Brussels, 27 September 2023
Case No: 78085
Document No: 1367345
Decision No: 136/23/COL

ESA | EFTA Surveillance Authority

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

Dear Sir or Madam,

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

1 Introduction

1. 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.

2. 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 because they had been awarded without a competitive process. 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] and a reasoned opinion dated 28 September 2022.[4]

3. The Norwegian Government responded to the reasoned opinion on 28 November 2022.[5] In that response, the Norwegian Government raised a new justification for engaging MNA without competition, arguing that it was lawful to enter into the arrangements because they were with an entity controlled by the municipalities (an "in-house company").

4. Information provided by the Norwegian Government[6] indicates that the relevant conditions for that exemption[7] may be met, at least as regards MNA's recent operations.[8] If the conditions are met, it would be lawful for MNA's owner municipalities to enter into a contract for MNA to provide waste management services without following the procedural requirements of Directive 2014/24/EU on public procurement[9] ("Directive 2014/24"). As such, the Authority does not intend to pursue the specific arrangements with MNA further at this point in time.

5. However, the Authority is nevertheless concerned that until the date of the response to the reasoned opinion, MNA's owner municipalities had relied on justifications relating to exclusive rights and transfers of powers in respect of the

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[1] Doc No 777989.
[2] In Norwegian, "*næringsavfall*".
[3] Decision No 277/21/COL; Doc No 1143836.
[4] Decision No 181/22/COL; Doc No 1281581.
[5] Doc No 1333182.
[6] Letter of 28 November 2022, email of 6 February 2023 (Doc No 1351102) and letter of 17 April 2023 (Doc No 1367241).
[7] Set out in Article 12(3) 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.
[8] As regards the requirement set out at Article 12(3)(b) that more than 80% of the activities of MNA must be carried out in the performance of tasks entrusted to it by its owner authorities, the information provided consists of data for 2020, 2021 and 2022; and an explanation as to why – pursuant to Article 12(5) – data in respect of the three years preceding the contract award is considered not relevant due to a reorganisation of activities.
[9] 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.

award without competition which the Authority considers not to be applicable. Furthermore, a report from the Norwegian Waste Management and Recycling Association, Avfall Norge, provided by the Norwegian Government in 2016, indicated that at least 13% of the municipalities surveyed had assigned exclusive rights for at least some of the management of their municipal commercial waste.

6. The Authority has also been made aware of two further concrete examples where exclusive rights appear to have been relied upon to enter into arrangements in respect of municipal commercial waste.

7. One example relates to the awarding of exclusive rights to ReMidt IKS for the collection and treatment of municipal commercial waste. These arrangements appear to be materially similar to the case of MNA, including in respect of the potential justification for a direct award.

8. The second example relates to arrangements between Sunnfjord Miljøverk IKS ("SUM") and its seven owner municipalities[10] for the collection, receipt and treatment of municipal commercial waste. The Authority is of the view that these arrangements do not comply with EEA law. The Authority is of the view that the arrangements constitute public contract(s) which should have been competitively tendered in accordance with EEA rules on public procurement.

9. Furthermore, the Authority considers that the data in the 2016 report referred to above and its knowledge of the three concrete examples concerning municipal commercial waste of MNA, ReMidt IKS and SUM indicate that there is a consistent and general practice in Norway of municipalities using exclusive rights to justify direct awards of contracts for services in relation to municipal commercial waste. The Authority considers this practice to breach EEA law.

10. In this letter, the Authority will first set out the history of the case (section 2) and the relevant legal framework (sections 3, 4 and 5)

11. The Authority will then set out the details of the arrangements with SUM (section 6) and its detailed legal analysis of those arrangements.

12. In section 7, the Authority will set out why SUM 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.

13. In section 8, the Authority will set out why the rules relating to contracts awarded to entities controlled by the relevant public authorities cannot be relied upon.

14. In section 9, the Authority will explain why the arrangements also 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.

15. In section 10, the Authority will explain why the arrangements meet the definition of a public contract, meaning that EEA public procurement rules should have been applied.

16. In section 11, the Authority will briefly comment on further arrangements entered into by SUM.

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[10] Askvoll, Fjaler, Gaular, Hyllestad, Jølster, Naustdal and Førde. From 1 January 2020, Gaular, Jølster, Naustdal and Førde merged into Sunnfjord.

17. Having addressed the case of SUM, the Authority will go on to set out in section 12 why it considers there to be a general and consistent practice of using exclusive rights to justify direct awards of contracts for services in relation to municipal commercial waste.

18. As stated in the reasoned opinion concerning MNA,[11] 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 letter relates only to the arrangements in respect of commercial waste and not those in respect of household waste.

19. The Authority also notes that whilst the specific arrangements in relation to SUM are relatively low value, they nevertheless exceed the relevant financial threshold for the application of procurement rules. In any case and moreover, the Authority is concerned with the on-going practice to use the exclusive rights justification in circumstances in which the EEA law does not allow it. In its reply to the first letter of formal notice, the Norwegian Government defended the legality of the arrangements with MNA claiming they constituted a transfer of powers and responsibilities or, in the alternative, because a direct award was justified on the basis of the existence of exclusive rights. In the reply to the reasoned opinion, the Norwegian Government did not address the Authority's arguments on these points, but rather invoked the in-house exemption to justify the specific arrangement. The Authority therefore can only conclude that the Norwegian Government does not distance itself from the position taken in its response to the first letter of formal notice.

2 Correspondence

20. On 15 December 2015,[12] the Authority issued a request for information to the Norwegian Government.

21. On 1 April 2016,[13] the Norwegian Government replied to the Authority's letter. On 20 May 2016[14] and 27 September 2016,[15] the Norwegian Government submitted additional information.

22. On 18 October 2016,[16] the Authority sent a further request for information to the Norwegian Government. On 1 February 2017,[17] the Norwegian Government replied to the Authority's letter.

23. On 30 May 2017,[18] the Authority sent a further request for information to the Norwegian Government to which the Norwegian Government replied on 7 July

[11] Page 3 of the Reasoned Opinion.
[12] Doc No 784886.
[13] Doc No 799119.
[14] Doc No 805325.
[15] Doc No 820204.
[16] Doc No 822684.
[17] Doc No 839541.
[18] Doc No 857713.

2017.[19] The Norwegian Government submitted additional information on 15 December 2017.[20]

24. The case was also discussed with the Norwegian Government during the package meetings that took place in Oslo on 27 – 28 October 2016[21] and on 26 October 2017.[22]

25. A pre-closure letter was sent to the complainant on 30 January 2018.[23] On 2 June 2018, the Authority became aware that the complainant had not received that letter. The letter was reissued on 11 June 2018.

26. On 3 July 2018,[24] 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.

27. On 4 December 2018, the Authority issued a further request for information.[25] The Norwegian Government responded on 14 February 2019.[26]

28. On 21 June 2019, the Authority requested further clarifications.[27] The Norwegian Government responded on 21 August 2019[28] and the matter was discussed at the Package Meeting which took place in Oslo on 24 – 25 October 2019.[29]

29. 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.[30] The Norwegian Government responded to that letter on 20 May 2020.[31]

30. On 2 October 2020, the Authority requested factual clarification regarding some matters.[32] The matter was discussed at the Package Meeting which took place virtually on 22 – 23 October 2020[33] and the Norwegian Government responded to the letter of 2 October 2020 on 1 December 2020.[34]

31. On 29 January 2021, the Authority sent a further request for information.[35] The Norwegian Government replied to that request on 11 March 2021.[36]

32. 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

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[19] Doc No 865020.
[20] Doc No 889088.
[21] See Doc No 824832, page 47.
[22] See Doc No 878916, page 41.
[23] Doc No 867102.
[24] Doc No 921972.
[25] Doc No 930863.
[26] Doc No 1052794.
[27] Doc No 1074450.
[28] Doc No 1084286.
[29] See Doc No 1096584, page 33.
[30] Doc No 1055823.
[31] Doc No 1134028.
[32] Doc No 1143705.
[33] See Doc No 1161672, page 21.
[34] Doc No 1166524.
[35] Doc No 1173551.
[36] Doc No 1187063.

failed to fulfil its obligations under Articles 1(1), 4(c) and 11 of Directive 2014/24, read in conjunction with Title II of that Directive.[37]

33. The Norwegian Government submitted its observations on the letter of formal notice on 8 April 2022.[38] 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.

34. On 28 September 2022,[39] the Authority issued a reasoned opinion to which the Norwegian Government responded on 28 November 2022.[40] The case was also discussed at the Package Meeting which took place in Oslo on 27 and 28 October 2022.[41]

35. On 17 February 2023, the Authority sent a further request for information.[42] The Norwegian Government replied to that request on 17 April 2023.[43]

3 Relevant national law

3.1 Public procurement law

36. Section 2-3 of the Regulation on Public Procurement of 12 August 2016 No. 974[44] 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".*

37. Section 3-2(1) of the same regulation provides:

> *"(1)… the Procurement Act and the Regulations […] do not apply when the contracting authority enters into contracts with another legal entity:*
>
> *(a) over which the contracting authority and other contracting authorities jointly exercise control that corresponds to the control they exercise over their own business,*
>
> *(b) which performs more than 80 percent of its activity on behalf of the controlling contracting authorities or other legal entities controlled by the contracting authorities; and*
>
> *(c) in which there are no direct private interests."*

[37] Decision No 277/21/COL; Doc No 1143836.
[38] Doc No 1281709.
[39] Decision No 181/22/COL; Doc No 1281581.
[40] Doc No 1333182.
[41] See Doc No 1325668, page 52.
[42] Doc No 1348253.
[43] Doc No 1367241.
[44] FOR-2016-08-12-974 *Forskrift om offentlige anskaffelser.*

3.2 Waste management law

38. The Pollution Control Act[45] sets out the different types of waste[46] under Norwegian law and municipalities' duties and powers in relation to waste management.

39. 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."*

40. 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."*

41. Section 30, first paragraph, reads:

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

42. 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."*

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

4 Relevant EEA law

44. Directive 2014/24 entered into force in the EEA on 1 January 2017.[47]

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[45] LOV-1981-03-13-6 *Lov om vern mot forurensninger og om avfall (forurensningsloven).*
[46] 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).
[47] Joint Committee Decision No 97/2016 of 29 April 2016, OJ L 300, 16.11.2017, p. 49.

45. 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."*

46. 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."*

47. 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."*

48. 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;"*

49. 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;"*

50. Article 4 of Directive 2014/24, as in force between 10 February 2018 and 7 February 2020 (inclusive),[48] 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:*
>
> *…*
>
> *(c) EUR 221 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities;…*
>
> *…*"

[48] 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.

51. 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."*

52. 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 noncontrolling 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.*
>
> *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."*

53. Article 12(5) of Directive 2014/24 provides:

> *"For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.*
>
> *Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based*

measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections."

54. Article 18(1) of Directive 2014/24 provides:

"Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

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

55. 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.

56. EEA public procurement law, in particular Directive 2014/24, applies to purchases of works, supplies and services[49] by contracting authorities[50] and generally requires opportunities to be exposed to competition.

57. However, not all arrangements entered into by the public sector concerning works, supplies or services constitute "procurement" for the purposes of Directive 2014/24.[51] Furthermore, there is no obligation to outsource service provision[52] and, inter alia, as referred to above, certain situations which are similar in effect to self-supply are excluded from the scope of Directive 2014/24.[53] 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.[54]

58. In the following sections, the Authority will set out detailed arguments as to why it was not lawful for SUM's owner municipalities to enter into contract(s) for services in relation to municipal commercial waste without competition. In this, the Authority will address arguments relating to exclusive rights, transfers of powers, and in-house companies. The point underlying the Authority's position as regards the application of the rules relating to exclusive rights and transfers of powers is that, in practice, there is nothing which distinguishes the wider

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[49] Articles 1(1) and 1(2) of Directive 2014/24.

[50] 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*".

[51] 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.*"

[52] 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.*"

[53] Article 12 of Directive 2014/24.

[54] As defined in Article 2(1)(5) of Directive 2014/24.

arrangements concluded by the municipalities from a normal public contract, despite how they are labelled. In this respect, it is settled case-law that national labels are not determinative when establishing whether EEA public procurement law applies.[55] 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 in the case of SUM

59. 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.

60. By municipal decisions taken in September and October 2019,[56] which the Authority understands took effect under a new company agreement on 1 January 2020, SUM was granted exclusive rights by its seven owner municipalities for, inter alia, the collection, receipt and treatment of municipal commercial waste.[57] The Norwegian Government has confirmed that the municipalities subsequently entered into contract(s) with SUM for the provision of these services. The Authority assumes that the contract(s) were awarded shortly after the relevant decisions to grant exclusive rights. The Authority requests that the Norwegian Government provides copy(ies) of the contracts in its response to this letter.

61. On 12 February 2021, SUM granted exclusive rights to BIR Avfallsenergi AS for treatment of household and municipal commercial waste for the period 1 April 2021 to 31 December 2021.[58] SUM then awarded a contract to BIR Avfallsenergi AS with a term to 10 June 2025. Subsequent to that, on 17 September 2021, SUM granted exclusive rights to BIR Avfallsenergi AS for, *inter alia*, treatment of municipal commercial waste for the period 2022 to 10 June 2025.[59]

62. The arrangements between the municipalities and SUM cover services relating to both municipal commercial waste and household waste. The obligations in respect of these different types of services derive from distinct provisions of the Pollution Control Act and this difference directly affects whether it is possible to rely on some of the provisions of Directive 2014/24 referred to by the Norwegian Government. Therefore the services relating to municipal commercial waste must be considered to be objectively separable from those relating to household

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[55] 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.

[56] Askvoll: decision 042/19 of 18.9.2019; Fjaler: decision 106/19 of 30.9.2019; Gaular: decision 061/19 of 26.9.2019; Hyllestad: decision 19/108 on 31/10/2019; Jølster: decision 064/19 of 26.9.2019; Naustdal: decision 19/050 of 26.9.2019 and Førde: decision 053/19 of 26.9.2019. See https://www.sum.sf.no/einerettkommunalt_nringsavfall_og_slam and page 4 and 5 of SUM company agreement (enclosure 13 to the Norwegian Government's letter of 17 April 2023, Document No 1367217).

[57] https://www.sum.sf.no/einerettkommunalt_nringsavfall_og_slam

[58] See enclosure 11 to the Norwegian Government's letter of 17 April 2023.

[59] See enclosure 12 to the Norwegian Government's letter of 17 April 2023.

waste. Given this separability, the assessment which follows will deal only with services in respect of municipal commercial waste. [60]

63. As the contract(s) between the municipalities and SUM were entered into without competition, the Authority must assess whether this was lawful. The Authority will also make some limited comments in relation to the arrangements with BIR Avfallsenergi AS in section 11 below.

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

64. In its response to a question concerning the legal basis for the owner municipalities engaging SUM to perform services in relation to municipal commercial waste without competition, the Norwegian Government has referred to SUM having been granted exclusive rights.[61] The Authority therefore assumes that the Norwegian Government considers that the arrangements fall within the scope of Article 11 of Directive 2014/24 and will therefore address this argument.

65. Article 11 of Directive 2014/24 provides for the award of a public service contract by one contracting authority to another contracting authority without competition *on the basis of* an exclusive right. At the outset, the Authority emphasises that the article 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.

66. 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. Given the framework established by the Pollution Control Act, a municipality has no ability to grant such an exclusive right in respect of services relating to commercial waste.

[60] 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.

[61] See page 9 of the letter of 17 April 2023, Document No 1367241.

7.1 No exclusivity

67. 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 SUM.

68. 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[62] and Directive 2014/25[63]).[64] 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.[65]

69. Directive 2014/23 defines the term as:

> *"a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties the effect of which is to limit the exercise of an activity to a single economic operator and which substantially affects the ability of other economic operators to carry out such an activity"*[66]

70. The Norwegian Government has previously 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.[67] 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

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[62] 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.

[63] 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.

[64] 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).

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

[66] 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*."

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

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.

71. 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.[68]

72. 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.[69]

7.1.1 Applying to a single entity

73. With regard to there being a single entity (within a specific geographical area), the legal notion of an exclusive right has been described as roughly corresponding to the popular notion of "monopoly".[70] 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.

74. As a consequence of Norway's chosen approach to management of commercial waste (including waste which is of a similar nature to household waste), 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.

75. In Norway, municipalities' obligations in respect of commercial waste do not differ in any way from those placed on private entities. This 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

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

[69] In its letter of 8 April 2022 (Doc No 1281709), the Norwegian Government 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.

[70] 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.

preparatory works[71] (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).[72]

76. As such, 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. Given this, the only influence a municipality can have on the provision of the service is to determine *its own* service provider.

7.1.2 Relating to an activity

77. With regard to the subject matter of the exclusive right, the Norwegian Government has previously advocated 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 awarded by a municipality can be limited to that municipality's own commercial waste.[73]

78. 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.[74]

79. In respect of MNA, the Norwegian Government claimed that the exclusive right was not defined in the above way as it was defined as "management of municipal commercial waste".[75] However, "management of municipal commercial waste" simply means "management of waste produced in the buildings and institutions belonging to the municipality as a legal person" and it was the municipality which was seeking to engage the service provider, therefore the purchaser was a defining part of the service description. In the case of SUM, the matter seems even more straightforward: the exclusive right is defined as relating to collecting, receiving and treating waste from municipal businesses/institutions.

80. Also, in respect of MNA, the Norwegian Government relied upon Case C-209/98, *Sydhavnens Sten & Grus*,[76] in which the CJEU accepted an exclusive right for building waste. The Norwegian Government claimed this was authority for

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[71] Ot.prp. nr. 87 (2001-2002), section 2.6.2.

[72] 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."*

[73] 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.

[74] 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.

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

[76] Judgment of the CJEU of 23 May 2000, *Sydhavnens Sten and Grus*, C-209/98, EU:C:2000:279

limiting an exclusive right by waste fraction. However, the limitation in the cases of MNA and SUM 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).

81. The relevant activities encompassed by the purported exclusive right awarded to SUM, are collection, receipt and treatment of commercial waste (and not purely *municipal* commercial waste).[77] 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 is understood under EEA law.

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

82. 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.

83. 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. As such, there is nothing to justify an exception from the procurement rules.

84. 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),[78] 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 in breach of the provisions of Directive 2014/24.

7.2 Conclusion regarding Article 11 of Directive 2014/24

85. 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, receipt, and treatment of municipal commercial waste. SUM's owner municipalities therefore cannot rely on that article to directly award a contract for the collection, receipt and treatment of municipal commercial waste without following the tendering requirements of Directive 2014/24.

[77] See page 9 of the letter of 17 April 2023, Document No 1367241.
[78] See in this respect section 7.3.4 of the Directorate's letter of 20 February 2020.

8 The Authority's assessment: application of Article 12(3) of Directive 2014/24 concerning in-house companies

8.1 Application of Article 12(3) at the point of contract award

86. In its response to the question concerning the legal basis for the municipalities engaging SUM to perform services in relation to municipal commercial waste without competition, the Norwegian Government has also referred to Article 12(3) of Directive 2014/24, which allows the direct award of contracts to in-house companies, provided certain conditions are met.[79] Whilst the Norwegian Government does not explicitly rely on this provision, for completeness, the Authority will set out its understanding of why it cannot be relied upon in any event.

87. One of the conditions which must be met for the Article 12(3) exemption to apply is that more than 80% of the activities of the in-house company must be carried out in the performance of tasks entrusted to it by its controlling contracting authorities or by other legal persons controlled by the same contracting authorities. Pursuant to Article 12(5), this should normally be calculated on the basis of the average total turnover, or an appropriate alternative activity-based measure such as costs, for the three years preceding the contract award. The Norwegian Government has not put forward any argument that the second paragraph of Article 12(5) (which provides for measurement of the activity on a different basis) should be applied.

88. The Norwegian Government has only provided data for the two years (more or less) preceding the contract award (2018 and 2019), however, in those years the total commercial activity was 26% and 23% (and 24.6% in overall), therefore unless the commercial activity in 2017 was significantly lower, Article 12(3) cannot be relied upon. In this respect, the Authority also notes that where the relevant municipal decisions (as linked to on SUM's website[80]) are accompanied by reports, these all refer to exclusive rights being proposed *because* SUM might exceed threshold of 20% commercial activity applicable to the exemption under Article 12 of Directive 2014/24/EU and therefore that that exemption should no longer be relied upon.[81]

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[79] See page 9 of the letter of 17 April 2023, Document No 1367241.
[80] https://www.sum.sf.no/einerettkommunalt_nringsavfall_og_slam
[81] See Kjaler municipality's decision of 30 September 2019, available at https://static1.squarespace.com/static/52eb8ee6e4b05d892b24828f/t/5d9727abda68ec39ec2f63fd/1570187181661/Fjaler+-+Sunnfjord+Milj%C3%B8verk+IKS+-+tildeling+ev+einerett+kommunalt+n%C3%A6ringsavfall+og+slam+%28218922%29.pdf; Jølster municipality's decision of 26 September 2019, available at https://static1.squarespace.com/static/52eb8ee6e4b05d892b24828f/t/5d97299312bd426f2c8df8c3/1570187672347/J%C3%B8lster+-+Sunnfjord+Milj%C3%B8verk+IKS+-+tildeling+ev+einerett+kommunalt+n%C3%A6ringsavfall+og+slam+%28218922%29.pdf ; Naustdal municipality's decision of 26 September 2019, available at https://static1.squarespace.com/static/52eb8ee6e4b05d892b24828f/t/5d9729c7ebce426061514a2d/1570187720847/Naustdal+-+Sunnfjord+Milj%C3%B8verk+IKS+-+tildeling+ev+einerett+kommunalt+n%C3%A6ringsavfall+og+slam+%28218922%29.pdf ; and Førde municipality's decision of 26 September 2019, available at https://static1.squarespace.com/static/52eb8ee6e4b05d892b24828f/t/5d9729f267599921ecbd0376/1570187764342/F%C3%B8rde+-+Sunnfjord+Milj%C3%B8verk+IKS+-+tildeling+ev+einerett+kommunalt+n%C3%A6ringsavfall+og+slam+%28218922%29.pdf

8.2 Subsequent reliance upon Article 12(3)

89. Even if the conditions of Article 12(3) were met at the point of contract award, the Authority is of the view that the municipalities' explicit reliance on Article 11 precludes subsequent reliance on Article 12 as this would breach the principle of transparency.

90. In *Irgita*, the CJEU held that the conclusion of an in-house transaction which satisfies the conditions laid down in Article 12 is not as such compatible with EU law.[82] The Court confirmed that a State has the freedom to choose whether services should be provided in-house or tendered out[83] but that that freedom must be exercised with due regard to the fundamental rules of the EEA Agreement, including transparency.[84]

91. Transparency is a key principle of procurement law and Article 18 of Directive 2014/24 obliges "[c]ontracting authorities [to] act in a transparent and proportionate manner."

92. As regards what the principle entails, in the words of the EFTA Court:

> *"[the] obligation of transparency requires the [contracting] authority to ensure, for the benefit of any potential [contractor], a degree of advertising sufficient to enable the bid process…to be opened up to competition and the impartiality of the award procedures to be reviewed"*[85]
>
> *"The purpose underlying the principle of transparency is essentially to ensure that any interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the [contracting] authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner, to make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way, and to circumscribe the contracting authority's discretion and enable it to ascertain effectively whether the tenders submitted satisfy the criteria applying to the relevant procedure."*[86]

93. Furthermore, in *Irgita,* the CJEU held that:

> "*The principle of transparency requires, like the principle of legal certainty, that the conditions to which the Member States subject the conclusion of in-house transactions should be made known by means of rules that are sufficiently accessible, precise and predictable in their application to avoid any risk of arbitrariness.*"[87]

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[82] See judgment of the CJEU of 3 October 2019, *Irgita*, C-285/18, EU:C:2019:829, paragraph 64. The CJEU was assessing Article 12(1) of Directive 2014/24, however the Authority considers the judgment to be equally applicable to Article 12(3).
[83] *Irgita,* paragraphs 44 to 47.
[84] *Irgita*, paragraph 48 and the case law cited.
[85] Judgment of the EFTA Court of 29 August 2014, *Casino Admiral*, E-24/13, [2014] EFTA Ct. Rep. 732, paragraph 52.
[86] *Casino Admiral, p*aragraph 55
[87] *Irgita*, paragraph 55. As regards the applicability of this to decisions made by individual contracting authorities, see paragraph 63 of the same judgment in which the CJEU referred to the possibility of an in-house transaction with a subject matter which overlapped with that of a pre-existing public contract potentially breaching, *inter alia*, the principle of transparency.

94. Reliance by a contracting authority on Article 12 of Directive 2014/24 must therefore be sufficiently clear, precise, unequivocal and accessible to make it possible for all reasonably informed tenderers to understand that the contract is excluded from the scope of Directive 2014/24 on the basis of the in-house exemption. Moreover, as is apparent from the judgment in *Irgita*, the choice to rely on the in-house exemption should be made at a stage prior to that of procurement.[88]

95. Awarding a contract on the basis of granting exclusive rights, and explicitly stating that the in-house rules are no longer to be relied on, but then subsequently justifying the direct award on the basis of those very in-house rules would breach the principle of transparency. It would not give rise to a precise or predictable situation and would make it more difficult for the award procedure to be reviewed. Economic operators would be hindered in their ability to hold the relevant contracting authorities to account due to a lack of transparency as regards the legal basis for the arrangements and therefore what conditions need to be complied with. Furthermore, it is impossible to provide for transparency at the point of an award of contract if the relevant justification is not relied upon until a later point in time when, by coincidence but not design, the relevant conditions are in fact met.

96. The Authority is therefore of the view that even if the conditions of Article 12(3) were met, the municipalities' explicit reliance on Article 11 to the exclusion of Article 12 precludes subsequent reliance on Article 12 as this would breach the principle of transparency.

97. Furthermore, as regards the wider context, whilst it is of course open to a contracting authority to seek to defend itself against a breach of the EEA procurement rules and consider alternative justifications, in practice, if *any* change in justification is made, the problems described in paragraph 95 above still arise to a certain degree. The Authority is of the view that if this situation were to occur in multiple cases, these problems would be exacerbated. This could potentially lead to a general lack of predictability in the market concerned and a situation in which economic operators have no legal certainty as to whether a stated justification would transpire to be the eventual justification in respect of *any* public contracts awarded directly to public sector operators in that market. The situation in the market as a whole would not be clear, precise and predictable, but instead uncertain in terms of contracting authorities' intended approaches and the extent to which they could be held to account. This could potentially be in breach of the principle of legal certainty,[89] or more generally raise issues in respect of sincere cooperation.

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

98. In addition to the exemptions addressed in the previous two sections, 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

[88] *Irgita*, paragraph 44.

[89] Regarding the principle of legal certainty, see Judgment of the EFTA Court of 8 October 2012, *Hurtigruten*, joined cases E-10/11 and E-11/11, paragraph 281; and of 29 August 2014, *Casino Admiral*, E-24/13, paragraph 56.

Directive 2014/24 and the Court of Justice of the European Union ("CJEU") dealt with this in *Remondis*.[90]

99. Whilst the Norwegian Government has not argued that the arrangements with SUM should be considered as transfers of powers and responsibilities, the Norwegian Government did argue this in respect of MNA.[91] The Authority sees potential for the same arguments to be applied in respect of SUM and therefore, again for completeness, addresses this argument in accordance with the position set out in its reasoned opinion.

9.1 General comments

100. 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".

101. 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…"*[92]

102. *Remondis* was decided under Directive 2004/18/EC,[93] which was replaced by Directive 2014/24 on 1 January 2017 in the EEA. Directive 2004/18/EC did not contain an equivalent provision to Article 1(6) of Directive 2014/24. Although the case was referred to the CJEU after Directive 2014/24 was adopted and there is reference to Article 1(6) of Directive 2014/24 in the judgment, the Court does not comment on the provision.

103. 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*,[94] and accordingly considers that the judgment should not be understood as establishing such a separate exception.

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[90] Judgment of the CJEU of 21 December 2016, *Remondis GmbH & Co. KG Region Nord v Region Hannover*, C-51/15, EU:C:2016:985.
[91] Letter of 8 April 2022 (Doc No 1281709), page 1 and section 2.
[92] *Remondis*, operative part.
[93] 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.
[94] See paragraphs 45 and 46 of the Opinion of Advocate General Mengozzi of 30 June 2016, EU:C:2016:504.

104. The CJEU in *Remondis* concluded that a transfer of competence (meeting the conditions described in the judgment) was not a public contract.[95] 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 responses to the previous letter of formal notice and reasoned opinion, the Authority assumes the Norwegian Government does not dispute this position.

9.2 The arrangement does not concern a public task

9.2.1 The relevance of the public task requirement

105. 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 granting of exclusive rights to SUM for the collection, receipt, and treatment of municipal commercial waste. As set out in section 7.1.1 above, 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.

106. The Norwegian Government has previously 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.[96] 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[97] 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.[98] However, the protection afforded to measures of internal organisation does not mean that all activity within the public sector is excluded from the reach of Directive 2014/24. Article 1(6) protects the State in its capacity 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 has implied, this does not diminish the importance of the existence of a public task.

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[95] See, in particular, *Remondis,* paragraphs 42 to 46 and 55.
[96] Letter of 8 April 2022, page 2.
[97] 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).
[98] 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*.

107. 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 SUM 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*.[99]

9.2.2 The position with SUM

108. 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.

109. 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 with this statement. 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.

110. As set out in section 7.1.1 above, 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[100] (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).[101] There is no additional public role for municipalities.

9.2.3 The Norwegian Government's arguments

111. The Norwegian Government has previously made a number of arguments as to why the task should be considered a public one. 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 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

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[99] 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 9.3 below.

[100] Ot.prp. nr. 87 (2001-2002), section 2.6.2.

[101] 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."*

own waste is collected, treated and disposed of as close as possible to the place where it is produced).[102]

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

9.2.3.1 Waste management is capable of being a public task

113. The Authority understands the Norwegian Government's main argument was based on waste management being recognised by the CJEU as being capable of being a public task. The Authority does not dispute this. Indeed, *Remondis* itself concerned waste management as a public task.[103] However, the fact something is *capable* of being a public task, does not automatically make it one in every instance.

114. 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.[104] 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.

115. 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.[105] 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 under the national applicable rules.

9.2.3.2 Waste management is capable of being an SGEI

116. The Norwegian Government has also referred to waste management being a service of general economic interest (SGEI)[106] and referred to the definition of "municipal waste" in Directive (EU) No 2018/851[107] in this regard. That directive entered into force in the EEA on 1 August 2022.[108]

117. 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

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[102] See judgment of the CJEU of 21 January 2010, *Commission* v *Germany*, C-17/09, EU:C:2010:33, paragraphs 16 and 17.

[103] 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.

[104] 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.

[105] See also Ot.prp. nr. 87 (2001-2002), sections 4.2 and 4.3.

[106] See letter of 20 May 2020 (Doc No 1134028), page 5.

[107] 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.

[108] Joint Committee Decision No 318/2021 of 29 October 2021, not yet published.

universal access) by the market without public intervention.[109] As the Authority accepted in its letter of 8 December 2021,[110] waste management is capable of being considered as an SGEI.[111] However, Norway has chosen to allow collection and treatment of commercial waste to be performed by the market.[112]

118. Furthermore, the fact that the Waste Framework Directive as amended by Directive (EU) 2018/851[113] defines "municipal waste" in a way which encompasses both household waste and some commercial waste as defined by Norwegian law[114] does not mean management of all such waste is a public task nor that it is an SGEI in Norway. As set out in Directive 2018/851 the definition of "municipal waste" is without prejudice to the allocation of responsibilities for waste management between public and private actors.[115] 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.[116] 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.[117] As such, whilst waste management is *capable* of being an SGEI, collection and treatment of commercial waste is not treated as such in Norway.

9.2.3.3 The relevance of the wider legislative context

119. 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. Under the previous wording of Section 30 of the Pollution Control Act, municipalities had the right and duty to collect consumption waste (being household waste and some commercial waste, in general terms, waste which was of the same nature as household waste). 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.[118] The Norwegian Government has also previously referred to Norwegian municipalities

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[109] 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.
[110] Doc No 1143836.
[111] 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.
[112] See also Ot.prp. nr. 87 (2001-2002), sections 4.2 and 4.3.
[113] 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.
[114] Article 3(2)(b) of Directive 2008/98/EC, as amended by Directive (EU) No 2018/851.
[115] Article 3(2)(b) of Directive 2008/98/EC and recital 7 of Directive (EU) No 2018/851.
[116] In its letter of 8 April 2022 (page 8), the Norwegian Government described 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 referred 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 9.2.3.3 sets out why the Authority does not agree with these arguments. As such, the Authority maintains its position.
[117] Under Sections 29 and 30 of the Pollution Control Act.
[118] See letter of 8 April 2022 (Doc No 1281709).

having other responsibilities in terms of reducing emissions to soil, air and water.[119]

120. 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.

121. 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 to reduce emissions to soil, air and water. It remains the case that today, as regards dealing with commercial waste municipalities are only subject to the same obligations as private entities and they have such responsibilities as waste producers and not as public authorities.

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

122. The Norwegian Government has also relied on the fact that municipal commercial waste is generated by public welfare services,[120] 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 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. [121]

123. 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.[122]

9.2.3.5 The relationship between EEA law and national law

124. In its letter of 8 April 2022, the Norwegian Government stated that the Authority's position regarding management of municipal commercial waste not being a public task was 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.[123] Whilst the Authority disputes the generality of the former part of the statement, the fact that municipalities and

[119] See the Norwegian Government's letter of 20 May 2020 (Doc No 1134028), page 4.
[120] 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".
[121] Letter of 20 May 2020 (Doc No 1134028), page 5.
[122] 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 questioned the relevance of this judgment. The analogy with the case of SUM is that the waste management services performed by SUM 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 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 seemed 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.
[123] Doc No 1281709, page 7.

private actors have the same obligations under Norwegian law regarding commercial waste is indeed key.

125. 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.[124]. However, when assessing the application of EEA public procurement law, choices a 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 – assuming no exemption applies – falls within the scope of Directive 2014/24.

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

126. The position taken in section 9.2 above is sufficient to preclude the awarding of exclusive rights to SUM in respect of municipal commercial waste from being excluded from EEA public procurement law on the basis of Article 1(6) of Directive 2014/24. However, for the completeness of its argumentation the Authority also considers that there is no comprehensive transfer of power.

127. 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…"[125]

128. 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*.

129. 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."

130. 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*

[124] Recital 7 to Directive 2014/24.
[125] *Remondis*, operative part.

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." [126]

131. The Authority is of the view that there is no transfer and relinquishing of powers in the awarding of exclusive rights to SUM in respect of 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.

9.3.1 There is no power to transfer

132. As regards municipal commercial waste, the only power which is transferred to SUM is the "power" to provide the service to each municipality. In the absence of the arrangement in question, SUM would have no right to access or take possession of the relevant waste, but it could provide services to other customers.[127] The arrangement allowing SUM 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.[128]

133. Furthermore, as the Norwegian Government has recognised[129] 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, and indeed the owner municipalities entered into a contract(s) after awarding exclusive rights to SUM. There seems to be nothing to distinguish the overall arrangements with SUM in respect of municipal commercial waste from a normal

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[126] Emphasis by ESA.

[127] When this argument was made in respect of MNA, it seemed the Norwegian Government had misunderstood it as being that MNA never had any power to access or take possession of the waste and therefore referred to legal ownership. The Authority's point is that if there was no agreement between the intermunicipal company and the municipalities in question, the company would have no access to the municipalities' premises, including the bins where the waste is stored pending collection. The company 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 awarding of exclusive rights followed by a contract(s) to SUM is that the company is (implicitly) entitled to access the premises and take away the waste. In the Authority's view, this is the only "power" the company 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.

[128] 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.

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

public contract(s) falling within the scope of public procurement law and therefore labelling the arrangements as a transfer of powers and responsibilities could not justify treating the arrangements as falling outside EEA public procurement law.[130]

9.3.2 There is no relinquishing of power

134. In the contract(s) in question 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 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, receipt and treatment of waste produced in the municipalities' own offices and institutions. SUM is carrying out a service for which the municipalities are the direct beneficiaries.

135. The Authority considers that would be 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 would not be 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….*"[131]

136. 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 awarding of exclusive rights to SUM concerning municipal commercial waste.

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

137. On the basis of the above, the Authority concludes that, in so far as it concerns municipal commercial waste, the awarding of exclusive rights to SUM cannot fall within the scope of Article 1(6) of Directive 2014/24 and therefore cannot fall outside the scope of Directive 2014/24 by virtue of being a matter of internal organisation of a State.

10 The Authority's assessment: the nature of the arrangements between the municipalities and SUM

138. Unlike with the case of MNA, addressed in the reasoned opinion, the owner municipalities of SUM have entered into contract(s) with SUM in reliance upon Article 11 of Directive 2014/24. The Authority has established in sections 7, 8 and 9 above that, in so far as services in relation to municipal commercial waste are concerned (i) Article 11 of Directive 2014/24 cannot be relied upon to directly award a public service contract, (ii) Article 12(3) of Directive 2014/24 concerning in-house arrangements cannot be relied upon, (iii) and the arrangements do not

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[130] See also paragraphs 47 and 46 of the Opinion of Advocate General Mengozzi in *Remondis.*

[131] *Piepenbrock* (cited above at footnote 122), operative part. See also paragraph 47 of the Opinion of Advocate General Mengozzi in *Remondis.*

constitute a transfer of powers and responsibilities falling under Article 1(6) of Directive 2014/24.

139. The Authority is of the view that the contract(s) fall within the scope of Directive 2014/24 and therefore should have been awarded in accordance with its requirements for a competitive procedure.

140. 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 financial threshold is awarded.

141. 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.

142. The owner municipalities are indisputably contracting authorities, and the object of the agreement(s) is the provision of services relating to municipal commercial waste.

143. 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.[132] It is settled case-law that a contracting authority can also be an economic operator,[133] and SUM is clearly offering provision of services.[134] SUM therefore meets the definition of an economic operator.

144. As regards the question of pecuniary interest, the Norwegian Government has confirmed that in 2022, SUM was paid a total of NOK 1,247,114, or an average of NOK 103,926 per month.

145. As regards whether the relevant financial threshold is met, as noted in section 6 above, it is not clear exactly when the contract(s) were entered into, but the Authority assumes shortly after the decisions to grant exclusive rights. Between the dates of the decisions and 7 February 2020, 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.[135]

146. The Norwegian Government has confirmed there is no fixed price for the services but has not indicated the term of the contract(s). The Authority refers to its request in paragraph 60 above for copies of the contract(s). In the event the contracts have no fixed term, Article 5(14)(b) of Directive 2014/24 provides that the basis for calculating the estimated contract value shall be the monthly value of the contract multiplied by 48. On this basis, the contract value can be

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[132] Article 2(1)(10) of the Directive.
[133] *Piepenbrock,* paragraph 29.
[134] 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.
[135] 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). From 8 February 2020, the threshold increased to NOK 2 062 522 (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 51, 14.2.2020, p. 16)

estimated at NOK 4,988,456. This value exceeds the threshold of NOK 2,049,583 referred to in the previous paragraph.[136]

147. In the event that the contract(s) do have a fixed term, the Authority assumes they are at least coterminous with contracts subsequently awarded to BIR Avfallsenergi AS, as these are effectively subcontracts, and therefore that the contract(s) have a minimum term from 1 April 2021 to 10 June 2025.[137] This period is longer than 48 months and therefore the value would exceed that estimated on the basis of Article 5(14)(b).

148. It is not material for this assessment whether there was one or multiple contracts awarded. Pursuant to Article 5(8) of Directive 2014/24, where a proposed work or a proposed provision of services may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots. This is clearly applicable in the case of SUM where the company appears to act as one unit towards all of its owners. For example, the company agreement[138] is one joint agreement with all owners and SUM has entered into downstream arrangements with BIR Avfallsenergi AS which do not appear to distinguish between the municipalities.[139]

149. On the basis of the above, at least in so far as they concern the collection, receipt and treatment of municipal commercial waste, the contract(s) between the municipalities and SUM must be considered to be public service contract(s) subject to the provisions on Directive 2014/24. As they were entered into directly, without following the requirements of Title II of Directive 2014/24, the Authority considers their award to be in breach of Directive 2014/24.

11 Downstream arrangements with BIR Avfallsenergi AS

150. On 12 February 2021, SUM granted exclusive rights to BIR Avfallsenergi AS for treatment of household and municipal commercial waste for the period 1 April 2021 to 31 December 2021.[140] SUM then awarded a contract to BIR Avfallsenergi AS with a term to 10 June 2025. Subsequent to that, on 17 September 2021, SUM granted exclusive rights to BIR Avfallsenergi AS for, *inter alia*, treatment of municipal commercial waste for the period 2022 to 10 June 2025.[141]

151. In so far as they concern municipal commercial waste, the arrangements between SUM and BIR Avfallsenergi AS are too low value to trigger the application of Directive 2014/24. In the event the services were of a higher value, the Authority would maintain its position that no contract could be awarded on the basis of an exclusive right, nor could the function be transferred.

12 The existence of a consistent and general practice

152. In this letter, the Authority has demonstrated that the arrangements with SUM were entered into in breach of EEA law. The Authority's understanding is that the

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[136] For completeness, the Authority notes that the value also exceeds the threshold applicable from 8 February 2020 of NOK 2,062,522 (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 51, 14.2.2020, p. 16).

[137] See section 11 below.

[138] Enclosure 13 to the Norwegian Government's letter of 17 April 2023.

[139] See enclosures 11 and 12 to the Norwegian Government's letter of 17 April 2023.

[140] See enclosure 11 to the Norwegian Government's letter of 17 April 2023.

[141] See enclosure 12 to the Norwegian Government's letter of 17 April 2023.

arrangements with SUM are an example of a wider practice in Norway to rely on exclusive rights to justify direct awards of contracts for services in relation to municipal commercial waste and that this practice is, to some degree, of a consistent and general nature.[142]

153. The Authority has assessed three concrete examples where a total of 36 municipalities have sought to rely on exclusive rights to justify direct contract awards, comprising, in addition to SUM, the cases of MNA and ReMidt IKS.[143] In addition to this, a report from the Norwegian Waste Management and Recycling Association, Avfall Norge, provided by the Norwegian Government in 2016,[144] indicated that at least 13% of the municipalities surveyed had assigned exclusive rights for at least some of the management of their municipal commercial waste.[145]

154. In its letter of 17 February 2023, the Directorate asked the Norwegian Government the extent to which it was aware of any considerable changes to this information. In response, the Norwegian Government stated that *Samfunnsbedriftene* (the largest employers' and interest organisation for municipal companies) had been advising its members to explore alternative solutions to the use of exclusive rights but otherwise stated it was not aware of any information as to whether there had been any considerable changes regarding the practice of the award of exclusive rights in the waste management sector in Norway in relation to municipal commercial waste. Given that the Norwegian Government has not indicated that there has been any considerable change to the practice identified in 2016, the Authority must proceed on the basis that the practice identified in the 2016 report is on-going.

155. The evidence indicates that in 2016, at least 29 municipalities[146] had awarded exclusive rights for the management of their municipal commercial waste. If the data is extrapolated to the current total number of municipalities in Norway (356), it suggests that around 43 municipalities may have awarded exclusive rights for some services in respect of municipal commercial waste. Against this background, the Authority concludes that the arrangements in relation to SUM can be seen as an example of a consistent and general practice.

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[142] See judgment of the EFTA Court of 11 September 2013, *ESA* v. *Norway*, E-6/12, [2013] EFTA Ct. Rep. 618, paragraph 58.

[143] SUM had 7 owner municipalities (after municipal mergers on 1 January 2020, it now has 4), MNA has 12 and ReMidt IKS has 17.

[144] Letter from the Norwegian Government of 20 May 2016, Doc No 805325.

[145] See table 1 of the report. There were 45 respondents to Avfall Norge's survey, representing 227 municipalities (see sections 1 and 2 of the report). As regards why the Authority considers the information to indicate "at least" 13% of municipalities had assigned exclusive rights, table 1 shows the percentages for each subcategory of municipal commercial waste. It is not clear whether or not the categories are mutually exclusive. Whilst that seems unlikely, it also seems unlikely that the categories are completely cumulative. If, for example, some of the municipalities falling within the 13% who have awarded exclusive rights for residual waste have not also awarded exclusive rights for paper waste, then the overall percentage of municipalities who have awarded exclusive rights for *some* waste will be more than 13% (comprising the 13% who have awarded exclusive rights for residual waste + x% who have awarded exclusive rights for paper waste but not residual waste).

[146] Being 13% of 227.

13 Conclusion

156. Accordingly, as its information presently stands, the Authority must conclude that, by

(i) the municipalities of Askvoll, Fjaler, Gaular, Hyllestad, Jølster, Naustdal and Førde awarding public service contract(s) for the collection, receipt and treatment of municipal commercial waste directly to Sunnfjord Miljøverk IKS, and

(ii) maintaining a practice by which municipalities award public service contracts for services in respect of municipal commercial waste directly in purported reliance on Article 11 of Directive 2014/24/EU, in circumstances such as those applicable to the arrangements between the municipalities of Askvoll, Fjaler, Gaular, Hyllestad, Jølster, Naustdal and Førde and Sunnfjord Miljøverk 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.

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

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

For the EFTA Surveillance Authority

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