



ROYAL NORWEGIAN MINISTRY OF  
CLIMATE AND ENVIRONMENT

EFTA Surveillance Authority  
Avenue des Arts 19H  
1000 BRUSSELS  
BELGIUM

Your ref  
Case No: 78085, Document No: 1143836

Our ref  
15/2910-

Date  
8 April 2022

**Reply to letter of formal notice in respect of a complaint against Norway concerning the award of exclusive rights for collection and treatment of municipal commercial waste**

**1. Introduction**

Dear Madam/Sir,

Reference is made to the letter of 8 December 2021 from the EFTA Surveillance Authority ("Authority"), requesting the Norwegian government to submit observations on the content. Reference is also made to the granted extension of the deadline to 8 April 2022. The Norwegian government will in the following provide comments on the elements of the Authority's general assessment. We do not share the Authority's view that the arrangements between the municipalities (Namsos, Flatanger, Overhalla, Grong, Høylandet, Leka, Bindal, Nærøysund, Namsskogan, Røyrvik, Lierne and Osen) and Midtre Namdal Avfallsselskap IKS ("MNA") are in breach of The Agreement on the European Economic Area (EEA Agreement).

Primarily, the Norwegian government upholds our arguments that the collection and treatment of the municipality's own commercial waste should be considered as performance of *public tasks*, and the arrangements should be considered as transfers of powers and responsibilities and thus fall outside the scope of Directive 2014/24/EU.

Alternatively, the Norwegian government claim that the arrangements fall within the scope of the exclusive rights' exception. There is an exclusive right (management of municipal commercial waste) within a specific geographical area (the 12 municipal owners).

In this letter, the Norwegian government will first explain why the arrangements are considered as transfer of power and responsibilities (section 2). Secondly, we will argue why in the alternative MNA has an exclusive right (section 3). In section 4 our view is summarised.

Postal address  
Postboks 8013 Dep  
0030 Oslo  
postmottak@kld.dep.no

Office address  
Kongens gate 20  
www.kld.dep.no

Telephone  
+47 22 24 90 90  
Org. nr.  
972 417 882

Department  
Department for Marine  
Management and  
Pollution Control

Reference  
Olve Klepp  
+47 22 24 58 62

## 2. Transfer of power and responsibilities

### 2.1 Legal basis

Member States are free to organise themselves as they find appropriate to accomplish their public tasks, cf. *Remondis GmbH & Co. KG Region Nord v. Region Hannover*, C-51/15 ("Remondis") and Directive 2014/24/EU (preamble section 5). As a principle, the rules of public procurement therefore do not apply when public authorities transfer competence and responsibilities for public tasks to other public bodies.

The principle of respect of national self-government in Article 4 (2) of the Treaty on European Union (TEU) was consolidated in Article 4 (2) of The Treaty of Lisbon. The respect for self-government applies also for the EEA EFTA States, even though the EEA Agreement does not contain a similar provision. The EEA Agreement does not entail transfer of powers from the EEA EFTA States to the institutions established through or as a consequence of the EEA Agreement to the extent the TEU entails for the EU Members States to EU institutions. The principle of national self-government is therefore not reflected directly in the EEA Agreement. It can however be seen as more indirectly reflected, at least partially, in e.g., Article 125 and 39, cf. Article 32 of the EEA Agreement. Moreover, the right to national self-government is a fundamental principle in Norwegian law, cf. The Norwegian Constitution Article 49 (2).

This limitation of scope of the public procurement rules is expressed in the EEA Agreement Annex XVI Procurement point 2 (page 2), Article 1(6) of Directive 2014/24/EU and the judgement of the Court of Justice of the European Union (CJEU) in the "Remondis" case.<sup>1</sup> The principle to respect such internal organization in EU is described as follows in *Remondis*: (paragraph 40)

*"Moreover, it should be borne in mind, first of all, that the division of competences within a Member State benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect national identities, inherent in their fundamental structures, political and constitutional, including local and regional self-government (...)"*

Article 1(6) of Directive 2014/24 states: (our underscoring)

*"Agreements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities or groupings of contracting authorities and do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by this Directive."*

It thus follows from Article 1(6) that for the arrangement to be excluded from the EEA public procurement law, there must be a transfer of powers and responsibilities between public bodies. Also, the transfer must relate to a "public task". However, in order to delegate powers, the authorities must in fact be positioned to delegate, which presupposes that the powers and responsibilities are related to a public task. It is therefore our view that the existence of a "public task" is somewhat subordinate compared to the requirement

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<sup>1</sup> Judgment of the Court of Justice of 21 December 2016, *Remondis GmbH & Co. KG Region Nord v Region Hannover*, C-51/15, EU:C:2016:985.

concerning transfer of powers. Another condition is that there is no remuneration paid for contractual performance.

It is not contested that both the municipalities who are owners of MNA pursuant to the Cooperation agreement of 2019 (“the New Partnership Agreement”)<sup>2</sup> and MNA are bodies governed by public law. However, The Authority claims that the New Partnership Agreement does not fulfil the conditions regarding delegation of a public task in Article 1(6) of Directive 2014/14/EU.

The Norwegian Government will in the following argue that the municipal owners’ transfer of competence to manage their own commercial waste to MNA fulfils all conditions as specified in Article 1(6) of Directive 2014/24/EU.

## **2.2 The transfer of competence between the owner municipalities and MNA is complete**

To qualify as a transfer of powers and responsibilities as described in Article 1(6) of Directive 2014/24, it is not sufficient to transfer the execution of the service to a legal person.

A transfer of execution of the service to a legal person is not sufficient to qualify as transfer of powers and responsibilities in accordance with Article 1(6) of Directive 2014/24. The transfer must encompass all competence regarding the task in question. Such transfers fall outside the scope of the EEA Agreement and does not represent a public contract, see *Remondies*. The transfer is described as follows in *Remondies* paragraph 49:

*“in order to be considered as such, a transfer of competence must concern not only the responsibilities associated with the transferred competence, including the obligation to perform the tasks that competence entails, but also those powers that are the corollary thereof.”*

According to the CJEU, a transfer of powers and responsibilities requires that the public authority upon which competence has been conferred, also has the power to organise the performance of the tasks falling within that competence, and that it has the financial autonomy of those tasks.

According to the letter of formal notice the Authority is of the opinion that MNA has not received such a competence: (page 11)

*“Firstly, the only power which is transferred to MNA is the “power” to provide the service to each municipality. In the absence of the arrangement in question, MNA would have no right to access or take possession of the relevant waste, but it could provide the service to other customers. This is no more of a “power” than what would be granted to any service provider under any normal service contract.”*

To understand the nature of the competence delegated, one must assess the municipalities’ responsibility to manage their own commercial waste, cf. the Pollution Control Act (PCA) Section 32, cf. Section 27a.<sup>3</sup> Pursuant to the PCA Section 27a second paragraph, waste from municipal buildings, institutions, schools, kindergartens, and similar are classified as commercial waste. Consequently, the municipalities are obliged both as waste producers

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<sup>2</sup> Attachment 1 to letter of 1 December 2020 (Doc No 1166524).

<sup>3</sup> LOV-1981-03-13-6 Lov om vern mot forurensninger og om avfall (forurensningsloven).

and waste owners, to collect and treat the waste in a recognized waste management facility or to ensure the recovery of the waste. The municipalities have the same obligation regarding household waste, cf. section 30.

A central task of waste management is to develop? waste management plans. This includes developing plans for waste sorting, what kind of equipment to have, how often to collect the waste etc. The waste management plans provide the framework for how to execute the different tasks.

The distinction between “household waste” and “commercial waste” was introduced through an amendment of Section 27a of the PCA that entered into force in 2004, repealing the old terms “consumption waste” and “production waste”. “Consumption waste” included both household waste and waste from some parts of business and industry.<sup>4</sup> More precisely, consumption waste was defined as *“ordinary waste, including bigger items as inventory etc. from households, smaller shops, ect and offices. The same applies to waste of similar character and amount from different establishments.”*<sup>5</sup> “Production waste” was defined as *“waste from business activity and services that in art or amount substantially differ from consumption waste.”*<sup>6</sup> According to the previous wording of the PCA Section 30, the municipalities had the right and duty to collect consumption waste. The purpose of the change from 2004 was firstly to give *“business bigger freedom of action and responsibility to choose waste management according to the environmental framework conditions.”* Secondly the purpose was also to *“make the distinctions between the different waste types clearer.”*<sup>7</sup>

The proposal was explained in more detail in Ot.prp. nr. 87 (2001-2002) chapter 2.4:

*«The proposed amendment entails new concepts and a new distinction between the types of waste, by replacing the concepts of consumption and production waste with household and commercial waste. Household waste will be all waste generated from households, while commercial waste will be all waste generated where business is conducted. The proposal means that the municipalities will continue to have the responsibility for and exclusive right to handle household waste, but that they will be exempted from the obligation to collect waste from business and industry. At the same time as the municipality's duties are reduced, the responsibility for business and industry having to handle its own waste will increase. The municipalities will still be free to offer their services to business and industry, and to make a profit for this in the same way as private waste management companies. Business and industry, for their part, will be able to choose a waste management company in a market. At the same time, the demarcation between the types of waste becomes clearer than today».*<sup>8</sup>

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<sup>4</sup> See Ot.prp. nr. 87 (2001-2002) section 2.2.

<sup>5</sup> Our translation. Originaly: «vanlig avfall, også større gjenstander som inventar o.l. fra husholdninger, mindre butikker o.l. og kontorer. Det samme gjelder avfall av tilsvarende art og mengde fra annen virksomhet.»

<sup>6</sup> Our translation. Originaly: «Produksjonsavfall er «avfall fra næringsvirksomhet og tjenesteyting som i art eller mengde skiller seg vesentlig fra forbruksavfall». Håndteringen av disse to typene avfall reguleres ulikt.»

<sup>7</sup> Ot.prp. nr. 87 (2001-2002) section 2.1.1.

<sup>8</sup> Our translation. Originaly: «Forslaget til lovendring innebærer nye begreper og en ny grensedragnin mellom avfallstypene, ved å erstatte begrepene forbruks- og produksjonsavfall med husholdning- og næringsavfall. Husholdningsavfall vil være alt avfall fra husholdningene, mens næringsavfall vil være alt avfall som oppstår der det drives virksomhet. Forslaget innebærer at kommunene fortsatt skal ha ansvaret for og enerett til å håndtere husholdningsavfallet, men at de fritas for plikten til å samle inn avfall fra næringslivet. Samtidig som kommunens plikter reduseres, vil næringslivets ansvar for selv å måtte sørge for håndtering av eget avfall øke. Kommunene vil fremdeles stå fritt til å tilby næringslivet tjenester, og til å ta fortjeneste for dette på samme måte som private renovatører. Næringslivet vil på sin side kunne velge renovatør i et marked. Samtidig blir grensedragningen mellom avfallstypene klarere enn i dag.»

Consequently, the only reduction of the existing duties and tasks of the municipalities was related to the management of commercial waste from private business. This is also implicitly stated in Ot.prp. nr. 87 (2001-2002) chapter 4.2.1, in which it is provided examples of the municipal governments' responsibilities for waste from key businesses and industries, and none of the examples indicate that the municipalities' responsibilities for management of its own commercial waste shall be reduced. This purpose of the amendment is also described in Meld.St.45 (2016-2017) page 20, where the conclusion is that the distinction is to be upheld:

*"The changes meant that the municipalities were still given responsibility for and the exclusive right to handle household waste, but were exempted from the obligation to collect similar waste from business and industry. Business and industry was given full responsibility for ensuring the handling of their own waste. By enabling a choice for collection and treatment solution for private actors, this should lead to increased recycling and to the establishment of new and efficient collection and treatment solutions. The amendment also meant that the municipalities had the opportunity to make a profit from offering services related to the collection and treatment of this household-like commercial waste."<sup>9</sup>*

Thus, the amendment of the PCA caused a *limited* encroachment of the municipal competence and responsibility. The municipalities maintained the responsibility for its own commercial waste in addition to the responsibility for household waste. It was never the intention to relieve the municipal governments of their duty to manage their own commercial waste.

Norway is of the opinion that the competence and responsibility for this statutory obligation is transferred to MNA. The Authority seems to have misunderstood the scope of this transfer of duty when arguing that the only power which is transferred "*is the 'power' to provide the service to each municipality*". It follows from the New Partnership Agreement § 2 that the competence and responsibility for this statutory obligation is transferred to MNA (our underscoring):

*"The objective of the company is, on behalf of the municipal owners and in accordance with the delegated authority to execute the managing authority and those tasks held by the municipal owners related to collection, transport, management and trade of waste and sewage, and all things else related to this in by the municipal owners."*

As regard the financing of the waste management, the following is stated in the New Partnership Agreement §3 (our underscoring):

*"The company will share costs and set the fees and prices based on the same price for similar services by the municipal owners"*

The fact that the municipal council itself determines the waste management fees cannot be considered decisive in this regard. Firstly, MNA has been granted the administrative and

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<sup>9</sup> Our translation. Originally: «Endringene medførte at kommunene fortsatt fikk ansvar for og enerett til å håndtere husholdningsavfallet, men ble fritatt for plikten til å samle inn husholdningsliknende avfall fra næringslivet. Næringslivet fikk fullt ut ansvar for å sørge for håndtering av eget avfall. Økt handlingsrom for næringslivet til selv å velge innsamlings- og behandlingsløsning skulle lede til økt gjenvinning og til etablering av nye og effektive innsamlings og behandlingsløsninger. Lovendringen innebar også at kommunene fikk anledning til å ta seg fortjeneste for tilbud av tjenester knyttet til innsamling og behandling av dette husholdningsliknende næringsavfallet.»

financial responsibilities from the municipal government, within the framework of the PCA. According to the Municipal Act Section 5-4, the municipal council may delegate statutory tasks only to the extent the special legislation allows for such delegation. The PCA Section 83 states that the municipal council, on special grounds, may delegate the authority to make individual decisions. Hence, the municipal council may not delegate the authority to adopt administrative regulations such as the determination of waste management fees.

Secondly, the PCA Section 34 provides guidance on the setting of fees. The municipality shall determine a fee to cover the costs associated with the waste sector, including collection, transport, reception, storage, treatment, control, etc. The costs shall be fully covered by the fee. Therefore, neither MNA nor the owner municipalities can determine the total amounts of fees. Even if the municipal owners are setting the fee formally, this follows the proposal from the MNA.

In addition, the New Partnership Agreement Section 4 illustrates that the transfer of competence is in accordance with the PCA Section 83:

*"The municipal owners' authority to make individual decisions arising from the Pollution Control Act pursuant to the waste management regulations is delegated to the company ref the Public Administration Act § 83 second sentence"*<sup>10</sup>

On these grounds the Norwegian government is of the opinion that that the powers delegated to MNA extends beyond the right to provide waste-related services to the municipal owners, as they also have the responsibilities for the "transferred competence and the powers that are the corollary thereof" (ref *Remondis* above). Since the municipalities themselves do *not have* regulatory competence for their own commercial waste, MNA can neither be granted such competence. Moreover, to grant MNA regulatory competence would be unnecessary due to the lack of need to impose other legal entities duties and tasks for the municipalities' own commercial waste.

As an argument against the existence of a transfer and relinquishing of powers, the Authority emphasises that MNA has no power to take access or possession of the relevant waste,. Norway disagrees with this view. The municipalities themselves are waste producers and waste owners and transfer the related responsibility fully to MNA. By extension, MNA also holds the physical control of the waste. Whether the legal ownership of the waste is transferred or not is thus of less importance. Waste has traditionally been regarded as of negative value. And even if MNA held the legal ownership of the waste, the principle of operating at cost (see section 2.4 below) would in any case prevent any profit if MNA chose to, for instance, resell the waste. Consequently, legal ownership is considered without significance in this case.

The Authority argue that MNA has no power to take access or possession of the relevant waste, against a transfer and relinquishing of powers. Norway do not share this view. The municipalities themselves are waste producers and waste owners and transfer the related responsibility fully to MNA. By extension, MNA also holds the physical control of the waste. Whether the ownership of the waste is to be considered "judicial" is thus irrelevant.

In *Remondis* it was further established that "such autonomy of action does not mean that the newly competent entity must be shielded from any influence whatsoever by another public entity" (ref para 52). The New Partnership Agreement is in line with the guidance given by

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<sup>10</sup> The Public Administration Act do not have an section 83. We assume it should be the PCA.

the CJEU in paragraph 52. That the municipal owners retain the powers to withdraw the transfer of competence is also in line with *Remondis*, ref paragraph 53.

The agreement does not otherwise contain any provisions on breach of contract, as one would expect to see if there had been a mutually onerous contract. The lack of provisions on remuneration points in the same direction. We can therefore hardly see that the New Partnership Agreement can be compared to an ordinary contract, as the Authority states.

On the basis of the above, we are of the opinion that the municipal owners have transferred the entire waste competence, both related to household waste and their own commercial waste, to MNA.

### **2.3 Waste management is a public task**

In order for the municipalities to be able to transfer competence and responsibility outside the scope of Article 1(6) of Directive 2014/24/EU and the conditions set out in *Remondis*, it must, as mentioned, be related to a public task. As mentioned, in order to delegate powers, the authorities must in fact be positioned to delegate, which presupposes that the powers and responsibilities are related to a public task. It is therefore our view that the existence of a "public task" is somewhat subordinate compared to the requirement concerning transfer of powers. We note that practice from the CJEU does not seem to focus on whether the task is a "public task".

The Authority states that the management of the municipalities' own commercial waste is not to be considered as a public task. This understanding is not based on CJEU case law or other sources of EEA law. The argument seems to be based on the fact that the municipalities' and private actors obligations to handle their own commercial waste are concurrent, which in turn results in the municipalities' obligation not being of "public nature". We are of the opinion that the Authority maintains a too narrow understanding of the term "public task". Article 1 (6) concerns the *application* of the procurement rules and cannot be considered as an exception rule as such. Consequently, it does not seem to be grounds to interpret the term "public task" narrow as one would interpret the term under an exception rule.

Firstly, the CJEU has clearly stated that a task such as waste management serves the needs of the public even though the task is also performed by private companies, cf. case C-360/96 ("Arnhem") paragraph 52-53.<sup>11</sup>

Secondly, it was clearly established in Case C-480/06 "Stadtreinigung Hamburg" that waste management must be regarded as a public task which may fall outside the scope of the procurement regulations (paragraph 37).<sup>12</sup>

*"It must nevertheless be observed that the contract at issue establishes cooperation between local authorities with the aim of ensuring that a public task that they all have to perform, namely waste disposal, is carried out."*

Moreover, *Remondis*, which concerned precisely waste management, provides clear guidance for the use of the Article 1(6) of Directive 2014/24/EU, and thus presupposes that

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<sup>11</sup> Judgment of the Court of 10 November 1998, *Gemeente Arnhem v BFI Holding*, ECLI:EU:C:1998:525.

<sup>12</sup> Judgment of the Court of 9 June 2009, *Stadtreinigung Hamburg*, ECLI:EU:C:2009:357.

waste management can be a public task that falls outside the scope of the procurement regulations if the other conditions in Article 1 (6) are met.

As illustrated by the case-law referred to above, the CJEU has generally ruled that waste management is a task that should serve the needs of the public. It is difficult to understand why the management of the municipality's own commercial waste waste generated through their performance of their tasks is not of "public nature", as the Authority claims. According to the CJEU, the fact that private actors also must ensure the management of commercial waste is irrelevant. The case law shows that the CJEU has not based its understanding on a strict interpretation of the concept of "public task", but rather on the contrary.

The Authority seems to give the national distinction in Section 27a of the PCA between household waste and commercial waste decisive importance in the assessment of what is to be regarded as a "public task". As mentioned, the municipalities were previously responsible for all "consumer waste". The municipal responsibility was subject to a limited reduction by the legislative amendment that came into force in 2004. Municipalities still have the responsibility for household waste and their own commercial waste generated through their performance of their tasks, and this must therefore be considered a public task. We cannot see that such a division of "municipal waste" into fractions would take away the character of municipalities commercial waste mangemen being a public task. The municipality still has a statutory duty to handle its own commercial waste, a task that was not relieved by the legal amendment. We emphasize that the municipalities' duties and responsibilities in this respect arise from extensive obligations related to waste management under EEA law. It is thus an erroneous conclusion by the Authority when stating that "Norway has chosen not to assign any public duties to municipalities with regard to commercial waste" (opening letter page 9).

In the same way as for managing household waste, the municipality's responsibility for managing its own commercial waste must be considered a "public task" because the waste is generated by public welfare services. By planning collection of larger volumes of waste from both households and the municipalities' own buildings / institutions, it will increase volume, co-ordination of shipment and transfers for further treatment. MNA can thus utilize economies of scale also when handling the municipalities' own commercial waste (which constitutes a much smaller volume than the volumes generated by households). This is significant given the remote and scarcely populated districts MNA covers. In its geographical coverage, MNA is responsible for 39,000 inhabitants spread over a total of 22,607 km<sup>2</sup>. The principle of proximity also indicates that the management of the municipalities' own commercial waste is a public task.

The Authority refers to case C-3/88 "Commission vs. Italy"<sup>13</sup> and claims that the fact that the waste originates from public welfare services is irrelevant for the assessment of whether the task constitutes a "public task" or not. It is difficult to see the relevance of this decision given that it concerned awarding contracts and deliveries of computer equipment for the performance of a public task. C-386/11 "Piepenbrock" also dealt with «public tasks», and specifically building and window cleaning.<sup>14</sup> Both decisions on public tasks apply to completely different tasks than management of waste generated by public welfare services. They also concerned tasks that in themselves cannot be regarded as public services, as opposed to waste management. The municipality's responsibility for its own commercial waste is in turn a statutory task that is clearly defined and appears as a public task similar to

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<sup>13</sup> Judgment of the Court of Justice of 5 December 1989, *Commission v Italy*, C-3/88, EU:C:1989:606.

<sup>14</sup> Judgment of the Court of Justice of 13 June 2013, *Piepenbrock Dienstleistungen GmbH & Co. KG v Kreis Düren*, C-386/11, EU:C:2013:385.

the handling of household waste. The comparability and relevance of the CJEU cases referred to by the Authority is therefore questioned. The fact that the waste originates from public welfare services emphasizes the "public nature" of the task.

Article 59 (2) of the EEA Agreement allows for deviations from the provisions of the Agreement if it is necessary to carry out "tasks of general economic importance" (the so-called SGEI exception). "Municipal waste", as the term is understood according to Directive (EU) 2018/851 amending the framework directive on waste, Article 2b, can be regarded as an SGEI. The directive is the process of being incorporated into the EEA Agreement. The connection between the procurement directives and the EEA Agreements provision on state aid suggests that a similar understanding is used as a basis for interpretation of Article 1(6) of Directive 2014/24/EU. Not to allow the municipalities' responsibility for municipal commercial waste to be regarded as a public task / SGEI could prevent the municipalities from carrying out the tasks, especially small rural municipalities. Overall, we are of the opinion that the management of the municipalities' own commercial waste must be regarded as a public task.

## **2.4 No remuneration is paid for the transfer of competence**

It follows from PCA section 34 that the costs associated with the waste sector shall be fully covered, cf. above. In the relationship between the municipal owners and the MNA, this "cost principle" thus applies. MNA waives any right to profit by operating at cost and receives the coverage in back payments – in contrast to a commercial agreement where the remuneration in general is fixed in advance. Such settlement must therefore be considered as a logical consequence of the transfer of competence and cannot be regarded as a remuneration. In this connection, we refer *Remondis* (paragraphs 44 and 45):

*«Moreover, irrespective of the fact that a decision on the allocation of public competences does not fall within the sphere of economic transactions, the very fact that a public authority is released from a competence with which it was previously entrusted by that self-same fact eliminates any economic interest in the accomplishment of the tasks associated with that competence.»*

*“Consequently, the reassignment of resources used to perform the tasks associated with the competence, which are transferred by the authority that ceases to be competent to the authority that acquires competence, cannot be analysed as a payment of a price, but on the contrary is the logical — and even necessary — consequence of the voluntary transfer or imposed reallocation of that competence from the first authority to the second.”*

Prior to the transfer of competence, costs associated with waste management were included in the municipalities' own budgets. The fact that the owner municipalities now pay a waste fee determined according to proposal from MNA in line with the cost principle in the Pollution Control Act § 34 is nothing more than a necessary consequence of the transfer of competence and does not constitute a remuneration.

We also refer to our letter of 1 December 2020 where the cost-principle was explained in detail.

## **2.5 Conclusion**

The municipal owners have transferred all competence and responsibility associated with their waste management to MNA. In our opinion it clearly follows from the case law of the

CJEU that waste management is to be regarded as a public task. No remuneration is paid to MNA. The conditions pursuant to Article 1(6) of Directive 2014/24/EU is thus fulfilled. As a consequence, the New Partnership Agreement falls outside the scope of Directive 2014/24/EU.

### **3. Exclusive right**

The Norwegian governments alternative claim is that MNA has been awarded an exclusive right from the owner municipalities according to Article 11 of Directive 2014/24/EU, in the case that the arrangement with MNA not fulfils the conditions for delegation set out in Article 1(6) of Directive 2014/24/EU. We will in the following elaborate on the reasons why MNA in our opinion has been awarded an exclusive right.

#### **3.1. Legal basis**

Exclusive right is regulated in Article 11 of Directive 2014/24/EU:

*“This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a law, regulation or published administrative provision which is compatible with the TFEU.”*

The exception from public procurement for exclusive rights was included in the procurement rules due to the need for such exceptions for services of general economic interest, like waste management.<sup>15</sup>

The only condition contested by the Authority seem to be the existence of an exclusive right, other conditions seem not contested, at least not in a way that give Norway an opportunity to respond to the Authority's arguments in a meaningful way. Norway will in the following argue that the conditions for application of Article 11 of Directive 2014/24 are met in the relation to the New Partnership Agreement

#### **3.2 MNA has been awarded an exclusive right**

One condition for the exception in Article 11 to be fulfilled, is that MNA must enjoy an exclusive right pursuant to a law, regulation or published administrative provision. The New Partnership Agreement has been adopted by resolutions of the municipal boards of the owner municipalities. According to the New Partnership Agreement § 2 second paragraph MNA has an exclusive right to collect and treat the waste that the owner municipalities are obliged by law to manage pursuant to Section 29 and 30 of the PCA, including the waste that is generated by the owner municipalities through their performance of their tasks (their own commercial waste). Section 2 third paragraph states that the exclusive right could be further delegated. We therefore consider this condition to be fulfilled.

The Authority takes the view that Article 11 of Directive 2014/24 cannot be relied upon in respect of arrangements for municipal commercial waste because there is no exclusivity and therefore no exclusive right. Firstly, the Authority argue that other entities must be limited to carry out the activity, and that this is not the case. Secondly, the Authority argue that

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<sup>15</sup> Parliament, *Report on the proposal for a directive of the European Parliament and the council on public procurement* 2013A7-0007/2013. See e.g. “Amendment 27 Proposal for a directive Article 11 a (new)”.

management of commercial waste from municipalities is not an “activity”, because the Authority find management of commercial waste from municipalities similar to management of waste from business.

It is worth noting at the outset that there is no precise legal definition of exclusive rights in EEA procurement law.

The Norwegian government also notes that the Authority apply a definition of exclusive right in another directive on public procurement, Directive 2014/23/EU. There is no cross reference between this directive and Directive 2014/24/EU.

The Norwegian government argue that the Authority’s understanding of exclusive right is too narrow. We here refer to the letter 20 May 2020 page 6-11, inter alia:

*“the Norwegian government disagrees with the general understanding the Authority has expressed on “exclusivity” and especially the narrow approach of requiring “genuine exclusivity”. We are of the opinion that the municipalities may decide which area of waste management they can award exclusive rights within. Decisive in this respect is the scope of the municipalities’ responsibility/competence.*

*Namsos municipality is responsible for and have competence in management of its own commercial waste. Consequently, the municipality can choose how they solve that task, whether they handle it themselves, use the in-house option, award an exclusive right or procure services by public tender. By awarding an exclusive right, Namsos municipality provides MNA with exclusivity for all its commercial waste. In our opinion, it is not relevant whether there exist other economic operators who handle similar waste types from other sources. An exclusive right within the waste management area is typically limited to a certain fraction, source etc.”*

The Norwegian government agrees with the view expressed by the Authority in its pre-closure letter to the complainant 30 January 2018, page 7, in that: *“The understanding of exclusive rights under EEA law is relatively broad, as public authorities, depending on their respective field of competence within the State, may determine both the economic activity and the geographical area in which the service provider entrusted with the exclusive right shall operate.”*

The Norwegian government find that the Authority has insufficient legal basing when they apply the definitions in Article 7(1) c of Directive 2014/23/EU and Article 4 nr. 3 of Directive 2014/25/EU to define exclusive right in Article 11 of Directive 2014/24/EU. Directives 2014/23/EU and 2014/25/EU seem to have two different definitions of exclusive right: One for the exception from public procurement and one regarding which entities are subject to the regulations of the directive, cf. recital 20 of 2014/25/EU. According to recital 20: (our underscoring)

*“However, bearing in mind the different ratio legis behind these provisions, it should be clarified that the notion of exclusive rights does not need to have the same meaning in the two contexts. It should thus be clarified that an entity, which has won the exclusive right to provide a given service in a given geographic area following a procedure based on objective criteria for which adequate transparency has been ensured would not, if a private body, be a contracting entity itself, but would, nevertheless, be the only entity that could provide the service concerned in that area.”*

Article 4 nr. 3 of Directive 2014/25/EU seems to define which entities that are subject to the provisions of the directive, not exclusive rights. According to the article the definition applies to *“this Article”*. Therefore, the Norwegian government does not find this definition to be applicable as a definition in respect of Article 11 of Directive 2014/24/EU. A supporting argument is that Article 11 of Directive 2014/24/EU refers to *“public service contracts”* and not as Article 4 nr. 3 of 2014/25/EU to *“activity”*. In our opinion the Authority’s emphasis on *“activity”* does not have sufficient basis in the wording of Article 11 of Directive 2014/24/EU.

The Norwegian government also questions the Authority’s understanding that a condition for exclusive right is to limit the ability of other entities to carry out the activity. It follows from Article 4 nr. 3 of 2013/23/EU that the limitation of the activity is a consequence of exclusivity, not a condition in itself; *“the effect of which is to limit the exercise of activities defined in Articles 8 to 14 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.”* (our underscoring)

The Norwegian Government also refers to *Caranta*, [European Public Procurement Commentary on Directive 2014/24/EU](#) page 117:

*«Whether, additionally, the condition that the right should substantially affect the ability of other economic operators to carry out such an economic activity is a separate condition is less evident; this condition can also be understood as the immediate effect of an exclusive right.»*

Furthermore, we do not find the Authority’s understanding of exclusive rights according to Article 11 of Directive 2014/24/EU referred to above decisive. Contrary to the Authority’s’ understanding, The Norwegian government’s comprehension of exclusive rights effectively limits other entities from performing the *same* service within the given geographical area. Other entities are clearly limited to manage municipal commercial waste from the owner municipalities when MNA is awarded an exclusive right on this service.

Moreover, we find the Authority understanding of economic activity too wide when they assume it must include all commercial waste from municipalities and business. We refer to section 2.3, where we argue that the municipality’s responsibility for managing its own commercial waste must be considered a *“public task”* because the waste is generated by public welfare services.

In support of our view, the Norwegian government refers to C-209/98 *“Sydhavnens Sten and Grus”*,<sup>16</sup> where the Danish municipalities had competence for waste produced within their boundaries. In the case, the CJEU accepted the award of an exclusive right for one specific waste fraction, namely building waste. The decision thus shows that an exclusive right can be limited to a waste fraction.

According to the letter of formal notice the Authority is of the opinion the municipality’s ability to determine and contract with its own service provider does not meet the definition in *Ambulanz Glöckner* (section 7.1.1). Firstly, the Norwegian government question that the decision defines exclusive rights. Secondly, the Norwegian government disagree with the Authorities understanding of the meaning of exclusive right. The New Partnership Agreement entails an exclusive right, the management of the municipalities commercial waste. The Norwegian government therefore do not agree with the Authority in the opening letter section 7.1 that the Norwegian government define the relevant activity *“with mere reference to the*

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<sup>16</sup> Judgment of the Court of Justice of 23 May 2000, *Sydhavnens Sten and Grus*, C-209/98, EU:C:2000:279.

*purchaser of the services being offered in each instance*". As described, the exclusive right is defined according to the service, management of municipal commercial waste. This corresponds to how Danish government defined the exclusive right after the service in *Sydhavnens Sten and Grus*.

On the basis of the above, we are of the opinion that the municipal owners have awarded MNA an exclusive right encompassing the handling of the commercial waste they generate through their performance of their tasks. This is "relating to an activity", namely management of municipal commercial waste. MNA has been awarded an exclusive right, the effect of which is to limit the exercise of this management of this waste to one entity.

### 3.3 Conclusion

The contested condition is whether MNA has an exclusive right pursuant to Article 11 of Directive 2014/24/EU. As described above, this condition is fulfilled. The Norwegian government briefly mentions that the other, not contested, conditions also are fulfilled. MNA is clearly a body governed by public law. MNA enjoys the exclusive right pursuant to a law, regulation or published administrative provision, because The New Partnership Agreement with its regulation of exclusive rights on management of commercial waste has been adopted by resolutions of the municipal boards of the owner municipalities. The New Partnership Agreement is a public contract. The award is compatible with the EEA Agreement. Because all conditions pursuant to Article 11 of Directive 2014/24/EU for the award of exclusive rights are fulfilled for MNAs management of own municipal commercial waste, there is therefore no breach of the EEA Agreement to not tender this service.

## 4. Conclusions

Transfer of power and responsibilities

- The municipal owners have transferred the entire waste competence, both related to household waste and their own commercial waste generated through their performance of their tasks, to MNA. The delegation in the New Partnership agreement is in line with the criteria set out in CJEU case-law and the transfer of competence does not appear as a mutually onerous contract.
- Management of the municipalities own commercial waste generated through their performance of public services is clearly a public task. This is supported by CJEU case-law which has concluded that management of waste should be considered as a public task. The municipalities have always had the responsibility to manage their waste generated through their performance of public services. This was not altered by the change in legislation that entered into force in 2004.
- No remuneration of significance is paid for the transfer of competence.
- The conditions set out in Article 1(6) of 2014/24/EU and case law are fulfilled

Exclusive right

- Management of the municipalities own commercial waste generated through their performance of their tasks is an exclusive right, the effect of which is to limit the exercise of this management of this waste to one entity.
- The exclusive right is a specific public task within a specific geographical area. It follows from case law of the CJEU that an activity can be limited to a specific waste fraction.
- The award of exclusive right concerns a service of general economic interest.
- The conditions for the award of exclusive right set out in Article 11 of Directive 2014/24/EU are fulfilled.

Yours sincerely

Mona Aarhus  
Deputy Director General

Olve Klepp  
Adviser

*This document is signed electronically and has therefore no handwritten signature*