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Brussels, 21 June 2019
Case No: 78085
Document No: 1074450

EFTA SURVEILLANCE
AUTHORITY

Norwegian Ministry of Climate and Environment
P.O. Box 8013 Dep
N-0030 Oslo

Dear Sir/Madam,

Subject: Complaint against Norway concerning the award of exclusive rights for collection and treatment of waste

On 4 December 2018, the Internal Market Affairs Directorate (“the Directorate”) of the EFTA Surveillance Authority (“the Authority”) sent a further request for information in relation to its examination of complaint against Norway concerning the award of exclusive rights by Norwegian municipalities to state-owned undertakings in the area of waste management.¹ The Norwegian Government responded to that request for information on 14 February 2019.²

The Directorate notes that subsequent to the receipt of the complaint and therefore also subsequent to the grants of exclusive rights considered in the case, Directive 2014/24/EU entered into force in the EEA and the Court of Justice of the European Union (“CJEU”) delivered its judgment in *Remondis*.³ Whilst Article 11 of Directive 2014/24/EU concerning the direct award of service contracts on the basis of exclusive rights is materially identical to Article 18 of Directive 2004/18/EU, Directive 2014/24/EU also contains Article 1(6) which provides:

“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.”

In *Remondis*, the CJEU held that:

“Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that an agreement concluded by two regional authorities, such as that at issue in the main proceedings, on the basis of which

¹ Doc No 930863.

² Doc No 1052794; Your ref 15/2910-.

³ Judgment of 21 December 2016 in Case C-51/15 – *Remondis GmbH & Co. KG Region Nord v Region Hannover*, EU:C:2016:985.

they adopt constituent statutes forming a special-purpose association with legal personality governed by public law and transfer to that new public entity certain competences previously held by those authorities and henceforth belonging to that special-purpose association, does not constitute a 'public contract'.

However, such a transfer of competences concerning the performance of public tasks exists only if it concerns both the responsibilities associated with the transferred competence and the powers that are the corollary thereof, so that the newly competent public authority has decision-making and financial autonomy, which it is for the referring court to verify.”⁴

The details provided in the Norwegian Government's letter of 14 February 2019 in response to the Authority's question 6 regarding Follo REN IKS suggest that the arrangements between Follo REN IKS and its owner municipalities could be regarded, as a matter of EEA law, as a transfer of powers and responsibilities/competences in the sense described in Article 1(6) and/or *Remondis*.

The Norwegian Government is therefore asked to clarify:

1. Whether it is of the view that the arrangements between Follo REN IKS and its owner municipalities should be regarded as a transfer of powers and responsibilities/competences in the sense described in Article 1(6) and/or *Remondis*.
2. Whether it is of the view that any other arrangements under consideration in the case should be regarded as a transfer of powers and responsibilities/competences in the sense described in Article 1(6) and/or *Remondis*.

Without prejudice to the Norwegian Government's response to the above questions and the Authority's further assessment of the matter, the Directorate makes the following preliminary observations based on information submitted thus far by the Norwegian Government.

The Directorate notes that on the basis of the CJEU's judgment in *Remondis*, a transfer of competence requires the transferee entity to have, inter alia, decision-making autonomy. On the other hand, in order to rely upon the exemption for in-house entities now provided for at Article 12(1) of Directive 2014/24, the in-house entity must be subject to a controlling authority which has a decisive influence over both its strategic objectives and significant decisions. It would therefore appear unlikely that arrangements described as meeting the requirements of the in-house exemption could also be characterised as transfers of powers and responsibilities/competences.

Furthermore, the Directorate notes that the requirements for the transfer of powers and for autonomy would also appear to preclude the existence of a contract for the services task in question. The Norwegian Government is therefore asked to clarify:

3. In the event that any arrangements are considered capable of being regarded as transfers of powers and responsibilities/competences, whether any service contracts have been entered into by the transferor authority with the transferee authority.

⁴ *Remondis*, operative part.

The Norwegian Government is requested to respond to the above questions, as well as provide any other information it deems relevant to the case, by *21 July 2019*. Please enclose copies of any relevant documentation, including English translations if available.

Yours faithfully,

Kristin Saether Bangsund
Deputy Director
Internal Market Affairs Directorate

This document has been electronically authenticated by Kristin Saether Bangsund.