Case No: 78085
Document No: 1446350
Decision No: 200/24/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 27 November 2024

closing a complaint case arising from an alleged failure by Norway to comply with Article 36 EEA and Directives 2004/18/EC and 2014/24/EU in relation to contracts for the collection and treatment of waste

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

1 Summary of the case

1. On 20 October 2015, the EFTA Surveillance Authority ("the Authority") 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:

    i. collection and treatment of commercial waste;[2]
    ii. treatment of hazardous waste; and
    iii. collection of household waste.

2. The complaint referred to a widespread practice in Norway of directly awarding exclusive rights and then contracts to these undertakings without a prior public call for tenders, which, in the complainant's view, amounted to a breach of Article 36 EEA and of Directive 2004/18/EC[3] (and therefore now would breach Directive 2014/24/EU[4], which replaced Directive 2004/18/EC in the EEA on 1 January 2017).

3. The Authority had assessed a similar complaint filed in 2010.[5] The Authority found that complaint to be without grounds and closed the case by College Decision

[1] Doc No 776926.
[2] In Norwegian, "*næringsavfall*".
[3] 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, OJ L 134, 30.4.2004, p. 114.
[4] 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, OJ L 94, 28.3.2014, p. 65.
[5] Case No 68457, Complaint against Norway concerning exclusive rights granted to public undertakings for household waste management.

413/12/COL of 21 November 2012.[6] The scope of the 2015 complaint was wider and, furthermore, there has now been further clarification from the Court of Justice of the European Union ("the CJEU"), and in Directive 2014/24/EU itself, regarding the scope of EEA public procurement rules.

4. The complainant presented various examples of alleged breaches. After detailed consideration of the case and various exchanges with both the Norwegian Government and the complainant, the Authority concluded that there had been a breach in one of the example cases to which the complainant had referred. The Authority sent a letter of formal notice to Norway on 8 December 2021,[7] followed by a reasoned opinion on 28 September 2022.[8]

5. The Authority's conclusion was that arrangements entered into with the inter-municipal waste company Midtre Namdal Avfallsselskap IKS ("MNA") by its owner municipalities in respect of commercial waste from municipal buildings and institutions ("municipal commercial waste") were in breach of EEA law because they had been entered into without a competitive process. The Authority considered that the exemption in Article 11 of Directive 2014/24/EU concerning the award of contracts on the basis of exclusive rights could not be applied, nor could Article 1(6) of the same directive concerning the non-applicability of that directive to transfers of powers and responsibilities.

6. In its response to the reasoned opinion on 28 November 2022,[9] the Norwegian Government raised a new justification for engaging MNA without competition, arguing that it was lawful to enter into the arrangements directly because they were with an entity controlled by the municipalities (an "in-house company").

7. Information provided by the Norwegian Government[10] indicated that the conditions for the relevant exemption[11] may have been met, at least in respect of MNA's recent operations.[12] If the conditions were met, it would have been 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. As such, the Authority did not pursue the specific arrangements with MNA further.

8. However, the Authority was 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 award without competition which the Authority considered not to be applicable. Furthermore, a report from the Norwegian Waste Management and Recycling Association, Avfall Norge, provided by the Norwegian Government in 2016,[13] 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. The Authority had also been made aware of two further concrete examples where

[6] Doc No 649422.
[7] Decision No 277/21/COL; Doc No 1143836.
[8] Decision No 181/22/COL; Doc No 1281581.
[9] Doc No 1333182.
[10] Letter of 28 November 2022, email of 6 February 2023 (Doc No 1351102) and letter of 17 April 2023 (Doc No 1367241).
[11] Set out in Article 12(3) of Directive 2014/24/EU.
[12] 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 consisted 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 was considered not relevant due to a reorganisation of activities.
[13] Letter from the Norwegian Government of 20 May 2016, Doc No 805325.

exclusive rights appeared to have been relied upon to enter into arrangements in respect of municipal commercial waste without competition.[14]

9. As a result, on 27 September 2023, the Authority sent a supplementary letter of formal notice to Norway,[15] concluding that by

   a. 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

   b. maintaining a practice by which municipalities awarded 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 had 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.

10. On 7 March 2024, the Norwegian Government responded to the Authority's supplementary letter of formal notice.[16] The Norwegian Government informed the Authority that the Ministry of Climate and Environment had reviewed the case and undertaken a new assessment of the facts and the relevant legal framework. The Norwegian Government noted that municipalities' responsibility for commercial waste pursuant to the Pollution Control Act Section 32, cf. Section 27a excluded Norwegian municipalities from directly awarding public service contracts for the management of municipal commercial waste pursuant to Article 11 of Directive 2014/24/EU, in effect agreeing with the Authority's assessment of the legal framework relevant to that provision set out in the supplementary letter of formal notice. The Norwegian Government stated that it would inform Norwegian municipalities accordingly.

11. On 18 March 2024, the Norwegian Government provided a copy of a letter sent to Norwegian municipalities on 15 March 2024.[17] That letter stated "*The Ministry has concluded that municipalities cannot use the exemption in the procurement regulations on exclusive rights to award contracts for the handling of municipal commercial waste without tendering*" and "*municipalities cannot use delegations, which fall outside the procurement regulations, or award exclusive rights without tenders for handling [municipal commercial waste]*".[18]

12. The Authority considers that through these letters, Norway has taken significant steps to address the issue of the incorrect application of the rules relating to exclusive rights in Article 11 of Directive 2014/24/EU.

13. Given the wide scope of this case, and in order to provide clarity to both contracting authorities and economic operators operating under the relevant rules, the Authority

[14] Sunnfjord Miljøverk IKS and Re-Midt IKS. The case of Re-Midt was first raised by the complainant in a letter of 31 January 2020 (Doc No 1111536) but was not individually pursued in the supplementary letter of formal notice for the reasons set out in that letter. The case of Sunnfjord Miljøverk IKS was first referred to in an email from the complainant of 29 September 2022 (Doc No 1319225) and, as set out in paragraph 9 of this decision, was pursued in the supplementary letter of formal notice.
[15] Decision No 136/23/COL; Doc No 1367345.
[16] Doc No 1442123
[17] Doc No 1444292.
[18] The Authority's translation.

will summarise in what follows its position on the different legal issues brought to the Norwegian Government's attention in this case.

2 Relevant EEA law

14. Directive 2014/24/EU entered into force in the EEA on 1 January 2017.[19]

15. Recital 30 of Directive 2014/24/EU 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."*

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

17. Article 11 of Directive 2014/24/EU 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."*

18. Article 12(3) of Directive 2014/24/EU 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.*

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

> *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."*

19. Article 12(5) of Directive 2014/24/EU 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."*

20. Article 18(1) of Directive 2014/24/EU 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."*

3 Relevant national law

3.1 Public procurement law

21. Section 2-3 of the Regulation on Public Procurement of 12 August 2016 No. 974[20] provides:

> *"The Procurement Act and the Regulation do not apply to service contracts which the contracting authority enters into with another contracting authority*

[20] FOR-2016-08-12-974 *Forskrift om offentlige anskaffelser.*

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".

22. 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."*

3.2 Waste management law

23. The Pollution Control Act[21] sets out the different types of waste[22] under Norwegian law and municipalities' duties and powers in relation to waste management. Pursuant to the provisions set out below, 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.

24. 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."*

25. 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."*

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[21] LOV-1981-03-13-6 *Lov om vern mot forurensninger og om avfall (forurensningsloven).*

[22] 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).

26. Section 30, first paragraph, reads:

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

27. 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."*

28. 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 The nature of the EEA public procurement law framework

29. EEA public procurement law, in particular Directive 2014/24/EU, applies to purchases of works, supplies and services[23] by contracting authorities[24] and generally requires public contracts to be exposed to competition.

30. However, not all arrangements entered into by the public sector concerning works, supplies or services constitute "procurement" for the purposes of Directive 2014/24/EU.[25] Furthermore, there is no obligation to outsource service provision[26] and, *inter alia*, as referred to above,[27] certain situations which are similar in effect to self-supply are excluded from the scope of Directive 2014/24/EU.[28] States and individual contracting authorities therefore have discretion as regards how they arrange their activities and services, and Directive 2014/24/EU will only apply if they choose to engage an external provider through a public contract.[29]

31. Below, the Authority will address rules relating to exclusive rights and transfers of powers in relation to the direct award of contracts, as well as certain limits arising from the principle of transparency in relation to justifications for direct awards. The point underlying the Authority's position as regards the application of the rules relating to exclusive rights and transfers of powers to services in respect of municipal commercial waste is that, in practice, there is nothing which can distinguish such arrangements from a normal public contract, despite how they may be labelled. In

[23] Articles 1(1) and 1(2) of Directive 2014/24/EU.
[24] Defined in Article 2(1)(1) of Directive 2014/24/EU 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*".
[25] Article 1(2) of Directive 2014/24/EU 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.*"
[26] See Recital 5 of Directive 2014/24/EU, 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.*"
[27] See paragraphs 6 and 7.
[28] Article 12 of Directive 2014/24/EU.
[29] As defined in Article 2(1)(5) of Directive 2014/24/EU.

this respect, it is settled case-law that national labels are not determinative when establishing whether EEA public procurement law applies.[30] Furthermore, Article 18 of Directive 2014/24/EU 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.

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

32. Article 11 of Directive 2014/24/EU 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/EU can only be relied upon to award a contract directly if all its conditions regarding the relevant exclusive right are met.

33. The Authority is of the view that Article 11 of Directive 2014/24/EU cannot be relied upon in respect of arrangements for municipal commercial waste because there is no exclusivity and therefore can be 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 Norwegian municipality has no ability to grant such an exclusive right in respect of services relating to commercial waste.

5.1 No exclusivity

34. In the present section, the Authority will set out its understanding of the term "exclusive right" for the purposes of Article 11.

35. The term "exclusive right" is used in a number of capacities within Directive 2014/24/EU and the other two 2014 procurement directives (Directive 2014/23/EU[31] and Directive 2014/25/EU[32]).[33] It is defined in both Directive 2014/23/EU and Directive 2014/25/EU in a similar manner but is not defined in Directive 2014/24/EU. All three directives have provisions equivalent to Article 11 of Directive 2014/24/EU.[34] The Authority considers the definitions in Directives 2014/23/EU and 2014/25/EU to be relevant in order to identify common themes in

[30] 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.

[31] 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.

[32] 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.

[33] 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).

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

the understanding of the term as a matter of EEA law and these common themes should be applied to interpret the term as used in Article 11 of Directive 2014/24/EU.

36. Directive 2014/23/EU defines the term as:

> *"a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties the effect of which is to limit the exercise of an activity to a single economic operator and which substantially affects the ability of other economic operators to carry out such an activity"*[35]

37. 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.[36]

38. 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.

5.1.1 Applying to a single entity

39. 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".[37] 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.

40. 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.

41. 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 preparatory works[38] (which state that

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[35] 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*."

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

[37] 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.

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

commercial waste is waste from public and private businesses and includes waste from public administrations and institutions which do not have an economic purpose).[39]

42. 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.

5.1.2 Relating to an activity

43. With regard to the subject matter of the exclusive right, public procurement law categorises services on the basis of what they entail.[40] The Authority is therefore of the view that the relevant activity must be defined with reference to the service itself and cannot be defined with reference to the purchaser.[41]

44. Recital 30 of Directive 2014/24/EU makes clear that Article 11 of Directive 2014/24/EU exists in recognition of the pointlessness of subjecting a contract to a competitive process where there is (lawfully) only one possible supplier.

45. If an exclusive right could be defined with mere reference to the purchaser, 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 would be nothing to justify an exception from the procurement rules.

46. Furthermore, that approach would mean that in any situation in which a contracting authority wanted to appoint a single contracting authority to perform a service, it would be able to first grant an "exclusive right", without any specific authority to do so and without necessarily following any open process,[42] and then award a contract directly in reliance upon Article 11 of Directive 2014/24/EU. 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/EU regarding awards of contract between entities within the public sector in breach of the provisions of Directive 2014/24/EU.

47. For activities relating to commercial waste, the services required by a municipality are the same as those required by other commercial waste producers. As such, as a

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[39] 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."*

[40] 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.

[41] In Case C-209/98, Sydhavnens Sten & Grus (Judgment of the CJEU of 23 May 2000, *Sydhavnens Sten and Grus*, C-209/98, EU:C:2000:279), the CJEU accepted an exclusive right for building waste. However, 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).

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

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.

5.2 Conclusion regarding Article 11 of Directive 2014/24

48. In the Authority's view, as there is no genuine exclusivity, the conditions for the application of Article 11 of Directive 2014/24/EU cannot be met in relation to services in respect of municipal commercial waste. Municipalities therefore cannot rely on that article to directly award a contract for services in respect of municipal commercial waste without following the tendering requirements of Directive 2014/24/EU.

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

49. EEA public procurement law does not apply where public authorities transfer their powers and responsibilities in relation to public tasks to other public authorities, provided certain conditions are met. This principle is now reflected in Article 1(6) of Directive 2014/24/EU and the Court of Justice of the European Union ("CJEU") dealt with this in *Remondis*.[43]

50. In this section, the Authority will address whether arrangements in respect of municipal commercial waste can be considered as transfers of powers and responsibilities.

6.1 General comments

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

52. 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…"*[44]

53. *Remondis* was decided under Directive 2004/18/EC,[45] which was replaced by Directive 2014/24/EU on 1 January 2017 in the EEA. Directive 2004/18/EC did not

[43] Judgment of the CJEU of 21 December 2016, *Remondis GmbH & Co. KG Region Nord v Region Hannover*, C-51/15, EU:C:2016:985.
[44] *Remondis*, operative part.
[45] 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*

contain an equivalent provision to Article 1(6) of Directive 2014/24/EU. Although the case was referred to the CJEU after Directive 2014/24/EU was adopted and there is reference to Article 1(6) of Directive 2014/24/EU in the judgment, the Court does not comment on the provision.

54. 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/EU, the Authority notes the express approach taken by Advocate General Mengozzi in *Remondis*,[46] and accordingly considers that the judgment should not be understood as establishing such a separate exception.

55. The CJEU in *Remondis* concluded that a transfer of competence (meeting the conditions described in the judgment) was not a public contract.[47] The term "public contract" is fundamental as regards the applicability of both Directive 2004/18/EC and Directive 2014/24/EU. Recital 4 of Directive 2014/24/EU 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/EU, *Remondis* should be seen as establishing the conditions for application of Article 1(6) of Directive 2014/24/EU, 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/EU.

6.2 Arrangements in respect of municipal commercial waste do not concern a public task

56. To qualify as a transfer of powers and responsibilities as described in Article 1(6) of Directive 2014/24/EU, the arrangement in question must concern a public task.

57. 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.[48] 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/EU. 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.

58. The Authority accepts 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 CJEU, private entities may carry out tasks which serve the public's needs without detracting from the public nature of public authorities performing similar tasks.[49] However the issue is not only whether the entity

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.

[46] See paragraphs 45 and 46 of the Opinion of Advocate General Mengozzi of 30 June 2016, EU:C:2016:504.

[47] See, in particular, *Remondis,* paragraphs 42 to 46 and 55.

[48] In the EU, this now arises from Article 4(2) of the Treaty on European Union. The Authority is of the view 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*.

[49] 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.

is a public authority, but whether the task's legal basis is a competence or responsibility placed on that entity as a public authority.

59. 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. 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.

60. As set out in section 5.1.1 above, municipalities' obligations in respect of commercial waste do not differ in any way from those placed on private entities. In the Authority's view, this 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.[50]

6.3 Arrangements in respect of municipal commercial waste cannot meet the other conditions set out in *Remondis*

61. The position taken in section 6.2 above is sufficient to preclude the awarding of exclusive rights 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/EU. However, for the completeness of its argumentation the Authority also considers that there can be no comprehensive transfer of power.

62. 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…*"[51]

63. 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*.

64. 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*."

65. 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*

[50] In the letter of formal notice, reasoned opinion and supplementary letter of formal notice, the Authority addressed further arguments made by Norway on this point. The Authority does not consider it necessary to repeat all those arguments here.
[51] *Remondis*, operative part.

> *synallagmatic nature of the contract is thus an essential element of a public contract, as observed by the Advocate General in point 36 of his Opinion.*
>
> *Moreover, irrespective of the fact that a decision on the allocation of public competences does not fall within the sphere of economic transactions, the very fact that a public authority is released from a competence with which it was previously entrusted by that self-same fact eliminates any economic interest in the accomplishment of the tasks associated with that competence*." [52]

66. The Authority is of the view that there can be no transfer and relinquishing of powers in the awarding of exclusive rights in respect of municipal commercial waste. This lack of a comprehensive transfer is related to the fact that such arrangements cannot relate to a public task. The lack of a public task means there is no real "power" which can be transferred, with the result that there can be no comprehensive transfer.

6.3.1 There is no power to transfer

67. As regards municipal commercial waste, the only power which can be transferred is the "power" to provide the service to a municipality. In the absence of an arrangement with the relevant municipality, a provider would have no right to access or take possession of the relevant waste, but it would be able to provide services to other customers. An arrangement allowing a provider to access and take away 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.[53]

68. Furthermore, municipalities have no regulatory competences in respect of their own commercial waste,[54] rather they merely have the responsibility to ensure that that waste is collected and disposed of, and can perform that task or engage others to perform it. It is very common for public bodies to appoint service providers to carry out tasks for which they are responsible (for example, appointing accountants to produce accounts, bus companies to drive buses or architects and construction companies to build schools). Such arrangements are generally made by way of public contracts falling within the scope of EEA public procurement law. There seems to be nothing which can distinguish arrangements with an external provider in respect of municipal commercial waste from a normal public contract falling within the scope of public procurement law. Labelling such arrangements as a transfer of powers and responsibilities can not justify treating the arrangements as falling outside EEA public procurement law.[55]

6.3.2 There is no relinquishing of power

69. In such contracts, there can also be no "transfer" in the sense of relinquishing power. Each municipality would still have a clear economic interest in the accomplishment of the tasks as it would have its waste collected, a service which would be of clear economic benefit to it and indicate an on-going synallagmatic relationship. The arrangements would concern the collection, receipt and/or treatment of waste

[52] Emphasis by ESA.

[53] 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.

[54] See page 6 of the Norwegian Government's letter of 8 April 2022, Doc No 1281709.

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

produced in the municipality's own offices and institutions. The provider would be carrying out a service for which the municipality would be the direct beneficiary.

70. The Authority considers that would be a misrepresentation to refer to transferring and relinquishing powers in the context of an arrangement where the task would be performed for the exclusive benefit of the relevant "transferor" authority. In practice, the arrangement would look identical in effect to a normal public contract and the mere labelling of it as something else is not sufficient to justify treating it differently. As the CJEU held in *Piepenbrock:*

> "*A contract … whereby … one public entity assigns to another [a task] while reserving the power to supervise the proper execution of that task, in return for financial compensation intended to correspond to the costs incurred in the performance of the task, the second entity being, moreover, authorised to avail of the services of third parties … for the accomplishment of that task – constitutes a public service contract….*"[56]

71. As there is no power to transfer and there can be nothing akin to the relinquishing of power, the Authority concludes that there can be no comprehensive transfer of powers and responsibilities in the awarding of exclusive rights concerning municipal commercial waste.

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

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

7 The Authority's assessment: limits arising from the principle of transparency in respect of justifications for direct awards

73. One exception to the requirement for competition which *can* be applied in relation to municipal commercial waste is that found in Articles 12(1) and (3) of Directive 2014/24/EU which exclude contracts awarded to in-house companies from the scope of that directive, provided certain conditions are met.

74. Given some specific issues which have arisen during the current case, the Authority sets out here its view that the principle of transparency precludes Article 12 from being relied upon if awards are initially justified with explicit reference to Article 11 to the exclusion of Article 12.

75. 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.[57] The Court confirmed that a State has the freedom to choose whether services should be provided in-house or tendered out[58] but that that freedom must be exercised with due regard to the fundamental rules of the EEA Agreement, including transparency.[59]

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[56] Judgment of the CJEU of 13 June 2013, *Piepenbrock Dienstleistungen GmbH & Co. KG v Kreis Düren*, C-386/11, EU:C:2013:385, operative part. See also paragraph 47 of the Opinion of Advocate General Mengozzi in *Remondis.*

[57] 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/EU, however the Authority considers the judgment to be equally applicable to Article 12(3).

[58] *Irgita,* paragraphs 44 to 47.

[59] *Irgita*, paragraph 48 and the case law cited.

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

77. 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"*[60]

> *"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."*[61]

78. 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."*[62]

79. Reliance by a contracting authority on Article 12 of Directive 2014/24/EU 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/EU 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.[63]

80. 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

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[60] Judgment of the EFTA Court of 29 August 2014, *Casino Admiral*, E-24/13, [2014] EFTA Ct. Rep. 732, paragraph 52.

[61] *Casino Admiral, p*aragraph 55

[62] *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.

[63] *Irgita*, paragraph 44.

justification is not relied upon until a later point in time when, by coincidence but not design, the relevant conditions are in fact met.

81. The Authority is therefore of the view that even if the conditions of Article 12(3) are met, 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.

8 Closure of the case

82. Article 5(1)(a) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") confers on the Authority a mandate to ensure the fulfilment by the EEA EFTA States of their obligations under the EEA Agreement. To this end, Article 5(2) SCA empowers the Authority to adopt a range of measures.

83. According to settled case-law of the EFTA Court, the Authority enjoys wide discretion in deciding whether and how to pursue proceedings against an EEA EFTA State. The Authority alone is competent to decide whether it is appropriate to bring proceedings under Article 31 SCA for failure to fulfil the obligations under the EEA Agreement.[64]

84. Furthermore, any infringement proceedings brought by the Authority under Article 31 SCA should be concentrated so as to ensure the greatest impact for the functioning of the EEA Agreement, bearing in mind the resources of the Authority and having regard to alternative enforcement mechanisms available to complainants at national level.[65]

85. On account of the Authority's limited resources and increased workload, and in an effort to pursue EEA law matters of principle in a timely manner, the Authority needs to exercise a strict prioritisation of the issues it examines. Such prioritisation aims to ensure clarity for complainants in line with the principle of good administration, and to increase the Authority's efficiency and effectiveness in discharging its duties.

86. The underlying issue in the current case has been the incorrect application of the rules relating to exclusive rights in what is now Article 11 of Directive 2014/24/EU and the Authority has continued to pursue the complaint to ensure that that article is properly applied in Norway. The case has also provided scope to ensure the correct interpretation of Article 1(6), as well as clarifying certain limits arising from the principle of transparency in relation to justifications for direct awards of contracts.

87. In the supplementary letter of formal notice, the Authority set out its view that Articles 11 and 1(6) of Directive 2014/24/EU could not be applied to arrangements in relation to municipal commercial waste, as well as its view of certain limitations arising from the principle of transparency in respect of justifications for direct awards of contracts. The Authority then concluded that arrangements entered into with the inter-municipal waste company Sunnfjord Miljøverk IKS by its owner municipalities in respect of municipal commercial waste were in breach of EEA law because they had been

[64] See, for example, Order of the EFTA Court of 23 October 2013 in Case E-2/13, *Bentzen Transport* v *EFTA Surveillance Authority*, point 40.

[65] As the European Commission has stated: "*Certain categories of cases can often be satisfactorily dealt with by other, more appropriate mechanisms at EU and national level. This applies in particular to individual cases of incorrect application not raising issues of wider principle, where there is insufficient evidence of a general practice, of a problem of compliance of national legislation with EU law or of a systematic failure to comply with EU law. In such cases, if there is effective legal protection available, the Commission will, as a general rule, direct complainants in this context to the national level.*" See "*EU law: Better results through better application*" (2017/C 18/02) paragraph 3, sub para 9. The same principles are applicable *mutatis mutandis* to the EEA legal order.

entered into without competition and that there was a general practice breaching EEA law of entering into similar arrangements in respect of municipal commercial waste without competition in purported reliance on Article 11 of Directive 2014/24/EU concerning the direct award of contracts on the basis of exclusive rights.

88. As is clear from sections 5 to 7 above, the Authority maintains the positions set out in the supplementary letter of formal notice.

89. As far as the Authority is aware, Article 11 has only been wrongfully applied in Norway in the waste management field. Through its letter of 15 March 2024, the Norwegian Government has now clearly communicated to all Norwegian municipalities that that provision cannot be used in relation to municipal commercial waste, and also explained why this is the case. The communication also refers to it not being possible to apply the concept of transfers of powers and responsibilities to tasks in respect of municipal commercial waste (referring to this as delegation).

90. The Authority considers the Ministry's communication to be a very clear statement to guide municipalities in relation to both waste management and other services, and something which should help prevent the incorrect application of Article 11 of Directive 2014/24/EU in the future. As such, it should lead to the end of the general practice identified in the supplementary letter of formal notice.

91. In light of the clear acknowledgement from the Norwegian Government concerning the limits to the application of Article 11 of Directive 2014/24/EU and the steps taken by the Norwegian Government to ensure the relevant contracting authorities are informed of that position and thereby to end the general practice of relying on Article 11 of Directive 2014/24/EU for contracts relating to municipal commercial waste, the Authority is of the view that it is appropriate to close the current case.

92. As regards the arrangements with Sunnfjord Miljøverk IKS those may, at present, still be in effect.[66] This may also be the case for other instances relied on to establish the general practice referred to in the supplementary letter of formal notice. However, the Authority is of the view that it is not appropriate to allocate resources to further pursue these individual arrangements. The Authority notes that national review procedures are available in respect of individual procurement procedures/contracts.

9 Other issues referred to by the complainant and/or considered in the case

93. In the original complaint and in the course of the case, the complainant has referred to various other alleged breaches of EEA public procurement law in the municipal waste management sector. In summary, these examples related to:

    a. use of Article 11 of Directive 2014/24/EU (and/or the equivalent provision in the previous procurement directive) in relation to household and hazardous waste;

    b. use of the 'sole supplier exemption', now found in Article 32(2)(b) of Directive 2014/24/EU;[67] and

[66] The Directorate notes that the Ministry of Climate and Environment's letter to the municipalities of 15 March 2024 refers to the potential need for changes as a result of its clarification, however, it is likely that some time will be needed for changes to be implemented.

[67] The relevant provision states that "*The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:*

c. the application of the "activity criterion" under Article 12 of Directive 2014/24/EU to group companies.

94. As noted above, the Authority enjoys wide discretion in deciding whether and how to pursue proceedings against an EEA EFTA State and needs to exercise a strict prioritisation of the issues it examines. In exercise of this discretion, and recalling the existence of national review procedures, as well as the clear communication by the Norwegian Government on the limits to the ability of municipalities to award contracts directly, the Authority concludes it is not appropriate to allocate resources to pursue the other issues raised by the complainant any further. The Authority may, however, reconsider these issues if the factual or legal circumstances change.

10 Conclusion

95. By letter of 14 June 2024, the Internal Market Affairs Directorate informed the complainant of its intention to propose to the Authority that the case be closed. The complainant was invited to submit any observations on the Internal Market Affairs Directorate's assessment of the complaint or present any new information by 13 July 2024.[68]

96. By letter of 2 July 2024, the complainant replied to this letter, commenting primarily on some of the additional issues referred to in section 9 of this letter.[69] However, the Authority does not consider that this reply alters the conclusions set out in the letter of 14 June 2024.

In the context outlined above, the Authority concludes not to pursue the case further.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Norway to comply with comply with Article 36 EEA and Directives 2004/18/EC and 2014/24/EU in relation to contracts for the collection and treatment of waste, is hereby closed.

…
(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:
…
(ii) competition is absent for technical reasons;
…
The exceptions set out in points (ii) and (iii) shall only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement"

[68] Document No 1444562.

[69] Document No 1468163.

For the EFTA Surveillance Authority

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

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

This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.