22. Recital 3 of the Regulation sets out:

“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.”

23. Recital 4 of the Regulation reads as follows:

“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.”

24. Recital 5 of the Regulation provides:

“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.”

25. Article 1(1) of the CPV Regulation establishes the CPV as the single classification system applicable to public procurement. The CPV codes available are set out in detail in Annex I of the Regulation.

2.4 Relevant national law

26. The Norwegian *Public Procurement Act* (Lov av 16 Juli 1999 no 69 om offentlige anskaffelser; “the Public Procurement Act”)⁹ determines that all public entities are required to follow the rules concerning procurement when issuing a tender.

27. This Act is supplemented by the Norwegian *Regulation on Public Procurement* (Forskrift av 7 April 2006 no 402 om offentlige anskaffelser; “the Public Procurement Regulation”).¹⁰

The Public Procurement Regulation was adopted on the basis of section 16 of the Public

⁸ OJ L 88, 25.3.2004, p. 61 and EEA Supplement No 15, 25.3.2004, p. 18.

⁹ LOV-1999-07-16-69.

¹⁰ FOR-2006-04-07-402.

Procurement Act, implementing Directive 2004/18/EC.¹¹ It contains detailed rules on tender procedures.

28. Section 1-3 (1) of the Public Procurement Regulation provides that the regulation is applicable to the award of public contracts including delivery of goods, services or construction and works contracts.
29. The Public Procurement Regulation section 4-1 c) defines “work contracts” as contracts regarding either the execution, or both the design and execution, of works related to one of the activities set out in 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.
30. Section 4-1 e) defines “service concession” as a contract of the same type as a public service contract except that the consideration for the provision of services consist either solely in the right to exploit the service or in this right together with payment.
31. “Concession of works” is defined in section 4-1 (f) as execution or planning of works in accordance with activities mentioned in Annex I where the compensation for the works consists of the right to exploitation of the construction or such exploitation in combination with payment.
32. Chapter 24 of the Public Procurement Regulation “*Concessions of work and construction*” provide specified rules for the concession of public works contracts.
33. Section 24-1 (1) provides that contracting authorities that wish to award a public work concession contract shall make known their intention by means of a notice where the value of the contract is equal to or greater than 39 million NOK. The notice of the public work concession contract shall be in accordance with section 18-1 of the Public Procurement Regulation.
34. Section 18-1 of the Public Procurement Regulation lays down requirements on the award of public contracts. It follows therefrom that contracting authorities are obliged to draft a contract notice in accordance with the announcement forms issued by the competent Norwegian ministry. Furthermore, the Public Procurement Regulation requires that the contract notice be published in both Norwegian and one of the official languages of the European Union. The contract notice shall be sent to Doffin, the Norwegian database for public procurement, which determines whether the substance of the notice complies with the requirements specified in the announcement forms. Contracting authorities are required

¹¹ The Regulation has since been replaced by Regulation No 974 of 12 August 2016 (FOR-2016-08-12-974) which entered into force in 1 January 2017. The latter regulation is however not relevant to the present case.

to use the CPV nomenclature in the announcement forms. Approved contract notices are sent to TED by Doffin.

35. In accordance with Section 24-1(6), a contracting authority that intends to award a works concession shall set a time limit for the presentation of application of no less than 45 days counting from the day the notice was made public. Section 24-1(6) a-d further provides that the contracting authorities are on certain conditions required to extend the time limit.

3 THE FACTS OF THE CASE

36. The present case concerns a tender carried out by the Municipality of Kristiansand. The tender was published in the Norwegian national notification database for public procurement, Doffin, on 20 April 2015, using the CPV code equivalent for “parking services” for the classification of the contract in question.¹² The deadline for submitting tenders was set for 15 May 2015 at 12.00.
37. In the invitation to tender, the Municipality specified that it was seeking a private operator which would establish, construct, finance and run a car park.¹³ The Municipality would provide the land through a lease agreement, with a duration of 50 years. The invitation to tender further set out a draft contract on the lease agreement and an agreement for a concession for parking services. Section 1.3.2 of the invitation set out an obligation on the contractor to establish an underground car park underneath Torvet in Kristiansand, including building the necessary infrastructure on the contractor’s own account and at its risk.¹⁴ The remuneration for the parking services would consist in the right to exploit the underground car park,¹⁵ which was to be operated on the contractor’s own account and at its risk. The Municipality’s only obligations were to lease out the land under which the car park would be built for the time provided in the contract and a one-time payment for the construction of a passage to the library and city hall.¹⁶
38. Moreover, the operator would have neither the right to transfer the lease nor any putative right to ownership of the land (“*innløsning*”).¹⁷ In the event of termination of the lease contract, the Municipality would become the owner of the structures without any remuneration.

¹² CPV Code No 63712400.

¹³ See invitation to tender, available here: <https://kgv.doffin.no/ctm/Supplier/Documents/Folder/130864>, page 3.

¹⁴ Ibid, page 3.

¹⁵ Ibid, section 5.1.

¹⁶ Ibid, section 5.1, page 11.

¹⁷ Ibid, sections 7.2 and 10.

39. According to the contract notice on Doffin,¹⁸ the value of the contract had been estimated to be between 24.000.000 and 100.000.000 NOK.
40. Only one tender was submitted within the prescribed deadline on 15 May 2015. The tender and the draft contracts were revised after negotiations, and the contract was eventually awarded on 24 June 2015. The contracts were signed by the parties on 29 June 2015. The final and signed contract had a duration of minimum 50 years, with an additional 10 years as the main rule.¹⁹ The lease contract, however, cannot be extended after 50 years, meaning that the operator potentially will have to rent the infrastructure from the Municipality during the last 10 years of operation.²⁰

4 THE PRE-LITIGATION PROCEDURE

41. On 13 August 2015, ESA received a complaint against Norway indicating a breach of EEA rules on public procurement in the framework of the award procedure launched by the Municipality of Kristiansand for the construction and the operation of the underground car park in question, at Torvet in Kristiansand.
42. On 9 February 2016, after examining the relevant information, ESA sent a letter of formal notice to Norway concluding that Norway had breached several provisions of the public procurement Directive.²¹ The Norwegian Government replied to the letter of formal notice on 22 April 2016, contesting ESA's conclusions.²²
43. After several requests for information, ESA delivered a reasoned opinion on 13 July 2016, maintaining the conclusions set out in its letter of formal notice.²³ Pursuant to the second paragraph of Article 31 of the Surveillance and Court Agreement ("SCA"), ESA required Norway to take the measures necessary to comply with the reasoned opinion within two months following the notification, that is, no later than 13 September 2016. It is accordingly that date – 13 September 2016 – at which the infringement has to be assessed.
44. By letter of 3 October 2016, Norway responded to the reasoned opinion, maintaining its position and providing some additional comments.²⁴ As Norway still maintained its position by the deadline set in the reasoned opinion, ESA decided to bring the matter before the EFTA Court pursuant to the second paragraph of Article 31 SCA.²⁵

¹⁸ Point II.2.1) of the contract notice, available here: <https://www.doffin.no/Notice/Details/2015-530214>.

¹⁹ See Norway's reply to the reasoned opinion, page 4.

²⁰ See Letter from Norway providing further information, Annex A.6, page 2-3.

²¹ Doc. No. 781834, attached as Annex A.1

²² Doc. No. 801883, attached as Annex A.2

²³ Doc. No. 804860, Attached as Annex A.3

²⁴ Doc. No. 820872, attached as Annex A.4.

²⁵ EFTA Surveillance Authority Decision No. 058/17/COL, adopted on 15 March 2017, Doc. No. 835395.

5 ESA'S SUBMISSIONS

5.1 Introduction

45. ESA submits that the tender procedure carried out by the Municipality of Kristiansand for the underground car park under Torvet is not in compliance with the EEA rules on public procurement on a number of counts. These breaches appear to be the consequence of an incorrect legal classification of the subject matter of the public contract in question as a “services concession”, which would lead to Directive 2004/18 not being applicable to the tender procedure.
46. More specifically, ESA will firstly argue that the contracting authority has **incorrectly described the subject matter** of the public contract by failing to use a complete and sufficiently precise set of CPV codes as required by Article 58(2) of the Directive.
47. Further, ESA argues that the contracting authority has **failed to publish a contract notice** in accordance with the legal requirements laid down in Article 58(1) of the Directive.
48. Finally, ESA submits that the contracting authority has **not respected the minimum time limit** for the submission of applications in an award procedure, as prescribed by Article 59 of the Directive.
49. Before going into detail on these three breaches, ESA will first outline why the tender procedure in question falls within the scope of the Directive, and consequently explain why the classification of the tender as a “service concession” rather than a “works concession” was incorrect.
50. On a technical note, it should be pointed out that, *ratione temporis*, it is Directive 2004/18 rather than the more recent *Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18* that applies to the tender procedure which is the subject of this application. Directive 2014/24 entered into force on 1 January 2017. Directive 2004/18 remains the relevant EEA Act for the purposes of the assessment of compliance with the EEA rules on public procurement in the present case, since the Directive was still in force in Norway at the time that the contracting authority launched the tender procedure in question.²⁶

5.2 The contract in issue constituted a “public works concession” rather than a “services concession”

51. An important issue at the centre of the dispute in the present case concerns the classification of the tender procedure.

²⁶ Case C-337/98, *Commission v France*, EU:C:2000:543, paras. 36 and 37; Case C-576/10, *Commission v Netherlands*, EU:C:2013:510, para. 52.

52. The Norwegian Government has suggested that the contract should be classified as a “service concession” pursuant to Article 1(4) of Directive 2004/18, while ESA submits that the tender should have been classified as a “public works concession” under Article 1(3) of the Directive. This classification is important, as Article 17 of the Directive provides that the provisions of the Directive, apart from its Article 3, does not apply to service concessions. Unlike public works concessions, which are partially covered by Directive 2004/18, awards of service concessions are not subject to any codified provisions, but only governed by the general principles of transparency, non-discrimination and equal treatment in the EEA Agreement.
53. Incorrectly classifying a contract as a “service concession” is liable to lead a contracting authority to wrongly apply a more lenient set of rules, which in turn could lead to the direct award of contracts without competition, with the risk of generating economic inefficiency and a negative impact on getting the best value for public money.
54. Article 1(3) of the Directive provides that 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.”*
55. Article 1(2)(b) of the Directive provides that “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.”*
56. Finally, a “public contract” is defined in Article 1(2)(a) of the Directive as a *“contract 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.”*
57. Contrary to the assertions of Norway and the contracting authority, a public contract such as the one in question, having as its subject matter both the construction and operation of an underground car park, constitutes a “public works concession”. The contract falls within the scope of Article 1(3) of the Directive, and it fulfils all the criteria provided by the case-law of the Court of Justice of the European Union (“CJEU”) and the guidelines of the Commission for such classification, namely: it confers the right to exploit the work, it consists of a transfer of financial risk, the estimated value exceeds the relevant threshold and finally, that contract is of the same type as a “public works contract”.

58. In the following, ESA will further set out how the above criteria are met and that the contract thus constitutes a “public works concession”.

5.2.1 The contract falls within the scope of Article 1(3) of the Directive

59. As set out above, ESA submits that the contract in question falls within the scope of Article 1(3) of the Directive, as it fulfils all the criteria for such classification. In particular, as regards the first criterion set out in that provision, the public contract awarded by the contracting authority guarantees the contractor the right to provide parking services in return for remuneration in the form of fees to be paid by the users of the underground car park.
60. ESA therefore submits that the contractor has been conferred the right to economically exploit the work within the meaning of Article 1(3) of the Directive, thus fulfilling the first criterion.
61. Article 1(3) of the Directive further provides that the contract must be considered 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.”*
62. For the purposes of the provisions of Article 1(2)(a) of Directive 2004/18, the contract in question is manifestly of pecuniary interest. It is furthermore not disputed that it is concluded in writing, that Torvparkering AS is an economic operator and that the Municipality, being a local authority, has the capacity of being a “contracting authority”. Nor is it disputed that the contract has as its object the execution of works, the supply of products or the provision of services. The dispute concerns whether the contract is a “work concession” or a “service concession” within the meaning of Directive 2004/18.
63. It follows from the definition set out in Article 1(3) of the Directive that the concept of a “public works concession” necessarily encompasses *“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 of the Directive. The activities mentioned in Article 1(2)(b) of the Directive include, in addition to those listed in Annex 1, *“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.”*
64. At the outset, ESA notes that Norway does not dispute the fact that the performance of the contract required both the design and the construction of the underground car park by the contractor itself or by subcontractors before its subsequent operation. ESA further notes that the contract notice clearly refers to the design and the construction (*“prosjektere, bygge”*) as an essential aspect of the contract.

65. The contracting authority has further specified the requirements for the work in its invitation to tender, by for instance specifying the construction of corridors connecting the underground car park with the town hall and the library. Moreover, the regulation plan adopted by the Municipality of Kristiansand contains specifications about the size of the parking spaces, number of floors, capacity for users, the location of access to the underground parking and where elevators are to be placed.²⁷
66. The type of construction works to be executed in the present case corresponds to the category of activities listed in Annex I of the Directive, in particular to the activity described under “Division 45”, having a subcategory described as “underground car park construction work.”²⁸ Therefore, the public contract in question is, in principle, of the same type as a “public works contract”.
67. The fact that the public contract also foresees the provision of services by the operator in form of “parking services”²⁹ does not alter this conclusion.

5.2.1.1 The works are not incidental to the main object of the contract

68. Pursuant to Article 1(2)(d) of the Directive, a public contract having services as its object, but that also includes construction work within the meaning of Annex I, shall be considered to be a public service contract if the works that have to be carried out are only incidental to the principal object of the contract.
69. During the pre-litigation phase, Norway has argued that since the main purpose of the contract is to provide parking services, this should be seen as its main object. Moreover, Norway has sought to rely on the “centre of gravity” of the contract supposedly being to provide services and not works as a ground for classifying the contract as a “service concession”. According to Norway, the assessment of the main purpose of the contract cannot only consider the main element, but also has to assess the main purpose of the contract, in order to determine where the “centre of gravity” is.³⁰
70. ESA disagrees with this approach. In ESA’s submission, when determining whether a contract is a “service concession” or a “works concession”, the centre of gravity is not the determining factor. 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.

²⁷ See Decision by the Kristiansand City Council, available here:

<http://opengov.cloudapp.net/Meetings/krs/AgendaItems/Details/1500107>. Vedtak BYSTYR, 06.11.2013 Sak 126/13, Torvet - parkeringsanlegg - detaljregulering - sluttbehandling.

²⁸ This is set out in Annex 1 as “division 45”, which concerns “construction of new buildings and works, restoring and common repairs”. Underground car park construction work is a subcategory of division 45, the relevant CPV code is 45223310-2.

²⁹ CPV code: 63712400.

³⁰ See Norway’s reply to the reasoned opinion, Annex A.4, page 9.

71. In this regard, ESA notes that the definition of a “public works concession” in Article 1(3) of the Directive comprises both the service and the work elements. A contract having as its subject matter a “public works concession” generally implies both the construction of a physical structure (such as tunnels, bridges, buildings and roads) and that this construction is carried out for the purpose of economic exploitation by the concessionaire in form of services to be provided to the public in general. This view is confirmed by the European Commission’s “*Interpretative communication on concessions under Community law*”, which states that public works concessionaires often provide services to users on the basis of the structure they have built.³¹
72. The Commission’s Communication also elaborates on the element of works, explaining that the main distinctive feature of a works concession is that “a right to exploit a *construction* is granted as a consideration for having *erected* it.”³² The right of exploitation allows the concessionaire to demand payment from those who use the structure (e.g. by charging tolls or fees) for a certain period of time. The concessionaire does not receive remuneration directly from the awarding authority, but acquires “the right to obtain income from the use of the *structures* built.”
73. Consequently, the concept of a “work concession” necessarily comprises both a service and a works element, rendering a distinction between “works” and “services” pointless.
74. In the present case, the design and the execution of works was essential (and recognised as such by the contracting parties) 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.³³
75. It would be incorrect from a perspective of EEA public procurement law to consider in the case at hand that the element of “services” predominates over the element of “works”. In any event, the works in question cannot be regarded as merely incidental to the main object of the award, which is the legal test pursuant to Article 1(2)(d) of the Directive. Instead, the fulfilment of the obligations laid down in the contract appears to depend entirely on the construction of the underground car park. Any failure by the contractor to finalise the construction – voluntarily or for reasons outside his sphere of responsibility – would make it impossible to provide the parking services and thus fulfil the purpose of the contract.

³¹ See “*Commission interpretative communication on concessions under Community law*” (2000/C 121/02) of 29/4/2000, point 2.3, which emphasizes the importance of the distinction between “works concessions” and “service concessions”.

³² See Commission Communication, 2000/C 121/02, point 2.1.1.

³³ Illustrations of the car park are attached to this Application as Annex A.7-A.9.

76. In the pre-litigation procedure,³⁴ Norway has sought to rely on two judgments of the CJEU to support its classification of the contract as a “service concession”, namely the judgments in case C-331/92 *Gestión Hotelera*³⁵ and Case C-220/05 *Jean Aroux and Others*.³⁶ ESA submits that neither of these judgments support Norway’s classification of the contract as a “service concession”.
77. The former case concerned invitations to tender by the Government of the Canary Islands relating to a hotel for the installation and opening of a gaming establishment at the hotel and the use of the hotel installations and the operation of the hotel business. The CJEU found that the contract did not fulfil the criteria of a public works contract because the “work” in question was not the object of the contract, but was incidental to the installation, opening and operation of the gaming establishment. This case is distinguishable from the present case, as the work required in *Gestión Hotelera* did not require the construction of the hotel or other structures, but minor architectural adjustments that would make the existing premises suitable for the intended activities.³⁷ In the present case however, the economic operator has the explicit contractual obligation to design and build the entire underground car park from scratch.
78. The latter case, *Jean Aroux and Others*, concerned the construction of a leisure centre. While the CJEU confirmed its approach in *Gestión Hotelera*, the Court found that even though the agreement with the economic operator included tasks which have the character of a supply of services, “it does not follow from the mere fact the agreement contains elements which go beyond the execution of works that it falls outside the scope of the Directive.”³⁸ On the contrary, the Court concluded in that case that the contract in question had to be classified as a public works contract within the meaning of Article 1(2)(a) of the Directive, as the works in fact were the main object of the contract. The Court arrived at this conclusion regardless of whether or not it was anticipated that the first contracting authority was, or would become, the owner of all or part of that work.³⁹
79. Other case-law relied on by the contracting authority does not support its interpretation either.⁴⁰ ESA notes that the CJEU in Case C-458/03, *Parking Brixen*, referred to by the contracting authority, did not concern the construction of an underground car park but rather the management of above-ground public pay car parks, which were already operational.⁴¹

³⁴ See Norway’s reply to the letter of formal notice, Annex A.2, page 4.

³⁵ See Case C-331/92 *Gestión Hotelera* ECLI:EU:C:1994:155.

³⁶ See Case C-220/05 *Jean Aroux and Others*, EU:C:2007:31.

³⁷ See Case C-331/92 *Gestión Hotelera*, para. 20.

³⁸ See Case C-220/05 *Jean Aroux and Others*, para. 36.

³⁹ *Ibid*, para. 47.

⁴⁰ See letter of the Municipality of Kristiansand of 22 September 2015, Doc No 774107, attached as Annex A.5, page 3.

⁴¹ See Case C-458/03, *Parking Brixen*, ECLI:EU:C:2005:605, para. 22-27.

In view of the absence of any element related to works in the award at issue, the CJEU had no reason to pronounce itself on the distinction between a “public works concession” and a “public service concession”.⁴²

80. As the CJEU established, where a concession contract only involves operating an existing structure, it must be regarded as a “service concession”.⁴³ This, however, is clearly not the case of the contract subject to the present application.
81. Given the difference as regards the facts and the legal issues analysed by the CJEU, the case-law relied upon by Norway and the contracting authority largely does not have any relevance for the assessment of the case at issue and, to the extent that it is relevant, actually supports ESA’s stance.

5.2.1.2 Relevance of the duration of the concession and ultimate ownership of the structure

82. Norway has further sought to argue during the pre-litigation procedure that the duration of the concession implies that the contract should be seen as a “service concession”.
83. ESA submits that the duration of the concession is not the determining factor for the classification of the project.
84. The very long duration of the concession, which lasts up to 60 years, indicates that it was expected by the contracting authority that the concessionaire would need a long time to recoup an important financial investment, principally connected to the construction of the underground car park rather than to the management of the parking services.
85. It follows from the case-law of the CJEU that the grant of concessions of up to 15 years is liable to foreclose competition and have a detrimental effect on the freedoms guaranteed by Articles 31 and 36 EEA.⁴⁴ This applies *a fortiori* for a concession granted for a duration of 60 years. According to the Court, a justification for a long-term concession can be the concessionaire’s need to have a sufficient length of time to recoup the investments required. Consequently, the value of the works has had a clear impact on the total estimated value of the public contract in question.
86. In this regard, ESA takes the position that it cannot be of relevance for a classification as “works concession” whether the concession is granted for 5, 15 or 50 years. Allowing a distinction based on the duration of the concession, i.e. an aspect of the contract which the

⁴² Instead, the CJEU was called upon to clarify whether the award at issue constituted a “public service contract” or a “public service concession”. The CJEU concluded on the latter.

⁴³ Case C-458/03, *Parking Brixen*, cited above, para. 40. The “*Commission interpretative communication on concessions under Community law*” (2000/C 121/02) of 29/4/2000, point 2.3, explains that a concession contract in which the construction work is incidental or which only involves operating an existing structure must be regarded as a service concession.

⁴⁴ See Case C-64/08, *Engelmann*, ECLI:EU:C:2010:506, para. 46-48.

contracting authority can influence decisively, would render the classification unpredictable in practice and ultimately give the contracting authority the possibility to circumvent the EEA rules on works concessions by a simple transfer of property for a limited, but yet sufficiently long period of time.

87. In the pre-litigation procedure, Norway has further argued that the fact that the contractor, Torvparkering AS, and not the Municipality of Kristiansand, will become the owner of the underground car park alters the classification as a public works concession, as, in its view, a public works contract of a public works concession is characterised by the fact that a contracting authority obtains ownership of the building or works which has been procured.⁴⁵
88. ESA takes the position that in the present case, the contracting authority in fact does not only retain ownership of the land, it will also eventually obtain ownership of the structures built on it. Both the surface and the ground underneath the square in Kristiansand remain property of the contracting authority. Torvparkering AS merely obtains the right to exploit them. While the structure to be built, the underground car park, is meant to become property of Torvparkering AS, ownership thereof as well as the right to exploit the ground are transferred to the Municipality after the expiry of the lease agreement. According to the information provided, the Municipality will take over the structures and buildings provided that they are in good condition.⁴⁶
89. In this way, the Municipality ultimately acquires ownership of the works. This is particularly true in view of the fact that the property is to stay with the Municipality even if, subsequently, the concession agreement might be prolonged for another 10 years.⁴⁷
90. Norway has in this context sought to rely on the CJEU's judgment in Case C-451/08 *Helmut Müller*,⁴⁸ which concerned the selling of public land under an urban planning project. ESA notes that that facts of the case at hand differ considerably from those in *Helmut Müller*. That case concerned public land which had been sold without any possibility of reacquisition by the public authority and a concession had been granted for an indeterminate period.⁴⁹
91. In the present case however, the Municipality has not sold the land and will furthermore become the ultimate owner of the structures built on the land. Consequently, the contracting authority's ultimate ownership also indicates that the contract should be classified as a "public works concession."

⁴⁵ See Norway's reply to the reasoned opinion, page 6.

⁴⁶ See the Norwegian Governments letter of 10 June 2016, p. 2 ("the contract concerning the ground lease"), attached as Annex. A.6.

⁴⁷ See the Norwegian Governments letter of 10 June 2016, p. 3 ("the contract concerning the award of the service concession").

⁴⁸ Case C-451/08, *Helmut Müller*, EU:C:2010:168

⁴⁹ Case C-451/08, *Helmut Müller*, cited above, paras. 33 and 70.

5.2.1.3 Relevance of the estimated value of the project

92. Norway has further sought to rely on the estimated value of the service element in support of its classification of the contract as a “public service concession”.
93. ESA submits that the estimated value of the project cannot in itself determine the classification of the contract.
94. In its reply to the letter of formal notice, Norway argues that since the service element of the contract appears to have greater value than the construction element, this must be understood as an indication that the provision of parking services constitutes the main subject matter of the contract in question.⁵⁰
95. It should be pointed out in this regard that there is nothing unusual about the services element having greater value than the works element in any public works concession. In fact, as already noted, the right to exploit the services is the *quid-pro-quo* for carrying out the works from the point of view of the contractor. Assuming the contractor would seek to make a profit, the services must necessarily be more valuable (in discounted present-day terms) than the cost of the works.
96. Furthermore, ESA takes the position that if Norway’s approach were to be applied in practice, the contracting authority would be allowed to circumvent the applicable provisions of EEA law by simply awarding a works concession for a particularly long period of time with the aim of rendering the service element all the more valuable compared to the construction element, regardless of the subject matter of the contract. This risk is particularly obvious in the case at hand, where a concession has been awarded for 50-60 years in total. The award of a concession for such a considerable period of time would then be liable to always artificially shift the balance to the detriment of the construction element.
97. In this regard, ESA recalls that the CJEU has held, as described in paragraph 85 above, that even a concession for 15 years is liable to foreclose competition and have a detrimental effect on the freedoms guaranteed by Articles 31 and 36 EEA.

5.2.1.4 The contract entails transfer of financial risk

98. In accordance with the case-law of the CJEU, 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.⁵¹ ESA notes in this regard that the contract awarded by the contracting authority foresees that the financial risk resulting from the construction and the

⁵⁰ See Norway’s reply to the letter of formal notice, Annex A.2, page 8.

⁵¹ Case C-206/08, *Eurawasser*, ECLI:EU:C:2009:540, para. 59 and 77; Case C-451/08, *Helmut Müller*, ECLI:EU:C:2010:168, para. 75.

operation of the underground car park will be borne entirely by the operator.⁵² The fact that the contracting authority concluded that the subject-matter of the contract in question qualifies as a “service concession” does not affect this assessment – it in fact reinforces it, as this requirement is equivalent for both categories of concessions.⁵³

99. ESA further notes that, according to the information provided by the contracting authority, the financial risk inherent in the exploitation of the construction has not been eliminated⁵⁴ by the contracting authority’s payment of an amount of 16.000.000 NOK, which was supposed to cover the costs for the construction of corridors connecting the underground car park with the town hall and the library. As will be assessed in further detail under point 5.2.2 below, the estimated value of the project was originally estimated as up to 100.000.000 NOK, with a subsequent estimate of 408.000.000 NOK. The payment by the contracting authority is therefore not sufficient to eliminate the financial risk involved in such a project.
100. Consequently, ESA submits that also this criterion for the classification of the public contract as a “public works concession” is met.
101. In the light of all of these considerations, ESA submits that the project in question constitutes a public works concession within the meaning of Article 1(3) of the Directive.

5.2.2 The estimated value of the public contracts exceeds the applicable threshold pursuant to Article 56 of the Directive

102. Finally, in order for the Directive to apply to the contract in question, the value of the contract has to be equal or greater than the value specified in Article 56 of the Directive. The threshold for “public works concessions” at the time the contracting authority commenced the contract awarding procedure was 39.266.836 NOK (5.186.000 EUR).⁵⁵ According to the contract notice published in Doffin, the contract value was estimated to be between 24.000.000 NOK and 100.000.000 NOK.
103. It is unclear from the pre-litigation procedure whether this estimate includes the projected costs for the construction and therefore whether it is in line with the method of calculation set out in Article 56 in conjunction with Article 9(4) of the Directive, which requires that the estimated value take account of both the cost of the works and the total estimated value

⁵² See Point II.2.1 of the contract notice.

⁵³ Case C-437/07, *Commission v Italy*, ECLI:EU:C:2008:624, para. 31.

⁵⁴ According to the “*Commission interpretative communication on concessions under Community law*” (2000/C 121/02) of 29/4/2000, the definition of a concession allows the State to make a payment in return for work carried out, provided that this does not eliminate a significant element of the risk inherent in the exploitation of the construction.

⁵⁵ EFTA Surveillance Authority – *Thresholds referred to in Directive 2004/17 and Directive 2004/18, as amended by Regulation (EU) No. 1336/2013, expressed in the national currencies of the EFTA States*, OJEU C 227, 17 July 2014 (published in Norwegian in the [EEA Supplement to the OJEU No. 41, 17 July 2014](#)).

of the supplies necessary for executing the works and placed at the contractor's disposal by the contracting authorities.

104. Furthermore, ESA considers that it is also uncertain whether the approach taken by the contracting authority is in line with Article 9(7) of the Directive, which prescribes that the choice of the method used to calculate the estimated value of a public contract may not be made with the intention of excluding it from the scope of the Directive. ESA understands this provision as imposing an obligation on contracting authorities to specify a realistic and truthful value, which would take all costs to be reasonably included into account.
105. ESA notes in this context that the contracting authority seems to have set the estimated maximum value at 100.000.000 NOK in order to take account of the possible costs related to the construction works.
106. Subsequently, the Norwegian Government has corrected the estimated value of the contract in question in its reply to the letter of formal notice, following the discovery of a miscalculation attributable to the contracting authority.⁵⁶ The Norwegian Government states that “233.000.000 NOK must be considered a realistic and reasonable estimate” with regard to the expected income of the operation of the car park.⁵⁷ Further, the Norwegian Government states that the actual value of the construction works is 175.000.000 NOK, leaving the total rectified value of the contract in question to 408.000.000 NOK.⁵⁸
107. As a consequence, Norway does not seem to dispute that the relevant financial threshold has been exceeded. In any event, ESA and Norway also seem to agree that this rectification does not affect the EEA rules applicable to the contract, due to the fact that the initially communicated value of maximum 100.000.000 NOK was already above the relevant thresholds.⁵⁹
108. Accordingly, ESA submits that the criterion set out in Article 56 of the Directive is fulfilled, as the estimated value of the contract in question exceeds the relevant threshold.

5.2.3 Conclusion

109. It follows from the above considerations that the contract in question in the present case falls within the scope of Article 1(3) of the Directive. Moreover, the estimated value of the project exceeds the relevant threshold set out in Article 56 of the Directive. Therefore, a classification of the public contract as “services concession” must be considered incorrect, and the provisions of the Directive therefore apply to the contract in question in the present case.

⁵⁶ See Norway's reply to the letter of formal notice, Annex A.2, page 2-3

⁵⁷ See Norway's reply to the letter of formal notice, Annex A.2, page 2.

⁵⁸ See Norway's reply to the letter of formal notice, Annex A.2, page 2.

⁵⁹ See Norway's reply to the letter of formal notice, Annex A.2, p. 3.

110. As a consequence of the incorrect classification, the contracting authority has apparently considered that it was not obliged to follow the provisions of the Directive when carrying out the tender procedure. The breaches of the Directive as a result of this incorrect classification will be addressed in further detail in sections 5.3-5.5 below.

5.3 The contracting authority has used the incorrect CPV code to describe the subject matter of the contract

111. Article 58(2) provides that *“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).”*

112. Article 1(14) of the Directive provides that the CPV shall designate the reference nomenclature applicable to public contracts. The purpose of the CPV codes is to accurately describe the services or products required by the contracting authority.

113. As noted in recital 4 of the Regulation, the CPV was introduced to provide 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”*.

114. Article 58(2) of the Directive requires the contracting authority to set out in the contract notice the information required by the standard form adopted by the Commission. Point II.1.6 of the standard form requires the contracting authority to fill in the relevant CPV codes.⁶⁰

115. The CPV codes allow bidders to identify the subject of the tender without having to resort to a translation, because the list of descriptions associated with each CPV code exists in all official languages. Consequently, the accurate use of CPV codes is of particular relevance in circumstances in which the full description of the tender or the individual lots involved is not available in a language spoken by the potential bidder.

116. In order to make the CPV codes work effectively, the contracting authority must endeavour to be as accurate as possible, to reflect the procurement needs which it seeks to satisfy by issuing the invitation to tender. The Commission’s “Guide to the CPV” states that *“the awarding entity should try to find a code that suits its needs as accurately as possible”*.⁶¹

⁶⁰ See European Commission: Standard form for Contract notice Directive 2004/18/EC, page 3, available here: http://simap.ted.europa.eu/documents/10184/49059/sf_002_en.pdf

⁶¹ See European Commission: “Guide to the Common Procurement Vocabulary (CPV)”, available under: http://simap.ted.europa.eu/documents/10184/36234/cpv_2008_guide_en.pdf, Point 6.2 (“How to choose a code”). The Guide indicates how to choose a code in practice.

117. In the present case, the contracting authority chose the code corresponding to “parking services”.⁶² This code is exclusively related to the provision of services in the transport sector. According to the explanatory notes issued by the Commission, this particular group of CPV codes, “Group 637”, concerns “*support services for land, water and air transport*”, which include *inter alia* highway operation/toll services, bridge and tunnel toll/operation services. None of the services listed in this group suggests that the contract being awarded involves the construction of significant infrastructure.
118. However, the description contained in the contract notice shows that the project in question also required the construction of the underground car park before it could be operated. ESA therefore submits that a CPV code related to “underground car park construction work”⁶³ should have been added as well, in order to allow potential tenderers to have a correct understanding of the scope of the project.
119. The use of incorrect CPV codes is liable to have the effect of misleading potential bidders, ultimately preventing them from participating in tender procedures. Consequently, in the present case, economic operators potentially interested in the construction part of the contract may not have been able to identify the nature of the contract correctly on the basis of the CPV code used.
120. ESA notes in this regard that the Commission’s Guide to the CPV envisages that up to 20 codes can be used in a single contract notice. According to the recommendations, “*the first one will be considered the title. Therefore, it may be a little more general than the others, for instance if no accurate code is suitable*”.⁶⁴
121. In circumstances such as the present case, ESA submits that more specific codes *must* be used if only these codes, taken together, give an accurate description of the entirety of the goods or services which the contracting authority is seeking to procure. Particularly in a situation such as the case at hand, where the public contract encompasses various different elements, such as performance of works and the provision of services, and none of them can reasonably be regarded as predominant, correct use of several CPV codes is indispensable.⁶⁵
122. On those grounds, ESA submits that the contracting authority has failed to specify the subject of the tender by referring to the correct CPV code and, by doing so, incorrectly

⁶² CPV code 63712400.

⁶³ CPV code: 45223310-2.

⁶⁴ Commission Guide to the CPV, page 9.

⁶⁵ See for instance Decision of the European Ombudsman of 11 October 2010 in complaint 333/2009/(BEH)KM against the European Aviation Safety Agency (EASA). Available here: <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/5362/html.bookmark>. In paragraph 34 of his Decision, the European Ombudsman interprets the Commission’s guidelines as meaning that more specific codes should be used in addition to a general one if these codes, taken together, cover the entirety of the goods or services concerned.

applied the CPV Regulation in breach of 58(2) of the Directive, in conjunction with Article 1(14) of the Directive.

5.4 The contracting authority failed to publish a contract notice EEA-wide

123. It is undisputed that the contracting authority failed to publish a contract notice EEA-wide, but only advertised the tender at national level in Doffin. The applicability of the Directive to a public contract qualifying as a “public works concession” entails the obligation to observe a number of procedural requirements when organising a tender procedure, among others the duty to publish a contract notice in accordance with the provisions set out in Article 58(1) to (3) of the Directive.
124. Article 58(2) of the Directive states that 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.
125. Article 58(3) refers to Article 36(2) to (8) of the Directive, which define the form and manner of the publication of notices, which entails among others the obligation on the contracting entity to send these notices to the Commission for publication in the *Official Journal of the European Union* (“OJEU”) and the *Tenders Electronic Daily* (“TED”) database.
126. During the pre-litigation procedure, Norway has not disputed the fact that the contracting authority failed to publish a contract notice in line with the above requirements. The contract notice was only published in the Norwegian portal for public procurement, Doffin.
127. ESA submits that the publication of a contract notice in Doffin cannot remedy a breach of this essential procedural requirement, as a publication only at national level precisely does not take into account the need to guarantee the necessary degree of transparency in an award procedure having cross-border relevance.
128. Even in cases concerning “service concessions”, which is not covered by the Directive, the CJEU has held that the obligation of transparency requires there to be a degree of publicity sufficient to enable, on the one hand, competition to be opened up and, on the other, the impartiality of the award procedure to be reviewed.⁶⁶
129. ESA considers in the case of “works concessions”, which are regulated by Directive 2004/18, 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, the

⁶⁶ See Case C-64/08, *Engelmann*, EU:C:2010:506, para. 50 and Joined Cases C-25/14 and C-26/14, *UNIS and Others*, ECLI:EU:C:2015:821, para. 39.

legislature has required EEA-wide publication of tender procedures above the threshold, as provided in Article 58(3) in conjunction with Article 36(2) to (8) of the Directive.

130. On these grounds, ESA submits that the failure by the contracting authority to submit the tender invitation for publication EEA-wide in the OJEU and the TED database, constitutes a breach of Article 58(3) in conjunction with Article 36(2) to (8) of the Directive.

5.5 The contracting authority did not respect the minimum time limit for the submission of applications in an award procedure

131. Article 59 of the Directive provides that when contracting authorities award 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.

132. Article 38(5) provides that where notices are drawn up and transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII, the time limits may be shortened by seven days. Accordingly, a time-limit may be shortened to a minimum of 45 days.

133. In the present case, the tender was published in Doffin on the 20 April 2015, with a deadline for reply set for 15 May 2015 at 12.00. Consequently, the contracting authority set a deadline for the submission of tenders of only 26 days. This is considerably shorter than provided for by Article 59, even in the event that Article 38(5) should apply.

134. The minimum time limit is set in order to give possible tenders reasonable time to participate in the tender procedure and prepare their tenders. ESA considers that it is important that contracting authorities, when fixing the time limits for the receipt of tenders and requests to participate, take account in particular of the complexity of the contract and the time required for drawing up tenders.

135. In ESA's submission, a time limit as short as the one in the present case does not allow possible tenders sufficient time to draw up their tender.

136. Consequently, ESA submits that the contracting authority did not respect the minimum time limit laid down in Article 59 of the Directive.

6 CONCLUSION

137. On those grounds, 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.



Carsten Zatschler



Maria Moustakali



Øyvind Bø

Marlene Lie Hakkebo

Agents of the EFTA Surveillance Authority

7 SCHEDULE OF ANNEXES

No	Description	Date	Document Number	Number of pages	Referred to in this Application at paragraph(s)
A.1	ESA's ESA sent a letter of formal notice	09.02.2016	781834	13	42
A.2	Norway's reply to the letter of formal notice	22.04.2016	801883	8	42, 76, 94, 106, 107
A.3	ESA's reasoned opinion	13.07.2016	804860	19	43
A.4	Norway's reply to the reasoned opinion	03.10.2016	820872	9	44, 69, 87
A.5	Letter from the Municipality of Kristiansand	22.09.2015	774107	4	79
A.6	Letter from Norway providing further information	10.06.2016	807897	18	88, 89
A.7	Illustration 1 of the car park		855434	1	74
A.8	Illustration 2 of the car park		855433	1	74
A.9	Illustration 3 of the car park		855432	1	74