



ROYAL NORWEGIAN MINISTRY OF
CLIMATE AND ENVIRONMENT

EFTA Surveillance Authority
Avenue des Arts 19H
1000 BRUSSELS
BELGIUM

Your ref
Case No: 78085, Document No: 1281581

Our ref
15/2910-

Date
28 November 2022

Dear Madame/Sir,

Reply to reasoned opinion in respect of a complaint against Norway concerning collection and treatment of municipal commercial waste

1. Introduction

Reference is made to the reasoned opinion of 28 September 2022 from the EFTA Surveillance Authority (“the Authority”). In its letter, the Authority concludes that by awarding a public service contract for the collection, transport, handling and trade of municipal commercial waste directly to Midtre Namdal Avfallsselskap IKS (“MNA”) without prior call for competition, 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. Moreover, the Authority points to the specific rules set out in Article 12 of Directive 2014/24 regarding awards of contract between entities within the public sector, which allows for one or more municipalities (contracting authorities) to engage another public authority to provide the services in question without the need for competition, provided the specified conditions in that Article are met. The deadline to take measures in response to the reasoned opinion is set to 28 November 2022.

Having thoroughly examined the reasoned opinion and the arrangements between MNA and its owner municipalities with regard to handling of municipal commercial waste, the Norwegian Government (“the Government”) is of the view that they meet the conditions in Article 12 of Directive 2014/24. Accordingly, the arrangements fall outside the scope of Directive 2014/24. In the Government’s view, the absence of a public procurement of MNAs handling of municipal commercial waste is therefore not a breach of EEA law.

In this letter, the Government will first set out the relevant legal framework (section 2). The Government will then in section 3 present its legal analysis in support of the conclusion outlined above. In further support to this conclusion, please find enclosed *Post-calculation MNA 2021* and *Budget MNA 2022*. The Government will submit the post-calculation for 2022, when it is finalized. These calculations will provide the final numbers regarding activities for

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the municipal owners and others. Finally, in section 4, the Government will make some general remarks.

2. Article 12(3) of Directive 2014/24

The first subparagraph of Article 12(3) of Directive 2014/24 provides:

“A contracting Authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

(a) the contracting Authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80 % of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.”

The second subparagraph of Article 12(3) of Directive 2014/24 provides:

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

In order for an arrangement to be excluded from Directive 2014/24 pursuant to Article 12(3), the contracting authorities must have sufficient control over the contractor; the contractor must carry out more than 80% of its activities with the controlling contracting Authorities (or others controlled by the same contracting Authorities); and there must be no private capital participation in the contractor. In the following, the Government will argue that all three conditions are met.

3. The Norwegian government's assessment: the New Partnership Agreement is a public contract between entities within the public sector according to Article 12(3) of Directive 2014/24

At the outset, the Government recalls that the Authority, in section 9 of its reasoned opinion, made the following assessment of the New Partnership Agreement between MNA and its owner municipalities: «*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 (...)*».¹ The Authority furthermore states that the owner municipalities are indisputably contracting authorities.²

MNA is a legal person governed by public law.³ MNA is 100% owned and controlled by the municipal owners.⁴ There is therefore no direct private capital participation in MNA, cf. Article 12(3) first subparagraph litra c of Directive 2014/24.

Provided that the conditions regarding control and activity in 12 (3) first subparagraph litra a, as further detailed in article 12(3) second subparagraph, and litra b of Directive 2014/24 are met, the arrangement is therefore in accordance the exclusion pursuant to Article 12.

3.2 The owner municipalities exercise jointly a sufficient control over MNA

i) MNAs decision-making bodies are composed of representatives of all owner municipalities

According to Article 12(3) second subparagraph i) of Directive 2014/24 “*the decision-making bodies of the controlled legal person must be composed of representatives of all participating contracting authorities*”. Individual representatives may represent several or all the participating contracting authorities.

The decision-making body of an intermunicipal company is the Board of representatives.⁵ According to the Act relating to Intermunicipal Companies Section 6 the Board of representatives must be composed of representatives of all municipalities with ownership in the company (the “owner municipalities”). That MNAs Board of representatives must be composed of representatives from all owner municipalities also follows from the New Partnership Agreement.⁶ Since the decision-making body of MNA are composed of representatives of all participating contracting authorities, the condition in Article 12(3) second subparagraph i) of Directive 2014/24 is fulfilled.

ii) the owner municipalities jointly exercise decisive influence over the strategic objectives and significant decisions of MNA

Article 12(3) second subparagraph ii) of Directive 2014/24 provides that a contracting authority is deemed to exercise the required level of control where it exercises “*a decisive influence over both strategic objectives and significant decisions*” of the company. That

¹ P. 23.

² P. 22.

³ LOV-1999-01-29-6 A *Lov om interkommunale selskaper (IKS-loven)*. Section 2 presuppose that an intermunicipal company is a legal person. It also follows from the New Partnership Agreement that MNA is a legal person, see Section 2 and 4.

⁴ New Partnership Agreement Section 3.

⁵ Attachment 1 to letter of 1 December 2020 (Doc No 1166524). Section 6.2.

⁶ Attachment 1 to letter of 1 December 2020 (Doc No 1166524). Section 6.2.

assessment must take account of all the legislative provisions and relevant circumstances. It must be a case of a power of decisive influence over both strategic objectives and significant decisions.⁷

The board of representatives is the supreme body of an intermunicipal company. It makes decisions regarding accounting, budget and financial plan and other matters that pursuant to the Act relating to Intermunicipal Companies or the Partnership agreement must be handled in the Board of representatives.⁸ The decision-making powers of the Board of MNA are set out in the New Partnership Agreement Section 6.2., including powers regarding election, setting guidelines for the election committee and the appeal board, proposal for waste management fees for the owner municipalities and changes of the partnership agreement.

The members of the company's board are elected by the Board of representatives.⁹ Since the municipal councils of the different owner municipalities have the power of instruction of its representatives in the board of representatives, the owner municipalities exercise a "*decisive influence over both strategic objectives and significant decisions*" of MNA, cf. Article 12(3) second subparagraph ii) of Directive 2014/24, with their influence over the supreme body of MNA.

iii) MNA does not pursue any interests which are contrary to those of the owner municipalities

Article 12(3) second subparagraph iii) of Directive 2014/24 requires that "*the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities*". The controlled legal person must be orientated towards the controlling authorities, not the market.¹⁰

According to Act relating to Intermunicipal Companies section 4, the Partnership Agreement must define the purpose of the company. MNAs New Partnership Agreement § 2 provides:

"The objective of the company is, on behalf of the municipal owners and in accordance with the delegated Authority to execute the managing Authority and those tasks held by the municipal owners related to collection, transport, management and trade of waste and sewage, and all things else related to this in by the municipal owners. The company can participate in or establish other companies to execute the tasks according to this purpose. The Company can also handle waste from private business and household waste subject to competition, if this is not contrary to the interests of the municipal owners."

It is clear that MNAs activities must principally be devoted toward the owner municipalities, and that any other activities should have only marginal significance. It is therefore a lack of "market orientation".¹¹ Moreover, the purpose of the MNA met the condition of Article 12(3) second subparagraph ii) of Directive 2014/24, namely that "*the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities*".

⁷ Judgment of the Court of Justice of the European Union of 13 October 2005, *Parking Brixen*, C-458/03 paragraph 66.

⁸ Act relating to Intermunicipal Companies § 7.

⁹ Act relating to Intermunicipal Companies § 10.

¹⁰ Judgment of the Court of Justice of the European Union of 13 November 2008, *Coditel Barbant*, C-324/07, EU:C:2008:621, paragraphs 37-42.

¹¹ Reference is made to case law that require that the awardee must act in the public interest rather than the pursuit of commercial objectives. See e.g. *Coditel Barbant*, paragraphs 37-42.

On the basis of the above, all the conditions of Article 12(3) first subparagraph a of Directive 2014/24, cf. second subparagraph, are met.

3.3 More than 80 % of the activities of MNA are carried out in the performance of tasks entrusted to it by the owner municipalities

Article 12(3) first subparagraph litra b requires that more than 80 % of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities. Accordingly, at least 80% of the average turnover of the controlled must derive from the controlling authorities.

MNAs activities can be divided in three, household waste, sludge and commercial waste. Pursuant to the Pollution Control Act managing household waste and sludge are municipal tasks.¹² It also follows from the New Partnership Agreement that handling of household waste and sludge are activities entrusted by the owner municipalities of MNA.¹³

In 2021 activities relating to household waste and sludge, activities entrusted by the owner municipalities, were 83,1 % of MNAs income.¹⁴ MNA has estimated that in 2022 tasks entrusted to it by the owner municipalities will provide 88,3% of MNAs income.¹⁵ This is over the threshold of 80%. The conditions according to first subparagraph of Article 12(3) litra b of Directive 2014/24 are met.

3.4 Conclusion

It is settled case-law that national labels are not determinative when establishing whether EEA public procurement law applies.¹⁶ It is therefore not determinative what the owner municipalities has labelled the duties entrusted to MNA through the New Partnership Agreement.

As the legal analyses shows, the arrangements entered into between the owner municipalities and MNA in respect of municipal commercial waste fulfil the conditions of Article 12(3) of Directive 2014/24. The duties entrusted to MNA through the New Partnership Agreement is therefore not subject to the EU public procurement rules.

4. Final remarks

In its reasoned opinion, the Authority emphasises that although the legal matters assessed in this case concern EEA public procurement law, the relevant national waste management framework must be taken into account: *“The regulatory choice made at national level to make all commercial waste producers responsible for their waste is key and directly*

¹² Pollution Control Act §§ 26 and 30.

¹³ New Partnership Agreement § 2.

¹⁴ Post calculation p. 6. See also p. 2.

¹⁵ According to MNAs attorney. The final numbers will be in the post-calculation after the year. See also *Budget MNA 2022* p. 16.

¹⁶ Reference is made to the Resoned Opinion p.8. 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.

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.”¹⁷

The Government hereby take this opportunity to inform the Authority that we will consider whether to assess the regulatory choice made at national level as regards responsibilities and powers in respect of household waste and waste similar to household waste from municipalities and private entities.

Yours sincerely

Mona Aarhus
Deputy Director General

Olve Klepp
Adviser

This document is signed electronically and has therefore no handwritten signature

Attachments

1. Post-calculation MNA 2021
2. Budget MNA 2022

¹⁷ P. 3.