Brussels, 8 December 2021
Case No: 78085
Document No: 1143836
Decision No: 277/21/COL

ESA | EFTA Surveillance Authority

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

Dear Sir or Madam,

Subject: Letter of formal notice to Norway in respect of a complaint against Norway concerning the award of exclusive rights for collection and treatment of municipal commercial waste

1 Introduction

By a letter dated 28 October 2015,[1] the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had received a complaint against Norway concerning the award of exclusive rights by municipalities to state-owned undertakings in the area of waste management. Specifically, the complaint concerned:

(a) collection and treatment of commercial waste;[2]

(b) treatment of hazardous waste; and

(c) collection of household waste.

Having examined the matters brought to the Authority's attention in the complaint, the Authority has concluded that arrangements entered into with the inter-municipal waste company Midtre Namdal Avfallsselskap IKS ("MNA") by its owner municipalities for services in respect of commercial waste from municipal buildings and institutions ("municipal commercial waste") are in breach of EEA law.

The Authority is of the view that these arrangements with MNA constitute a public contract which should have been competitively tendered in accordance with EEA rules on public procurement. Whilst there are rules which provide for exemptions from the requirement for competition, including in respect of arrangements within the public sector, the Authority considers that the conditions for these rules are not met. In particular, the Authority does not consider that the arrangements with MNA constitute a transfer of powers and responsibilities (such matters falling outside EEA law) or that MNA holds an exclusive right in respect of the activity (which would justify the direct award of a contract without competition).

In this letter, the Authority will first set out the history of the case (section 2), the relevant legal framework (sections 3 and 4) and the details of the arrangements under assessment (section 5). The Authority will then set out its detailed legal analysis to support the conclusions outlined above.

[1] Doc No 777989.
[2] In Norwegian, "*næringsavfall*". In Decision 085/19/COL of 4 December 2019 in Case 84370 concerning waste handling in Tromsø, the Authority has used the translation "industrial waste". Given that the correspondence in Case 78085 has used the term "commercial waste", this has been continued in this letter. The two English translations are viewed as synonymous.

In section 6, the Authority will explain why the arrangements cannot be considered to be a transfer of powers and responsibilities. The Authority will base its argument on the tasks not constituting public tasks (as will be explained, in Norway, all producers of commercial waste are subject to the same responsibilities, regardless of whether they are public or private bodies) and the transfer not being sufficiently comprehensive.

In section 7, the Authority will set out why MNA cannot be considered to have an exclusive right such that a contract can be awarded directly. Again, the Authority's argument will rely on the fact that Norwegian municipalities have no special powers or responsibilities in respect of commercial waste. In this instance, the consequence of this state of affairs is that a municipality is not in a position to grant exclusivity in respect of the activity because it only has a role in respect of its *own* waste. As such, there is no justification for not engaging with the market.

Finally, in section 8, the Authority will explain why the arrangements meet the definition of a public contract, meaning that EEA public procurement rules should have been applied.

It should be emphasised that the legal matters assessed in this case, and the breaches identified, concern EEA public procurement law. However, the breaches arise in the context of waste management and so the Authority must take into account the relevant waste management framework. As is evident from the summary above, the regulatory choice made at national level as regards responsibilities and powers in respect of commercial waste is key and directly affects the application of the relevant procurement rules.

Save for as set out in section 6, this letter does not concern any of the other example cases referred to in the complaint. In this regard, reference is made to the letter from the Authority's Internal Market Affairs Directorate ("the Directorate") of 20 February 2020 in which the Directorate found a number of those cases to be compliant with EEA law on the basis of rules relating to transfers of powers and responsibilities/competences, in-house companies, or contracts awarded on the basis of exclusive rights.[3]

2 Correspondence

On 15 December 2015,[4] the Authority issued a request for information to the Norwegian Government.

On 1 April 2016,[5] the Norwegian Government replied to the Authority's letter. By letters dated 20 May 2016[6] and 27 September 2016,[7] the Norwegian Government submitted additional information.

By letter dated 18 October 2016,[8] the Authority sent a further request for information to the Norwegian Government. By letter dated 1 February 2017,[9] the Norwegian Government replied to the Authority's letter.

By letter dated 30 May 2017,[10] the Authority sent a further request for information to the Norwegian Government to which the Norwegian Government replied by letter

[3] Doc No 1055823.
[4] Doc No 784886.
[5] Doc No 799119.
[6] Doc No 805325.
[7] Doc No 820204.
[8] Doc No 822684.
[9] Doc No 839541.

dated 7 July 2017.[11] The Norwegian Government submitted additional information by letter dated 15 December 2017.[12]

The case was also discussed with the Norwegian Government during the package meetings that took place in Oslo on 27 – 28 October 2016[13] and on 26 October 2017.[14]

A pre-closure letter was sent to the complainant on 30 January 2018.[15] On 2 June 2018, the Authority became aware that the complainant had not received that letter. The letter was reissued on 11 June 2018.

By letter dated 3 July 2018,[16] the complainant submitted additional information. A meeting between the Directorate and the complainant took place on 16 August 2018.

On 4 December 2018, the Authority issued a further request for information.[17] The Norwegian Government responded on 14 February 2019.[18]

On 21 June 2019, the Authority requested further clarifications.[19] The Norwegian Government responded on 21 August 2019[20] and the matter was discussed at the Package Meeting which took place in Oslo on 24 – 25 October 2019.[21]

On 20 February 2020, the Directorate issued a letter setting out its assessment of the issues raised and the potential breaches of EEA law identified in the case.[22] The Norwegian Government responded to that letter on 20 May 2020.[23]

On 2 October 2020, the Authority requested factual clarification regarding some matters.[24] The matter was discussed at the Package Meeting which took place virtually on 22 – 23 October 2020[25] and the Norwegian Government responded to the letter of 2 October 2020 on 1 December 2020.[26]

On 29 January 2021, the Authority sent a further request for information.[27] The Norwegian Government replied to that request on 11 March 2021.[28]

3 Relevant national law

[10] Doc No 857713.
[11] Doc No 865020.
[12] Doc No 889088.
[13] See Doc No 824832, page 47.
[14] See Doc No 878916, page 41.
[15] Doc No 867102.
[16] Doc No 921972.
[17] Doc No 930863.
[18] Doc No 1052794.
[19] Doc No 1074450.
[20] Doc No 1084286.
[21] See Doc No 1096584, page 33.
[22] Doc No 1055823.
[23] Doc No 1134028.
[24] Doc No 1143705.
[25] See Doc No 1161672, page 21.
[26] Doc No 1166524.
[27] Doc No 1173551.
[28] Doc No 1187063.

3.1 Public procurement law

Section 2-3 of the Regulation on Public Procurement of 12 August 2016 No. 974[29] provides:

> *"The Procurement Act and the Regulation do not apply to service contracts which the contracting authority enters into with another contracting authority who has an exclusive right to perform the service. This will only apply when the exclusive right is awarded by law, regulation or published administrative decision which is in compliance with the EEA Agreement".*

3.2 Waste management law

The Pollution Control Act[30] sets out the different types of waste[31] under Norwegian law and municipalities' duties and powers in relation to waste management.

Section 27a, first to third paragraphs, reads:

> *"By household waste is meant waste from private households, including larger items such as furniture and similar.*
>
> *By industrial/commercial waste is meant waste from public and private businesses and institutions.*
>
> *By special waste is meant waste which is not suitable to be treated together with other household waste or industrial/commercial waste because of its size or because it can lead to severe pollution or danger to harm to humans or animals."*

Section 29, third paragraph, reads:

> *"The Municipality shall have facilities for storage or treatment of household waste and sewage sludge and is obliged to receive such waste and sludge. The Pollution Control Authority may by regulations or in individual cases determine that the municipality shall also have facilities for special waste and industrial waste, and a duty to receive such waste. The Pollution Control Authority may also lay down further conditions for the waste facilities."*

Section 30, first paragraph, reads:

> *"The Municipality shall provide for collection of household waste. […]"*

Section 30, third paragraph, reads:

> *"The Municipality may issue the regulations necessary to ensure appropriate and hygienic storage, collection and transport of household waste. Without the consent of the Municipality, no one may collect household waste. In special cases, the Pollution Control Authority may by regulations or in individual cases decide that the consent of the Municipality is not necessary."*

Section 32 first paragraph reads:

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[29] FOR-2016-08-12-974 *Forskrift om offentlige anskaffelser.*
[30] LOV-1981-03-13-6 *Lov om vern mot forurensninger og om avfall (forurensningsloven).*
[31] The Norwegian Government has noted that these do not fully coincide with the definitions applied in EEA law (see letter of 1 February 2017 (Doc No 839541), page 3).

"He who produces industrial/commercial waste shall ensure that the waste is brought to a legal waste plant or is recovered, so that it either ceases to be waste or in another way is of use by replacing materials which otherwise would have been used. […]"

4 Relevant EEA law

Directive 2014/24/EU on public procurement[32] ("Directive 2014/24") entered into force in the EEA on 1 January 2017.[33]

Recital 30 of Directive 2014/24 states:

"In certain cases, a contracting authority or an association of contracting authorities may be the sole source for a particular service, in respect of the provision of which it enjoys an exclusive right pursuant to laws, regulations or published administrative provisions which are compatible with the TFEU. It should be clarified that this Directive need not apply to the award of public service contracts to that contracting authority or association."

Article 1(1) of Directive 2014/24 provides:

"This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4."

Article 1(6) of Directive 2014/24 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."

Article 2(1)(5) of Directive 2014/24 provides:

" 'public contracts' means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;"

Article 2(1)(9) of Directive 2014/24 provides:

"'public service contracts' means public contracts having as their object the provision of services other than those referred to in point 6;"

Article 11 of Directive 2014/24 provides:

"This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting

[32] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, act referred to at point 2 of Annex XVI to the EEA Agreement, OJ L 94, 28.3.2014, p. 65.

[33] Joint Committee Decision No 97/2016 of 29 April 2016, OJ L 300, 16.11.2017, p. 49.

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."

5 The arrangement under assessment

Pursuant to the provisions set out in section 3.2 above, Norwegian municipalities are responsible for the collection of household waste. They must also have facilities for storage or treatment of household waste and sewage sludge and are obliged to receive such waste and sludge. On the other hand, Norwegian municipalities' responsibilities in respect of commercial waste arise by virtue of them being waste producers and they do not have any special responsibilities as public authorities with regard to such waste.

On 26 March 2015, Namsos Municipality granted MNA exclusive rights for the collection and treatment of municipal commercial waste by way of a municipal board resolution ("the 2015 Resolution"). Namsos Municipality is one of the owners of MNA.[34]

The 2015 Resolution has not been given effect. However, in its letter of 1 December 2020,[35] the Norwegian Government explained that in 2019, the owner municipalities of MNA transferred powers and responsibilities/competences for the handling of waste to MNA through a new partnership agreement ("the New Partnership Agreement").[36] These powers and responsibilities include the municipalities' obligations in respect of municipal commercial waste.[37]

As it was adopted after the entry into force of Directive 2014/24 on 1 January 2017, the compliance of the New Partnership Agreement with EEA public procurement law must be assessed against Directive 2014/24.

The Norwegian Government only confirmed the adoption of the New Partnership Agreement in its letter of 1 December 2020.[38] Prior to this, correspondence in the case focused on the 2015 Resolution and the arrangements it gave rise to between Namsos Municipality and MNA. Given that the New Partnership Agreement was intended to transfer *additional* powers and responsibilities for the handling of waste to MNA,[39] and that services in respect of municipal commercial waste were already encompassed by the 2015 Resolution, for the purposes of this letter the Authority will assume that the Norwegian Government's previous arguments concerning the nature of the arrangements between MNA and Namsos Municipality in relation to municipal commercial waste under the 2015 Decision are equally applicable to the arrangements between MNA and all its owner municipalities under the New Partnership Agreement.

In this letter, the Authority will assess the New Partnership Agreement in respect of its compliance with EEA law. As the 2015 Resolution was not given effect and was, in effect, superseded by the New Partnership Agreement, the Authority will not assess the 2015 Resolution.

The New Partnership Agreement covers services relating to both municipal commercial waste and household waste. However, the services relating to municipal commercial waste must be considered to be objectively separable from those relating to household waste. Firstly, the obligations in respect of these different types of services derive from

[34] The other owners of MNA are Flatanger, Overhalla, Grong, Hoylandet, Leka, Bindal, Næroysund, Namsskogan, Royrvik, Lierne and Osen.
[35] Doc No 1166524.
[36] Attachment 1 to letter of 1 December 2020 (Doc No 1166524).
[37] Section 2 of the New Partnership Agreement.
[38] Doc No 1166524.
[39] Letter of 21 August 2019 (Doc No 1084286), page 11.

distinct provisions of the Pollution Control Act.[40] Secondly, the Authority's understanding is that prior to the adoption of the New Partnership Agreement, there were in fact different types of arrangements in place in relation to household and municipal commercial waste, at least in Namsos municipality: MNA dealt with household waste pursuant to a partnership agreement, whereas the collection and treatment of municipal commercial waste was dealt with by the municipality itself (which in fact tendered out the service).[41] Given this separability, the assessment which follows will deal only with services in respect of municipal commercial waste.

The Authority understands that similar arrangements to the New Partnership Agreement may have been entered into by other municipalities. The Authority may assess such arrangements at a later date.

6 The Authority's assessment: transfer of powers and responsibilities

EEA public procurement law does not apply where public authorities transfer their powers and responsibilities in relation to public tasks to other public authorities, provided certain conditions are met. This principle is now reflected in Article 1(6) of Directive 2014/24 and the Court of Justice of the European Union ("CJEU") dealt with this in *Remondis*.[42] The Norwegian Government argued that the previous arrangement between Namsos Municipality and MNA should be considered as such a transfer of powers and responsibilities.[43] The Norwegian Government's letter of 1 December 2020[44] also describes the New Partnership Agreement as entailing a transfer of powers and responsibilities.[45]

Article 1(6) of Directive 2014/24 states that "*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 [the] Directive*".

In *Remondis*, the CJEU held that:

> *"… an agreement concluded by two regional authorities … on the basis of which 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*

[40] As regards severability, see the judgment of the Court of Justice of 22 December 2010, *Mehiläinen and Terveystalo Healthcare v Oulun kaupunki*, C-215/09, EU:C:2010:807, particularly paragraphs 37 to 41, and, by analogy, Article 3(3) of the Directive.
[41] See letter of 21 August 2019 (Doc No 1084286), pages 9 to 11.
[42] 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.
[43] Letter of 21 August 2019 (Doc No 1084286), page 10 and letter of 20 May 2020 (Doc No 1134028), page 10.
[44] Doc No 1166524.
[45] Letter of 1 December 2020 (Doc No 1166524), page 2.

> *the newly competent public authority has decision-making and financial autonomy…"*[46]

Remondis was decided under Directive 2004/18/EC,[47] which was replaced by Directive 2014/24 on 1 January 2017 in the EEA. Directive 2004/18/EC did not contain an equivalent provision to Article 1(6) of Directive 2014/24. Although the case was referred to the CJEU after Directive 2014/24 was adopted and there is reference to Article 1(6) of Directive 2014/24 in the judgment, the Court does not comment on the provision. It is therefore not fully clear whether *Remondis* should be understood as establishing a separate exception to that provided for under Article 1(6) of Directive 2014/24.

Following the express approach of Advocate General Mengozzi in *Remondis*,[48] the Authority is of the view that the case should not be understood as establishing a separate exception to that provided for under Article 1(6) of Directive 2014/24. The CJEU in *Remondis* concluded that a transfer of competence (meeting the conditions described in the judgment) was not a public contract.[49] The term "public contract" is fundamental with regards to the applicability of both Directive 2004/18/EC and Directive 2014/24. Recital 4 of Directive 2014/24 states that the notion of "procurement" in that directive is not intended to broaden the scope of that directive compared to that of Directive 2004/18/EC, and that its rules are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. In this context, for arrangements being assessed under Directive 2014/24, *Remondis* should be seen as establishing the conditions for application of Article 1(6) of Directive 2014/24, which in turn should be seen as clarifying which arrangements are not public contracts and so do not fall within the scope of Directive 2014/24.

In any case, for the purposes of the primary argument which the Authority will make in section 6.1 below regarding the absence of a public task, it is not necessary to conclude on this matter as both *Remondis* and Article 1(6) of Directive 2014/24 refer to "public tasks".

6.1 The arrangement does not concern a public task

In order to qualify as a transfer of powers and responsibilities as described in Article 1(6) of Directive 2014/24, the arrangement in question must concern a public task. The Authority is of the view that this condition is not satisfied in the case of the New Partnership Agreement in so far as it concerns the collection and treatment of municipal commercial waste. Municipalities' obligations in respect of commercial waste do not differ in any way from those placed on private undertakings and therefore the task cannot be considered to be of a public nature.

In its letter of 20 May 2020, the Norwegian Government made a number of arguments as to why the task should be considered a public one and stated that the Directorate did not appear to have taken environmental concerns and the particularities of the waste sector sufficiently into account.[50] The specifics of these arguments will be addressed below. However, in respect of the latter point, it should be noted at the outset that the CJEU has

[46] *Remondis*, operative part.
[47] 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, act previously referred to at point 2 of Annex XVI to the EEA Agreement (replaced by Joint Committee Decision No 97/2016), OJ L 134, 30.4.2004, p. 114.
[48] See paragraphs 45 and 46 of the Opinion of Advocate General Mengozzi of 30 June 2016, EU:C:2016:504.
[49] See, in particular, *Remondis,* paragraphs 42 to 46 and 55.
[50] See letter of 20 May 2020 (Doc No 1134028), page 2.

held that states are not exempt from their obligations under EEA public procurement law on the basis of the particular nature of waste and the principle that environmental damage should as a matter of priority be remedied at source (that principle entailing that it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated and disposed of as close as possible to the place where it is produced).[51]

Firstly, the Norwegian Government refers to Norwegian municipalities having other responsibilities in terms of reducing emissions to soil, air and water.[52] However, the fact that, in Norway, municipalities are subject to the same rules as private actors as regards commercial waste is clear from (i) the definition of commercial waste under Section 27a of the Pollution Control Act (being waste from public and private businesses and institutions), (ii) the drafting of Section 32 of the Pollution Control Act itself (which does not distinguish between different producers of commercial waste) and (iii) the relevant preparatory works[53] (which state that commercial waste is waste from public and private businesses and includes waste from public administrations and institutions which do not have an economic purpose).[54] This position is not altered by Norwegian municipalities having other responsibilities in terms of reducing emissions.

Secondly, Norway makes reference to the definition of "municipal waste" in the Waste Framework Directive.[55] It should be noted that Directive (EU) No 2018/851, which introduces the definition of "municipal waste" into the Waste Framework Directive, is not yet incorporated into the EEA Agreement.[56] As a result, the Waste Framework Directive in force in the EEA does not (yet) have a clear definition of "municipal waste". In any event, the fact that the Waste Framework Directive as in force in the EU defines "municipal waste" in a way which would encompass both household waste and some commercial waste as defined by Norwegian law[57] does not mean management of all such waste is a public task in Norway. It is clear that the new definition of "municipal waste" introduced by Directive (EU) No 2018/851 is without prejudice to the allocation of responsibilities for waste management between public and private actors.[58] As is clear from the Pollution Control Act, Norway has chosen not to assign any public duties to municipalities with regard to commercial waste. This is the case even where such waste is of a similar nature to household waste, in respect of which Norwegian municipalities do have clear public duties.[59]

Thirdly, the Norwegian Government refers to waste management being a service of general economic interest (SGEI).[60] The Authority recalls that SGEIs are economic

[51] See judgment of the Court of Justice of 21 January 2010, *Commission* v *Germany*, C-17/09, EU:C:2010:33, paragraphs 16 and 17.
[52] See the Norwegian Government's letter of 20 May 2020 (Doc No 1134028), page 4.
[53] Ot.prp. nr. 87 2001 – 2002, section 2.6.2, https://www.regjeringen.no/no/dokumenter/otprp-nr-87-2001-2002-/id169578/
[54] This position can be contrasted with that in relation to household waste, in respect of which the third paragraph of Section 30 of the Pollution Control Act provides "*[t]he Municipality shall provide for collection of household waste*" and "*[w]ithout the consent of the Municipality, no one may collect household waste."*
[55] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, act referred to at point 32ff of Annex XX to the EEA Agreement, OJ L 312, 22.11.2008, p. 3. See letter of 20 May 2020 (Doc No 1134028), pages 2 – 3.
[56] Joint Committee Decision No 318/2021 of 29 October 2021 is subject to constitutional requirements and so is not yet in force.
[57] Article 3(2)(b) of Directive 2008/98/EC, as amended by Directive (EU) No 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste, OJ L 150, 14.6.2018, p. 109.
[58] Article 3(2)(b) of Directive 2008/98/EC and recital 7 of Directive (EU) No 2018/851.
[59] Under Sections 29 and 30 of the Pollution Control Act.
[60] See letter of 20 May 2020 (Doc No 1134028), page 5.

activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention.[61] Waste management is capable of being considered as an SGEI.[62] However, Norway has chosen to allow collection and treatment of commercial waste to be performed by the market.[63] As such, whilst waste management is *capable* of being an SGEI, collection and treatment of commercial waste is not treated as such in Norway. The fact that some of the actors engaging the market will be public authorities does not transform the service into an SGEI.

Finally, the Norwegian Government argues that the fact that the commercial waste which the municipality is responsible for derives directly from its legal obligations to provide services of public interest (i.e. schools, kindergartens, elderly care etc.) should also be taken into consideration. The Norwegian Government considers that municipalities' management of their own waste from public services can be considered part of their public task to provide necessary public services. [64]

The Authority agrees that providing schools, kindergartens and elderly care is capable of being a public task (depending on the particular approach applied in the State in question). As such, a transfer by a public authority of its powers and responsibilities in respect of such matters to another public authority would be capable of falling under Article 1(6) of Directive 2014/24. However, the fact that management of waste may facilitate a public task does not mean that management of waste in itself constitutes a public task.[65]

On the basis of the above, the Authority concludes that due to the allocation of responsibilities in respect of waste management in Norway under Sections 29, 30 and 32 of the Pollution Control Act, the collection and treatment of municipal commercial waste is not a public task in Norway and therefore an arrangement in respect of these services cannot fall under the *Remondis*/ Article 1(6) exception.

6.2 The arrangement does not meet the other conditions set out in *Remondis*

The position taken in section 6.1 above is sufficient to preclude the arrangements under the New Partnership Agreement concerning municipal commercial waste from being excluded from EEA public procurement law on the basis of Article 1(6) of Directive 2014/24. However, the Authority also considers that the condition of a comprehensive transfer of power is not satisfied.

The CJEU in *Remondis* held that 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...*"[66]

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[61] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Quality Framework for Services of General Interest in Europe, 20 December 2011, COM(2011) 900 final, page 3.

[62] See judgment of the EFTA Court of 22 September 2016, *Sorpa bs. v The Icelandic Competition Authority*, E-29/15, [2016] EFTA Ct. Rep. 825, paragraph 67; judgment of the Court of Justice of 23 May 2000, *Sydhavnens Sten and Grus*, C-209/98, EU:C:2000:279, paragraph 75; and judgment of the Court of Justice of 10 November 1998, *Gemeente Arnhem v BFI Holding*, C-360/96, EU:C:1998:525, paragraph 52.

[63] See also Ot.prp. nr. 87 2001 – 2002, sections 4.2 and 4.3.

[64] Letter of 20 May 2020 (Doc No 1134028), page 5.

[65] See judgment of the Court of Justice of 5 December 1989, *Commission v Italy*, C-3/88, EU:C:1989:606, paragraph 26.

[66] *Remondis*, operative part.

This concept is elaborated on in paragraphs 41, 43 and 44 of the judgment.

At paragraph 41, the Court describes a transfer as "*having the consequence that a previously competent authority is released from or relinquishes the obligation or power to perform a given public task, whereas another authority is henceforth entrusted with that obligation or power.*"

At paragraphs 43 and 44, referring to the absence of the necessary condition of pecuniary interest in transfers of powers and responsibilities, the Court states:

> "*Only a contract concluded for pecuniary interest may constitute a public contract coming within the scope of Directive 2004/18, the pecuniary nature of the contract meaning that the contracting authority which has concluded a public contract receives a service which must be of direct economic benefit to that contracting authority (see, to that effect, judgment of 25 March 2010, Helmut Müller, C-451/08, EU:C:2010:168, paragraphs 47 to 49). The synallagmatic nature of the contract is thus an essential element of a public contract, as observed by the Advocate General in point 36 of his Opinion.*
>
> *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*." [67]

The Authority is of the view that there is no transfer and relinquishing of powers in the case of the New Partnership Agreement in so far as it concerns municipal commercial waste.

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. This can be contrasted with municipalities' powers in relation to household waste, which include powers to make decisions with legal effect in relation to municipal responsibilities within waste management.[68]

Secondly, there is no "transfer" in the sense of relinquishing power. Each municipality still has a clear economic interest in the accomplishment of the tasks associated with the competence as it will have its waste collected, a service which is of clear economic benefit to it and indicates an on-going synallagmatic relationship.

The Authority considers that it is a fiction to refer to transferring and relinquishing powers in the context of an arrangement where the task in each municipality is performed for the exclusive benefit of the relevant "transferor" authority. In essence, rather than giving rise to a comprehensive transfer of powers and responsibilities, the substance of the

[67] Emphasis added.

[68] For example, Section 30 of the Pollution Control Act provides "*The Municipality may issue the regulations necessary to ensure appropriate and hygienic storage, collection and transport of household waste."* Pursuant to Section 83 of the same act, the responsibility to take individual decisions may be delegated to municipal or inter-municipal undertakings. For an example in practice, see Frogn municipality's regulations on household waste (*Forskrift for husholdningsavfall, Frogn kommune, Akershus, FOR-2011-06-20-1559*) which refer to individual decisions and delegate responsibility to Follo REN IKS under paragraph 3.

arrangement appears the same as that considered by the CJEU in *Piepenbrock.*[69] In that case, the Court held that

> "*A contract … whereby … one public entity assigns to another [a task] while reserving the power to supervise the proper execution of that task, in return for financial compensation intended to correspond to the costs incurred in the performance of the task, the second entity being, moreover, authorised to avail of the services of third parties … for the accomplishment of that task – constitutes a public service contract….*"[70]

The Authority concludes that there is no comprehensive transfer of powers and responsibilities in the arrangements under the New Partnership Agreement concerning municipal commercial waste.

6.3 Conclusion regarding Article 1(6) of Directive 2014/24

On the basis of the above, the Authority concludes that, in so far as it concerns municipal commercial waste, the New Partnership Agreement does not fall within the scope of Article 1(6) of Directive 2014/24 (nor, if it were to be considered to be distinct, within the exclusion established by *Remondis*) and therefore does not fall outside the scope of Directive 2014/24 by virtue of being a matter of internal organisation of a State.

7 The Authority's assessment: application of Article 11 of Directive 2014/24 concerning exclusive rights

The Norwegian Government's letter of 1 December 2020 refers to MNA having exclusive rights,[71] as does the New Partnership Agreement itself.[72] With regard to the 2015 Resolution, the Norwegian Government expressed the view that if it was not accepted that the arrangement fell within the exclusion set out in Article 1(6) of Directive 2014/24, it should be treated as falling under Article 11 of Directive 2014/24.[73] As per the comment in section 5 above, for the purposes of this letter, the Authority will assume that the Norwegian Government takes the same position as regards the New Partnership Agreement and so will address the application of Article 11 of Directive 2014/24 to the New Partnership Agreement.

At the outset, the Authority would emphasise that Article 11 of Directive 2014/24 is concerned with the awarding of a public service contract by one contracting authority to another contracting authority *on the basis of* an exclusive right which that second contracting authority enjoys pursuant to a law, regulation or published administrative provision which is compatible with EEA law. It does *not* govern the *award* of the exclusive right itself. Article 11 of Directive 2014/24 can only be relied upon to award a contract directly if all its conditions regarding the relevant exclusive right are met.

It is not fully clear how Article 11 would apply to arrangements now in place with MNA, given there is only one agreement (i.e. the New Partnership Agreement), rather than an award of exclusive rights followed by a separate public service contract. However, the Authority assumes that an argument could be made that the New Partnership Agreement itself is an award of exclusive rights which gives rise to the ability for the relevant

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[69] 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.
[70] *Piepenbrock*, operative part. See also paragraph 47 of the Opinion of Advocate General Mengozzi in *Remondis.*
[71] Letter of 1 December 2020 (Doc No 1166524), page 3.
[72] See section 2 of the New Partnership Agreement (in Norwegian, "enerett").
[73] Letter of 20 May 2020 (Doc No 1134028), page 10.

municipalities to award contracts pursuant to Article 11 of Directive 2014/24 in respect of municipal commercial waste.

As regards this argument, the Authority takes the view that Article 11 of Directive 2014/24 cannot be relied upon in respect of arrangements for municipal commercial waste for the simple reason that there is no exclusivity and therefore no exclusive right.

7.1 No exclusivity

In the present section, the Authority will set out why it considers that an exclusive right for the purposes of Article 11 of Directive 2014/24 means that one entity is granted the right to perform an economic activity as the sole operator within a specific geographical area with the consequence that the measure prevents other entities from carrying out the activity. As such, in order to award an exclusive right, the awarding body must be capable of regulating the provision of the activity within the relevant geographical area in order to limit the ability of other entities to carry out the activity. The Authority considers this is not the case in respect of services relating to commercial waste.

The term "exclusive right" is used in a number of capacities within Directive 2014/24 and the other two 2014 procurement directives (Directive 2014/23/EU[74] and Directive 2014/25/EU[75]).[76] It is defined in both Directive 2014/23/EU and Directive 2014/25/EU in a similar manner but is not defined in Directive 2014/24/EU. As all three directives have provisions equivalent to Article 11 of Directive 2014/24/EU, the Authority considers the definitions in Directives 2014/23/EU and 2014/25/EU to be relevant for the interpretation of Article 11 of Directive 2014/24/EU.[77]

Directive 2014/23/EU defines the term as:

> *"a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties the effect of which is to limit the exercise of an activity to a single economic operator and which substantially affects the ability of other economic operators to carry out such an activity"*[78]

[74] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, act referred to at point 6f of Annex XVI to the EEA Agreement, OJ L 94, 28.3.2014, p. 1.

[75] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, act referred to at point 4 of Annex XVI to the EEA Agreement, OJ L 94, 28.3.2014, p. 243.

[76] In Article 11 and its equivalent provisions in the other Directives (Article 10 of Directive 2014/23/EU and Article 22 of Directive 2014/25/EU); as a justification for an award without prior call for competition (Article 31(4)(b) and (c) of Directive 2014/23/EU, Article 32(2)(b)(iii) of Directive 2014/24/EU and Article 50(c)(iii) of Directive 2014/25/EU); and to define which entities (other than state bodies, bodies governed by public law, associations thereof and public undertakings) are subject to Directives 2014/23/EU and 2014/25/EU (Article 7 of Directive 2014/23/EU and Article 4 of Directive 2014/25/EU).

[77] Article 10 of Directive 2014/23/EU and Article 22 of Directive 2014/25/EU.

[78] Article 5(10). The definition is subject to limitation when used to determine to which entities the Directive applies to, excluding situations where the rights were granted by means of a procedure in which adequate publicity was ensured and where the granting of those rights was based on objective criteria. Substantially the same definition and limitation are used within Article 4 of Directive 2014/25/EU, which provides as follows: "*'special or exclusive rights' means rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision 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*."

The Norwegian Government has stated that definitions found in various other instruments in EEA law are quite broad and vary. However, the Norwegian Government appears to accept that an exclusive right must apply to a single entity (or association) to the exclusion of others within a specific geographical area, and relate to an activity.[79] The Authority considers these two aspects to be key to the proper understanding of the term.

7.1.1 Applying to a single entity to the exclusion of others

With regard to there being a single entity (within a specific geographical area), the legal notion of an exclusive right has been described as roughly corresponding to the popular notion of "monopoly".[80] The scope of an exclusive right will not necessarily coincide with the scope of a market assessed from a competition law perspective, as the relevant market for the purposes of competition law may be wider than the scope of the exclusive right (for example, encompassing a wider geographical area or additional activities). However, a necessary characteristic of a monopoly is that there is a single seller. This is clearly also the case for an exclusive right, which is by definition held by a single entity.

As a consequence of the Norwegian Government's chosen approach to management of commercial waste (including waste which is of a similar nature to household waste), as described in section 6.1 above, a municipality's ability to give rise to a situation where there is a single provider in respect of commercial waste is limited to the scope of its own needs as a customer. It is clear that the services required by a municipality in relation to commercial waste are the same as those required by other commercial waste producers whose waste is of the same type as the municipality's and the municipality has no additional public role in relation to these services. As such, the only influence a municipality can have on the provision of the service is to determine *its own* service provider.

In *Ambulanz Glöckner,* the CJEU applied the concept of special or exclusive rights by describing a measure substantially affecting the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions as being such a right.[81] A municipality's ability to determine and contract with its own service provider does not meet this definition. "Under substantially equivalent conditions" cannot mean under one specific contract, otherwise every contract would give rise to special or exclusive rights.

7.1.2 Relating to an activity

With regard to the subject matter of the exclusive right, the Norwegian Government argues for a very broad interpretation of "economic activity", arguing, in effect, that an economic activity can be defined with reference to the purchaser of the service. When this is applied to the case at hand, it means that the Norwegian Government considers that the scope of an exclusive right can be limited to a municipality's own commercial waste.[82] No supporting authority is given for this proposition. Examples given in correspondence copied to the Authority[83] relate to the general nature of the relevant activity, not its purchaser.[84]

[79] Letter of 20 May 2020 (Doc No 1134028), page 6. See also letter of 7 July 2017, page 2.
[80] Buendia Sierra in Faull and Nikpay, The EC Law of Competition, second edition, 2007, page 601.
[81] Judgment of the Court of Justice of 25 October 2001, *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, paragraph 24.
[82] See page 4 of the letter of 14 February 2019 (Doc No 1052794).
[83] Letter on behalf of the municipality of Namsos and MNA to Miljødirektoratet dated 25 January 2019, copied to the Directorate (Doc No 1054634) and letter from Bergen municipality to Miljødirektoratet dated 25 January 2019, copied to the Directorate (Doc No 1056692).
[84] In the example given, the general nature being social insurance provision for a specific *sector*.

The Authority does not accept that the relevant activity can be defined with mere reference to the purchaser of the services being offered in each instance. Public procurement law categorises services on the basis of what they entail and not on the basis of who is purchasing them.[85] Even simply looking at the terminology of "activity", defined by the Oxford English Dictionary as "an action taken in pursuit of an objective," it is logical for the subject matter of an exclusive right to be defined by what it involves.

As noted above, the services required by a municipality are the same as those required by other commercial waste producers. As such, in conclusion, as a municipality has no influence on the ability of other economic operators to perform those services for other customers in its area, it cannot award an exclusive right as that term should be understood under EEA law.

7.2 The implications of the Norwegian Government's approach for EEA public procurement law

In the previous section, the Authority has set out its interpretation of the term "exclusive right" for the purposes of Article 11 of Directive 2014/24. In the present section, the Authority will elaborate on why, if the Norwegian Government's interpretation of that provision were to be accepted, significant issues would arise for EEA public procurement law and thus the operation of the internal market.

The Norwegian Government has noted that an exclusive right must be respected by all, contrasting it with contractual exclusivity which is binding only on the parties to the contract. However, if the Norwegian Government's approach to exclusive rights were to be followed, the effect of an "exclusive right" could be no more than the effect of contractual exclusivity and as such, would not bind other parties. Such an exclusive right would in fact be a commitment on the part of the contracting authority to only buy from one specific entity and have no impact on either the ability of other providers to perform the activity or the ability of other purchasers to enter into contracts with other providers. Put another way, there would be no restriction on other providers being able to sell, just a particular customer would be prevented from buying from those providers.

Recital 30 of Directive 2014/24 makes clear that Article 11 of Directive 2014/24 exists in recognition of the pointlessness of subjecting a contract to a competitive process where there is (lawfully) only one possible supplier. There is nothing about the Norwegian Government's approach which would mean that there would be no market for the service such that there would be no reason to conduct a competitive process. As such, there is nothing to justify an exception from the procurement rules.

Furthermore, the Norwegian Government's approach would mean that in any situation in which a contracting authority wanted to appoint a single contracting authority to perform any service whatsoever, it would be able to first grant an "exclusive right", without any specific authority to do so and without necessarily following any open process (let alone one compliant with Directive 2014/24), and then award a contract directly in reliance upon Article 11 of Directive 2014/24. Such an approach would not only prejudice other market operators, but also circumvent the specific rules set out at Article 12 of Directive 2014/24 regarding awards of contract between entities within the public sector.

7.3 Conclusion regarding Article 11 of Directive 2014/24

In the Authority's view, as there is no genuine exclusivity, the conditions for the application of Article 11 of Directive 2014/24 are not met in relation to the collection and

[85] See, for example, Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV), act referred to at point 6a of Annex XVI to the EEA Agreement, OJ L 340, 16.12.2002, p. 1 and Article 10 of the Directive.

treatment of municipal commercial waste. On that basis, a contract between an owner municipality and MNA for the collection and treatment of municipal commercial waste awarded directly without following the tendering requirements of Directive 2014/24 would be in breach of Directive 2014/24.

8 The Authority's assessment: the nature of the New Partnership Agreement

As noted above in section 7, no separate contracts have been entered into with MNA in reliance upon Article 11 of Directive 2014/24. The only arrangement in place is the New Partnership Agreement. The Authority established in section 6 above that, in so far as it concerns municipal commercial waste, the New Partnership Agreement does not constitute a transfer of powers and responsibilities falling under Article 1(6) of Directive 2014/24. The Authority has now established in section 7 that the arrangement does not give rise to an exclusive right allowing for the direct award of a public service contract. The question therefore arises as to how the New Partnership Agreement should be categorised, in so far as it concerns municipal commercial waste.

Under the New Partnership Agreement, MNA is responsible for the collection, transport, handling and trade of municipal commercial waste.[86] MNA has carried out a procurement procedure in respect of collection and treatment of municipal commercial waste from the owner municipalities.[87]

Pursuant to the New Partnership Agreement, MNA is entitled to payment for the services performed under the agreement. Such payment is on a cost basis.[88] The Norwegian Government has clarified that the cost of any service outsourced by MNA will form part of the costs to be reimbursed.[89]

Directive 2014/24 applies to public contracts and the procedures set out in Title II thereof are required to be followed where a public contract exceeding the relevant threshold is awarded.[90] The Authority recalls that it is settled case law that whether an arrangement constitutes a public contract is a matter of EEA law and national categorisations are not decisive.[91]

Pursuant to Article 2(1)(5) of Directive 2014/24, a public contract is a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as its object the execution of works, the supply of products or the provision of services.

The owner municipalities are indisputably contracting authorities and the object of the agreement is clearly the provision of services (the collection, transport, handling and trade of municipal commercial waste).

An economic operator is any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services

[86] Section 2 of the New Partnership Agreement.
[87] See Notices 2021/S 136-363673 and 2021/S 210-549068 on Tenders Electronic Daily, available at https://ted.europa.eu/udl?uri=TED:NOTICE:363673-2021:TEXT:EN:HTML&src=0, and https://ted.europa.eu/udl?uri=TED:NOTICE:549068-2021:TEXT:EN:HTML, and also the letter of 1 December 2020 (Doc No 1166524), page 3.
[88] Section 2 of the New Partnership Agreement.
[89] Letter of 1 December 2020 (Doc No 1166524), page 4.
[90] Article 1(1) and Article 4 of the Directive.
[91] See judgment of the EFTA Court of 21 March 2018, *EFTA Surveillance Authority v Norway*, E-4/17, [2018] EFTA Ct. Rep. 5, paragraph 77 and case law cited.

on the market.[92] It is settled case law that a contracting authority can also be an economic operator,[93] and MNA is clearly offering provision of services.[94] MNA therefore meets the definition of an economic operator.

As regards the question of pecuniary interest, as noted above, MNA is entitled to payment from the municipalities in return for providing the services. The fact that that payment is limited to costs does not preclude the contract being a public contract.[95]

At the time the New Partnership Agreement was entered into, the threshold for the application of Directive 2014/24 to public service contracts awarded by sub-central contracting authorities was, pursuant to Article 4(c) of Directive 2014/24, set at EUR 221 000, or NOK 2 049 583.[96] The New Partnership Agreement does not contain a price. In accordance with Article 5(14)(b) of Directive 2014/24, the basis for calculating the estimated contract value of public service contracts which do not indicate a total price and without a fixed term, shall be the monthly value of the contract multiplied by 48.

The annual value of the contract is estimated at NOK 5 737 287,24.[97] On the basis of this figure, and pursuant to the method set out in the previous paragraph, the contract value can therefore be estimated at NOK 22 949 148,96. This value exceeds by far the threshold of NOK 2 049 583 referred to in the previous paragraph.

The fact that MNA has chosen to run a tender process to appoint a third party provider for the collection and treatment services does not affect the arrangement between it and the municipalities being a public contract. By appointing a contractor to perform services, MNA is in fact appointing a subcontractor to perform (some of) its obligations to the municipalities.

On the basis of the above, at least in so far as it concerns the collection, transport, handling and trade of municipal commercial waste, the New Partnership Agreement must be considered to be a public service contract subject to the provisions on Directive 2014/24. As it was entered into directly, without following the requirements of Title II of Directive 2014/24, the Authority considers its award to be in breach of Directive 2014/24.

9 Consequences of the Authority's assessment

It can be noted that the Authority's position that arrangements entered into by Norwegian municipalities in respect of municipal commercial waste cannot give rise to an exclusive right and that the arrangements with MNA in fact constitute a public contract, does not mean that municipalities are always required to conduct a competitive procurement process in order to deal with their waste management requirements.

Where a municipality wishes to engage another public authority to provide the service in question, Article 12 of Directive 2014/24 allows for arrangements to be made without the need for competition, provided the specified conditions are met. Furthermore, that Article allows for arrangements to be made between multiple contracting authorities. The article

[92] Article 2(1)(10) of the Directive.
[93] *Piepenbrock,* paragraph 29.
[94] See *Piepenbrock,* paragraph 29 and the judgment of the Court of Justice of 23 December 2009, *Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v Regione Marche*, C-305/08, EU:C:2009:807, paragraph 42.
[95] See judgment of the Court of Justice of 11 December 2014, *Azienda sanitaria locale n. 5 «Spezzino» and Others*, C-113/13, EU:C:2014:2440, paragraph 37 and the case law cited.
[96] See *Threshold values referred to in Directives 2014/23/EU, 2014/24/EU, 2014/25/EU and 2009/81/EC, expressed in the national currencies of the EFTA States*, (OJ C 146, 26.4.2018, p. 7).
[97] Document No 1187059.

has in fact been utilised in the context of municipal waste management in Norway,[98] as well as in other countries.

Furthermore, EEA law does not require services to be outsourced. It is only where an authority chooses to do so that compliance with EEA public procurement rules is required. Reference is also made to the Directorate's letter of 20 February 2020[99] in which a number of Norwegian waste management arrangements were assessed, and the majority found to be compliant with EEA law.

10 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, in relation to a partnership agreement entered into in 2019 by the municipalities of Flatanger, Overhalla, Grong, Hoylandet, Leka, Bindal, Næroysund, Namsos, Namsskogan, Royrvik, Lierne and Osen, awarding a public service contract for the collection, transport, handling and trade of municipal commercial waste directly to Midtre Namdal Avfallsselskap IKS, Norway has failed to fulfil its obligations under Articles 1(1), 4(c) and 11 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, referred to at point 2 of Annex XVI to the Agreement on the European Economic Area, read in conjunction with Title II of that Directive.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Norwegian Government submits its observations on the content of this letter *within two months* of its receipt.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Norwegian Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

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This document has been electronically authenticated by Bente Angell-Hansen, Melpo-Menie Josephides.

[98] See the cases of BIR AS and BIR Privat AS; BIR AS and BIR Transport; and Tromsø municipality and Remiks Husholdning considered in the Directorate's letter of 20 February 2020, Doc No 1055823.
[99] Doc No 1055823.