Brussels, 28 September 2022
Case No: 78085
Document No: 1281581
Decision No: 181/22/COL

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Norway's breach of 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

1 Introduction

On 28 October 2015, 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 publicly-owned undertakings in the area of waste management.[1] 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 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") were in breach of EEA law. The Authority's arguments in this regard were set out in a letter of formal notice to the Norwegian Government dated 8 December 2021.[3] Having considered the Norwegian Government's response to that letter, the Authority maintains that the arrangements are in breach of EEA law.

The Authority is of the view that the arrangements with MNA in respect of municipal commercial waste constitute a public contract which should have been competitively tendered in accordance with EEA rules on public procurement. Whilst there are exemptions from the requirement for competition, including in respect of arrangements within the public sector, the Authority considers that the conditions for these 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 award of a contract without competition).

In this opinion, the Authority will first set out the history of the case (section 2), the relevant legal framework (sections 3, 4 and 5) and the details of the arrangements under assessment (section 6). The Authority will then set out its detailed legal analysis to support the conclusions outlined above.

In section 7, 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 and the transfer not being sufficiently comprehensive.

In section 8, the Authority will set out why MNA cannot be considered to have an exclusive right such that a contract can be awarded directly. The Authority will rely on the fact that Norwegian municipalities have no special powers or responsibilities in respect of commercial waste and so are not in a position to grant exclusivity.

Finally, in section 9, the Authority will explain why the arrangements meet the definition of a public contract, meaning that EEA public procurement rules should have been applied.

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[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 opinion. The two English translations are viewed as synonymous.

[3] Decision No 277/21/COL; Doc No 1143836.

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 national waste management framework. The regulatory choice made at national level to make all commercial waste producers responsible for their waste is key and directly affects the application of the relevant procurement rules. This situation can be contrasted with that applicable to household waste, in respect of which municipalities have specific responsibilities and powers. The Authority's assessment in this opinion relates only to the arrangements in respect of commercial waste and not those in respect of household waste.

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. On 20 May 2016[6] and 27 September 2016,[7] the Norwegian Government submitted additional information.

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

On 30 May 2017,[10] the Authority sent a further request for information to the Norwegian Government to which the Norwegian Government replied on 7 July 2017.[11] The Norwegian Government submitted additional information on 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.

On 3 July 2018,[16] the complainant submitted additional information. A meeting between the Authority's Internal Market Affairs Directorate ("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]

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

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]

On 8 December 2021, the Authority sent a letter of formal notice to the Norwegian Government, concluding that in relation to a partnership agreement entered into in 2019 by the municipalities of Flatanger, Overhalla, Grong, Høylandet, Leka, Bindal, Nærøysund, Namsos, Namsskogan, Røyrvik, Lierne and Osen, awarding a public service contract for the collection, transport, handling and trade of municipal commercial waste directly to MNA, Norway had failed to fulfil its obligations under Articles 1(1), 4(c) and 11 of Directive 2014/24/EU on public procurement[29] ("Directive 2014/24"), read in conjunction with Title II of that Directive.[30]

The Norwegian Government submitted its observations on the letter of formal notice on 8 April 2022.[31] The Norwegian Government disagreed with the Authority's conclusions and argued that the arrangements in question should be considered as transfers of powers and responsibilities falling outside the scope of Directive 2014/24. In the alternative, the Norwegian Government submitted that the arrangements fell within the scope of the exclusive rights exception set out in Article 11 of Directive 2014/24.

3 Relevant national law

3.1 Public procurement law

[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.
[29] 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 EEA Agreement, OJ L 94, 28.3.2014, p. 65.
[30] Decision No 277/21/COL; Doc No 1143836.
[31] Doc No 1281709.

Section 2-3 of the Regulation on Public Procurement of 12 August 2016 No. 974[32] 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[33] sets out the different types of waste[34] 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:

> *"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*

[32] FOR-2016-08-12-974 *Forskrift om offentlige anskaffelser.*
[33] LOV-1981-03-13-6 *Lov om vern mot forurensninger og om avfall (forurensningsloven).*
[34] 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).

another way is of use by replacing materials which otherwise would have been used. […]"

4 Relevant EEA law

Directive 2014/24 entered into force in the EEA on 1 January 2017.[35]

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 4 of Directive 2014/24, as in force at the relevant time,[36] provided:

> "*This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:*
>
> *…*

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

[36] See amendments implemented by Commission Delegated Regulation (EU) 2017/2365 *of 18 December 2017 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts*, act referred to at point 2 of Annex XVI to the EEA Agreement, OJ L 337, 19.12.2017, p. 19.

> *(c) EUR 221 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities;…*
>
> *…*"

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 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 second paragraph of Article 18(1) of Directive 2014/24 provides:

> *"The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."*

5 The nature of the EEA public procurement law framework

Prior to presenting its assessment of the case, the Authority will set out an overview of some of the key features of the EEA public procurement law framework in order to place the issue in the relevant context.

EEA public procurement law, in particular Directive 2014/24, applies to purchases of works, supplies and services[37] by contracting authorities[38] and generally requires opportunities to be exposed to competition.

However, not all arrangements entered into by the public sector concerning works, supplies or services constitute "procurement" for the purposes of Directive 2014/24.[39] Furthermore, there is no obligation to outsource service provision[40] and, *inter alia*, certain situations which are similar in effect to self-supply are excluded from the scope of Directive 2014/24.[41] States and individual contracting authorities therefore have discretion as regards how they arrange their activities and services, and Directive 2014/24 will only apply if they choose to engage an external provider through a public contract.[42]

In this reasoned opinion, the Authority will set out its detailed arguments as to why the arrangements with MNA do not fall within the provisions relied upon by the Norwegian

[37] Articles 1(1) and 1(2) of Directive 2014/24.
[38] Defined in Article 2(1)(1) of Directive 2014/24 as "*the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law*".
[39] Article 1(2) of Directive 2014/24 defines procurement as "*the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.*"
[40] See Recital 5 of Directive 2014/24, the first sentence of which reads: "*It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive.*"
[41] Article 12 of Directive 2014/24.
[42] As defined in Article 2(1)(5) of Directive 2014/24.

Government but instead constitute a public contract. The point underlying the Authority's position is that, in practice, there is nothing which distinguishes the arrangements from a normal public contract, despite how they can be labelled. In this respect, it is settled case-law that national labels are not determinative when establishing whether EEA public procurement law applies.[43] Furthermore, Article 18 of Directive 2014/24 contains an explicit prohibition on designing a procurement with the intention of excluding it from the scope of that directive or of artificially narrowing competition.

6 The arrangements 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. The Norwegian legislator clearly intended to treat household waste and commercial waste differently.

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.[44]

The 2015 Resolution was not given effect. In 2019, the owner municipalities of MNA transferred powers and responsibilities for the handling of waste to MNA through a new partnership agreement ("the New Partnership Agreement").[45] These powers and responsibilities include the municipalities' obligations in respect of municipal commercial waste.[46]

In this opinion, 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.

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 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 distinct provisions of the Pollution Control Act.[47] 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,

[43] See, for example, the 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 the judgment of the Court of Justice of the European Union ("CJEU") of 29 October 2009 in *Commission* v *Germany*, C-536/07, EU:C:2009:664, paragraph 54 and the case-law cited.

[44] The other owners of MNA are Flatanger, Overhalla, Grong, Høylandet, Leka, Bindal, Nærøysund, Namsskogan, Røyrvik, Lierne and Osen.

[45] See letter of 1 December 2020 (Doc No 1166524). The New Partnership Agreement is attachment 1 to that letter.

[46] Section 2 of the New Partnership Agreement.

[47] As regards severability, see the judgment of the CJEU 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.

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).[48] 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.

7 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*.[49]

The Norwegian Government has argued that the arrangements in question with MNA should be considered as transfers of powers and responsibilities.[50]

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 the newly competent public authority has decision-making and financial autonomy…"*[51]

Remondis was decided under Directive 2004/18/EC,[52] 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

[48] See letter of 21 August 2019 (Doc No 1084286), pages 9 to 11.
[49] Judgment of the CJEU of 21 December 2016, *Remondis GmbH & Co. KG Region Nord v Region Hannover*, C-51/15, EU:C:2016:985.
[50] Letter of 8 April 2022 (Doc No 1281709), page 1 and section 2.
[51] *Remondis*, operative part.
[52] 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*, 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.

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.

Therefore, although it is not fully clear whether the CJEU in *Remondis* established a separate exception to that provided for under Article 1(6) of Directive 2014/24, the Authority notes the express approach taken by Advocate General Mengozzi in *Remondis*,[53] and accordingly considers that the judgment should not be understood as establishing such a separate exception.

The CJEU in *Remondis* concluded that a transfer of competence (meeting the conditions described in the judgment) was not a public contract.[54] The term "public contract" is fundamental as regards 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 that certain arrangements are not public contracts and so do not fall within the scope of Directive 2014/24. As nothing was stated to the contrary in its letter of 8 April 2022, the Authority assumes the Norwegian Government does not dispute this position.

7.1 The arrangement does not concern a public task

7.1.1 The relevance of the public task requirement

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's view is that this requirement 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 entities and therefore the task cannot be considered to be of a public nature.

The Norwegian Government has disputed the Authority's emphasis on the requirement for a public task and stated that this is somewhat subordinate to the requirement concerning a transfer of powers.[55] The Authority agrees that the ability of a public body to delegate a power will often imply that the task in question is a public one[56] but maintains that the requirement for a public task is a key aspect. The principle underlying Article 1(6) is that measures of internal organisation are a matter for States and their public sectors and thus outside the reach of EEA law.[57] However, the protection afforded to measures of internal organisation does not mean that all activity within the public sector is excluded

[53] See paragraphs 45 and 46 of the Opinion of Advocate General Mengozzi of 30 June 2016, EU:C:2016:504.
[54] See, in particular, *Remondis,* paragraphs 42 to 46 and 55.
[55] Letter of 8 April 2022, page 2.
[56] It should be clarified that by "delegation", the Authority understands a full transfer of the power (and not, for example, the type of arrangement in question in *Commission* v *France*, C-264/03, EU:C:2005:620).
[57] In the EU, this now arises from Article 4(2) of the Treaty on European Union. The Authority agrees with the Norwegian Government's position that the absence of an equivalent provision in the EEA Agreement does not detract from this principle applying in the context of the less wide-reaching EEA Agreement. See also paragraphs 38 and 39 of the Opinion of Advocate General Mengozzi in *Remondis*.

from the reach of Directive 2014/24. Article 1(6) protects the State as a state. The same protection is not afforded to the State acting as any other (market) actor. The "public task" requirement limits the exclusion to the State and its public sector acting as public authorities. The fact that the CJEU has not elaborated on the existence of a public task in the existing case-law merely indicates that the existence of a public task was not at issue. Contrary to what the Norwegian government implies, this does not diminish the importance of the existence of a public task.

Given that the Authority maintains that the requirement for a public task is a key issue, in what follows the Authority will first assess the issue of whether the arrangements with MNA concern a public task before going on to assess whether or not there is a comprehensive transfer of power in the sense set out in the judgment in *Remondis*.[58]

7.1.2 The position with MNA

In the Authority's view, the fact that municipalities find themselves in exactly the same legal situation as any private actor wishing to dispose of its commercial waste is sufficient to conclude that the task in question is not of a public nature.

It is recalled that municipal commercial waste is waste which municipalities produce themselves as entities with physical premises. Municipalities are obliged to deal with this waste not because they are public authorities but because they are commercial waste producers. The Norwegian Government has stated that municipalities have the same obligation to collect and treat municipal commercial waste as they have regarding household waste. The Authority does not agree: municipalities' obligations in respect of household waste are set out in, *inter alia*, Section 29, third paragraph and Section 30, first paragraph of the Pollution Control Act. Their obligations in respect of municipal commercial waste, on the other hand, are set out in Section 32 of the same act, which applies to any producer of commercial waste.

The fact that 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 wording 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[59] (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).[60] There is no additional public role for municipalities.

7.1.3 The Norwegian Government's arguments

The Norwegian Government has made a number of arguments as to why the task should be considered a public one. The specifics of these arguments will be addressed below. As the Norwegian Government has made reference to the particularities of the waste sector, it should be noted at the outset that the CJEU has 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

[58] The operative part of Remondis refers to a transfer of competences being required to concern "*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".* See further section 7.2 below.
[59] Ot.prp. nr. 87 (2001-2002), section 2.6.2.
[60] 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."*

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).[61]

None of the arguments of the Norwegian Government change the Authority's conclusion that there is no public task.

7.1.3.1 Waste management is capable of being a public task

The Authority understands the Norwegian Government's main argument to be based on waste management being recognised by the CJEU as being capable of being a public task. The Authority does not dispute this position. Indeed, *Remondis* itself concerned waste management as a public task.[62] However, the fact something is *capable* of being a public task, does not automatically make it one in every instance.

Similarly, the Authority does not dispute that waste management serves the public's needs. However, whether a task serves the public's needs and whether it is performed as a public task are different issues. As recognised by the case-law referred to by Norway, private entities may carry out tasks which serve the public's needs without detracting from the public nature of public authorities performing similar tasks.[63] However the issue is not only whether the entity is a public authority, but whether the task's legal basis is a competence or responsibility placed on that entity as a public authority.

As set out above, Norway has required each individual commercial waste producer to ensure their waste is dealt with and has chosen to allow collection and treatment of commercial waste to be performed by the market.[64] As such, whilst the Authority accepts that waste management is *capable* of being a public task, collection and treatment of commercial waste is not treated as such in Norway.

7.1.3.2 Waste management is capable of being an SGEI

The Norwegian Government has also referred to waste management being a service of general economic interest (SGEI)[65] and referred to the definition of "municipal waste" in Directive (EU) No 2018/851[66] in this regard. That directive entered into force in the EEA on 1 August 2022.[67]

The Authority recalls that SGEIs are economic 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

[61] See judgment of the CJEU of 21 January 2010, *Commission* v *Germany*, C-17/09, EU:C:2010:33, paragraphs 16 and 17.
[62] In this respect, the Authority notes that at paragraph 7 of the judgment it is made clear that the regional authorities were designated as responsible for waste treatment under federal and regional law.
[63] Judgment of the CJEU of 10 November 1998, Gemeente Arnhem v BFI Holding, C-360/96, ECLI:EU:C:1998:525, paragraph 52 and 53.
[64] See also Ot.prp. nr. 87 (2001-2002), sections 4.2 and 4.3.
[65] See letter of 20 May 2020 (Doc No 1134028), page 5.
[66] Directive (EU) 2018/851 *of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste*, act referred to at point 32ff of Annex XX to the EEA Agreement, OJ L 150, 14.6.2018, p. 109.
[67] Joint Committee Decision No 318/2021 of 29 October 2021, not yet published.

the market without public intervention.[68] As the Authority has already accepted in its letter of 8 December 2021,[69] waste management is capable of being considered as an SGEI.[70] However, Norway has chosen to allow collection and treatment of commercial waste to be performed by the market.[71]

Furthermore, the fact that the Waste Framework Directive as amended by Directive (EU) 2018/851[72] defines "municipal waste" in a way which encompasses both household waste and some commercial waste as defined by Norwegian law[73] does not mean management of all such waste is a public task nor an SGEI in Norway. It is clear that the definition of "municipal waste" is without prejudice to the allocation of responsibilities for waste management between public and private actors.[74] As is clear from the Pollution Control Act, Norway has chosen not to assign any public duties to municipalities with regard to the management of commercial waste.[75] 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.[76] As such, whilst waste management is *capable* of being an SGEI, collection and treatment of commercial waste is not treated as such in Norway.

7.1.3.3 The relevance of the wider legislative context

The Norwegian Government has also emphasised the fact that Norwegian municipalities have a statutory obligation to deal with their commercial waste and they have always had such an obligation. The Norwegian Government has argued that the placing of obligations on private waste producers when the Pollution Control Act was amended to introduce the current dichotomy between household and commercial waste should not be seen as altering municipalities' duties regarding their own waste. The Norwegian Government has also previously referred to Norwegian municipalities having other responsibilities in terms of reducing emissions to soil, air and water.[77]

The Authority fails to see the relevance of the obligation being a statutory one. Statutory obligations can be imposed on public and private bodies, as the obligation in Section 32 of the Pollution Control Act is.

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[68] 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.
[69] Doc No 1143836.
[70] 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 CJEU of 23 May 2000, *Sydhavnens Sten and Grus*, C-209/98, EU:C:2000:279, paragraph 75; and judgment of the CJEU of 10 November 1998, *Gemeente Arnhem v BFI Holding*, C-360/96, EU:C:1998:525, paragraph 52.
[71] See also Ot.prp. nr. 87 (2001-2002), sections 4.2 and 4.3.
[72] Directive 2008/98/EC *of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives*, OJ L 312, 22.11.2008, p. 3, act referred to at point 32ff of Annex XX to the EEA Agreement.
[73] Article 3(2)(b) of Directive 2008/98/EC, as amended by Directive (EU) No 2018/851.
[74] Article 3(2)(b) of Directive 2008/98/EC and recital 7 of Directive (EU) No 2018/851.
[75] In its letter of 8 April 2022 (page 8), the Norwegian Government describes this wording (which, aside from the inclusion of the words "the management of", was included in the Authority's letter of 8 December 2021 (Doc No 1143836)) as an "erroneous conclusion". In support of this, the Norwegian Government refers to municipalities having always had responsibility for both their own commercial waste and household waste, this being a statutory duty and the municipalities' obligations in this area arising from extensive obligations related to waste management under EEA law. Section 7.1.3.3 sets out why the Authority does not agree with these arguments. As such, the Authority maintains its position.
[76] Under Sections 29 and 30 of the Pollution Control Act.
[77] See the Norwegian Government's letter of 20 May 2020 (Doc No 1134028), page 4.

Similarly, the Authority fails to see the relevance of the fact that municipalities used to have different obligations in respect of commercial waste or that they have other obligations in the environmental field. It remains the case that today, municipalities are only subject to the same obligations as private entities as regards dealing with commercial waste and they have such responsibilities as waste producers and not as public authorities.

7.1.3.4 The relevance of the connection between waste management and other (public) tasks

The Norwegian Government has also relied on the fact that municipal commercial waste is generated by public welfare services,[78] arguing that this emphasises the public nature of the task and referring to the possibility for economies of scale in handling this waste alongside household waste. The Norwegian Government has also argued that municipalities' management of their own waste from public services can be considered part of their public task to provide necessary public services. [79]

The Authority agrees that a transfer by a public authority of its powers and responsibilities in respect of public welfare services 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.[80]

7.1.3.5 The relationship between EEA law and national law

In its letter of 8 April 2022, the Norwegian Government states that the Authority's position regarding management of municipal commercial waste not being a public task is not based on CJEU case-law or other sources of EEA law, but on the fact that municipalities and private actors in Norway have concurrent obligations as regards commercial waste.[81] Whilst the Authority disputes the generality of the former part of the statement, the fact that municipalities and private actors have the same obligations under Norwegian law regarding commercial waste is indeed key.

The assignment of public tasks within the public sector is principally a matter for the State, and public authorities have freedom to define services of general economic interest, their scope and the characteristics of the service to be provided, in order to pursue their public policy objectives.[82] As such, what EEA law can say in the abstract about whether or not a specific service is in fact a public task is somewhat limited. However, when assessing the application of EEA public procurement law, choices a

[78] The Authority assumes that it is only some of the waste that is generated in this way as not all activity conducted by municipalities can be considered "public welfare services".
[79] Letter of 20 May 2020 (Doc No 1134028), page 5.
[80] See judgment of the CJEU of 5 December 1989, *Commission v Italy*, C-3/88, EU:C:1989:606, paragraph 26. In its letter of 8 April 2022 (page 8), the Norwegian Government has questioned the relevance of this judgment. The analogy with the case of MNA is that the waste management services performed by MNA in respect of the municipalities' municipal commercial waste are equivalent to the supply of computer equipment: they are services which the municipalities require in order to perform their public tasks (e.g provision of education) but do not therefore become public tasks in their own right. The Norwegian Government has also referred to *Piepenbrock* (judgment of the CJEU of 13 June 2013, *Piepenbrock Dienstleistungen GmbH & Co. KG v Kreis Düren*, C-386/11, EU:C:2013:385). Contrary to what the Norwegian Government seems to suggest, in that case, there was no question that the tasks of building and window cleaning were not public tasks (see paragraph 22 of the judgment) but in any event, the same point would apply: the fact those tasks facilitate the performance of public tasks, does not make them public tasks.
[81] Doc No 1281709, page 7.
[82] Recital 7 to Directive 2014/24.

State has made about a particular service must be taken into account. Where a task is in fact a public one, a transfer of the powers and responsibilities underlying that task does not engage EEA law. However, where a task is just something which must be carried out by a public authority as part of its general affairs, in practice, "transferring" that task amounts to assigning the obligation to perform a service, something which may well fall within the scope of Directive 2014/24.

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

The position taken in section 7.1 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 there is no comprehensive transfer of power.

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...*"[83]

In what follows, the Authority will refer to this as a requirement for a comprehensive transfer. This concept is elaborated on in paragraphs 41, 43 and 44 of the judgment in *Remondis*.

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 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*."[84]

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. This lack of a comprehensive transfer is related to the fact that the arrangements do not relate to a public task. The lack of a public task means there is no real "power" to be transferred, with the result that there can be no comprehensive transfer.

[83] *Remondis*, operative part.
[84] Emphasis added.

7.2.1 There is no power to transfer

As regards municipal commercial waste, 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 services to other customers. [85] The arrangement allowing MNA to access and take away the waste 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.[86]

Furthermore, as the Norwegian Government has recognised[87] municipalities have no regulatory competences in respect of their own commercial waste, rather they merely have the responsibility to ensure that that waste is collected and disposed of, and can perform that task or engage others to perform it. It is very common for public bodies to appoint service providers to carry out tasks for which they are responsible (for example, appointing accountants to produce accounts, bus companies to drive buses or architects and construction companies to build schools). Such arrangements are generally made by way of public contracts falling within the scope of EEA public procurement law. There seems to be nothing to distinguish the arrangement under the New Partnership Agreement from a normal public contract falling within the scope of public procurement law.

The Norwegian Government has disputed the argument that there is no real power transferred on the basis that the New Partnership Agreement transfers competence and responsibility for the statutory obligation. The Authority accepts that the New Partnership Agreement refers to authority being delegated. However, as national labels are not determinative, it is necessary to consider the practical implications of the arrangements. This point was explicitly dealt with by the Advocate General in *Remondis:*

> "*Although it is clear from the foregoing that acts of internal organisation of the Member States do not fall within the scope of EU rules on public procurement, this does not alter the fact that, as is evident from the Court's settled case-law, public authorities may not contrive to circumvent the rules on public procurement in order to avoid the obligations stemming from those rules. Accordingly, operations which relate in essence to the acquisition of goods or services for consideration by one or more contracting authorities fall under the EU rules on public procurement*

[85] The Norwegian Government seems to have misunderstood this argument as being that MNA never has any power to access or take possession of the waste and has therefore referred to legal ownership. The Authority's point is that if there was no agreement between MNA and the municipalities in question, MNA would have no access to the municipalities' premises, including the bins where the waste is stored pending collection. MNA would simply be another third party unable to access private land and the items on it (including the waste) without permission of the owner. The consequence of the New Partnership Agreement is that MNA is (implicitly) entitled to access the premises and take away the waste. In the Authority's view, this is the only "power" MNA is granted and – as set out in the main text – such a right would also have to be granted to any waste management service provider appointed to handle waste under a contract.

[86] 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.

[87] See page 6 of the letter of 8 April 2022, Doc No 1281709.

> *because the conditions governing the application of those rules are met, even if they might have been formally classified as an act of internal reorganisation…*"[88]

In the case under assessment, in terms of the "powers" transferred, there is no difference between the position under the New Partnership Agreement and the position under any public service contract and therefore labelling the arrangement as a transfer of powers and responsibilities does not justify treating the arrangement as falling outside EEA public procurement law.

7.2.2 There is no relinquishing of power

There is also 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 arrangement concerns the collection and treatment of waste produced in the municipalities' own offices and institutions. Irrespective of the wording used in the New Partnership Agreement, MNA is carrying out a service for which the municipalities are the direct beneficiaries.

The Authority considers that it is a misrepresentation 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 practice, the arrangement looks identical in effect to a normal public contract and the mere labelling of it as something else is not sufficient to justify treating it differently. As the CJEU held in *Piepenbrock:*

> "*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….*"[89]

As there is no power to transfer and nothing akin to power being relinquished, 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.

7.3 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 and therefore does not fall outside the scope of Directive 2014/24 by virtue of being a matter of internal organisation of a State.

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

[88] Paragraph 47, footnotes omitted. See also the judgment in *Piepenbrock* (cited above at footnote 80) where the fact the agreement stated that the right and obligation to perform the task were transferred (paragraph 11) did not prevent the Court from finding that that agreement constituted a public contract.

[89] *Piepenbrock* (cited above at footnote 80), operative part. See also paragraph 47 of the Opinion of Advocate General Mengozzi in *Remondis.*

The Norwegian Government has argued in the alternative that the arrangements fall within the scope of Article 11 of Directive 2014/24.

At the outset, the Authority emphasises 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. 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 remains unclear to the Authority how Article 11 would apply to arrangements 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 municipalities to award contracts pursuant to Article 11 of Directive 2014/24 in respect of municipal commercial waste.

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. Any service contract entails that the contractor receives the right to perform the service and therefore an exclusive right must entail something more, otherwise any service contract awarded to another contracting authority could fall within Article 11. A municipality has no ability to grant such exclusive right in respect of services relating to commercial waste.

8.1 No exclusivity

In the present section, the Authority will set out its understanding of the term "exclusive right" for the purposes of Article 11 of Directive 2014/24 and then apply that term to the arrangements with MNA.

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[90] and Directive 2014/25[91]).[92] It is defined in both Directive 2014/23 and Directive 2014/25 in a similar manner but is not defined in Directive 2014/24. As all three directives have provisions equivalent to Article 11 of Directive 2014/24, the Authority considers the definitions in Directives 2014/23 and 2014/25 to be relevant for the interpretation of Article 11 of Directive 2014/24.[93]

Directive 2014/23 defines the term as:

[90] Directive 2014/23/EU *of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts*, referred to at point 6f of Annex XVI to the EEA Agreement, OJ L 94, 28.3.2014, p. 1.
[91] 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*, referred to at point 4 of Annex XVI to the EEA Agreement, OJ L 94, 28.3.2014, p. 243.
[92] 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).
[93] Article 10 of Directive 2014/23/EU and Article 22 of Directive 2014/25/EU.

> *"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"*[94]

The Norwegian Government has questioned the Authority's reliance on the definitions found in Directives 2014/23 and 2014/25, both because there is no cross-reference to those definitions in Directive 2014/24 and because the definition in Directive 2014/25 applies only in order to determine who is a contracting entity for the purposes of that directive.[95] The Authority agrees there is a lack of cross-referencing and that the definition in Directive 2014/25 serves a different purpose. Nevertheless, the Authority considers that these other definitions are relevant in order to identify common themes in the understanding of the term as a matter of EEA law and these common themes should be applied to interpret the term as used in Article 11 of Directive 2014/24.

Further insight can be gained from the courts. 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.[96]

Based on the above, the Authority considers 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.[97]

8.1.1 Applying to a single entity

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

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[94] 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*."

[95] Letter of 8 April 2022, Doc No 1281709, pages 11 and 12.

[96] Judgment of the CJEU of 25 October 2001, *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, paragraph 24.

[97] In its letter of 8 April 2022 (Doc No 1281709), the Norwegian Government has questioned whether limiting the ability of other entities to carry out the activity is a condition or a consequence of an exclusive right, referring to Article 4(3) of Directive 2014/25 and an extract from *Caranta, European Public Procurement Commentary on Directive 2014/24/EU, 2021, page 117*. In so far as the reference to Article 4(3) is concerned, the Authority does not follow the Norwegian Government's argument: it appears that the Norwegian Government is arguing that the definition of exclusivity does not need to entail any reference to limiting the exercise of the activity to one entity but if that were the case, the Authority fails to see how there would be anything resembling exclusivity as the term is commonly understood at all. In so far as the reference to the extract from *Caranta* is concerned, that extract appears to relate to the aspect of "substantially affecting the ability of other economic operators to carry out the activity" rather than the aspect of "limiting the exercise of the activity to one or more entities" (note that the definition in question concerns exclusive *and* special rights, hence the reference to "one *or more* entities"). The Authority accepts that this may not be a necessary condition but this is *because* it follows from limiting the exercise of the activity to one entity.

notion of "monopoly".[98] 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 Norway's chosen approach to management of commercial waste (including waste which is of a similar nature to household waste), as described in section 7.1 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.

8.1.2 Relating to an activity

With regard to the subject matter of the exclusive right, the Norwegian Government has argued 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.[99]

The Authority does not accept that the relevant activity can be defined with mere reference to the purchaser of the services being offered. Public procurement law categorises services on the basis of what they entail and not on the basis of who is purchasing them.[100]

The Norwegian Government has claimed that the exclusive right is not defined in the above way as it is defined as "management of municipal commercial waste".[101] However, that term simply means "management of waste produced in the buildings and institutions belonging to the municipality as a legal person" and it is the municipality which is seeking to engage the service provider, therefore the purchaser is a defining part of the service description.

The Norwegian Government has relied upon Case C-209/98, *Sydhavnens Sten & Grus*,[102] in which the CJEU accepted an exclusive right for building waste. The Norwegian Government claims this is authority for limiting an exclusive right by waste

[98] Buendia Sierra in Faull and Nikpay, The EC Law of Competition, second edition, 2007, page 601. See also Janssen, EU Public Procurement Law & Self Organisation, 2018, page 221.

[99] See page 4 of the letter of 14 February 2019 (Doc No 1052794). In its letter of 8 April 2022 (Doc No 1281709), the Norwegian Government has disputed the Authority's emphasis on "activity," seeming to suggest a more appropriate reference would be to a "public service contract". The Authority does not accept the scope of an exclusive right can be defined as a "public service contract" as then Article 11 becomes entirely circular. To the extent that the Norwegian Government's argument is that the scope should be defined by a "service" rather than an "activity", the Authority does not consider there to be a material difference between the terms for the purposes of its arguments in this section.

[100] 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.

[101] Letter of 8 April 2022, Doc No 1281709, page 12.

[102] Cited above at footnote 70.

fraction. However, the limitation in the current case is of a different nature. The Authority considers that there is a material difference between defining waste on the basis of the nature of its source when that has an impact what the waste comprises (*building* waste) and defining waste by the legal entity responsible for its source (*municipal* commercial waste).

In the Authority's view, the relevant activities are collection and treatment of commercial waste. As noted above, the services required by a municipality are the same as those required by other commercial waste producers. As such, 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.

8.1.3 The practical implications of the Norwegian Government's approach in respect of EEA public procurement law

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),[103] 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.

8.2 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 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.

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

[103] See in this respect section 7.3.4 of the Directorate's letter of 20 February 2020.

As noted above in section 8, 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 has established in section 7 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 8 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.

The Authority has made reference above to how the arrangements under the New Partnership Agreement are, in practice, indistinguishable from those under a normal public service contract. In this section, the Authority will set out how the arrangements meet the definition of a public service contract. It seems that this position is actually accepted by the Norwegian Government, which states in its letter of 8 April 2022 that "[t]he New Partnership Agreement is a public contract".[104]

Under the New Partnership Agreement, MNA is responsible for the collection, transport, handling and trade of municipal commercial waste.[105] MNA has carried out a procurement procedure in respect of collection and treatment of municipal commercial waste from the owner municipalities.[106]

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.[107] The Norwegian Government has clarified that the cost of any service outsourced by MNA will form part of the costs to be reimbursed.[108]

Pursuant to Article 1(1) and Article 4, 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.

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 on the market.[109] It is settled case-law that a contracting authority can also be an economic operator,[110] and MNA is clearly offering provision of services.[111] MNA therefore meets the definition of an economic operator.

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[104] Doc No 1281709, page 13.
[105] Section 2 of the New Partnership Agreement.
[106] 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.
[107] Section 2 of the New Partnership Agreement.
[108] Letter of 1 December 2020 (Doc No 1166524), page 4.
[109] Article 2(1)(10) of the Directive.
[110] *Piepenbrock,* paragraph 29.

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.[112]

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.[113] 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.[114] 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.

10 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 has in fact been utilised in the context of municipal waste management in Norway,[115] as well as in other countries.

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[111] See *Piepenbrock,* paragraph 29 and the judgment of the CJEU 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.

[112] See judgment of the CJEU of 14 July 2022, *Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE) v Consejería de Igualdad y Políticas Inclusivas*, C-436/20, EU:C: 2022:559, paragraph 67 and the case law cited.

[113] 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).

[114] Document No 1187059.

[115] 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.

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[116] in which a number of Norwegian waste management arrangements were assessed, and the majority found to be compliant with EEA law.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by the municipalities of Flatanger, Overhalla, Grong, Høylandet, Leka, Bindal, Nærøysund, Namsos, Namsskogan, Røyrvik, 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, read in conjunction with Title II of that Directive.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

Done at Brussels,

For the EFTA Surveillance Authority

Arne Røksund President	Stefan Barriga College Member	Árni Páll Árnason Responsible College Member

For Melpo-Menie Joséphidès
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Arne Roeksund, Catherine Howdle.

[116] Doc No 1055823.