ROYAL NORWEGIAN MINISTRY OF
CLIMATE AND ENVIRONMENT

EFTA Surveillance Authority
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BELGIUM

Your ref	Our ref	Date
78085	15/2910-	21 August 2019

Reply to request for information - complaint against Norway concerning the award of exclusive rights for collection and treatment of waste

Dear Madam/Sir,

Reference is made to the Authority's letter 21 June 2019 requesting additional information regarding the complaint against Norway concerning the award of exclusive rights by Norwegian municipalities to state-owned undertakings in the area of waste management,[1] previous correspondence, and e-mail 27 June 2019 granting an extension of the deadline to reply until 21 August 2019.

General remarks

In its letter 21 June 2019, the Directorate asks the Norwegian government to respond to questions concerning the application of Article 1 (6) of Directive 2014/24/EU and/or the judgement from the Court of Justice of the European Union ("CJEU") in *Remondis*[2] to the arrangements under consideration in the case.

As pointed out by the Directorate, Directive 2014/24/EU entered into force in the EEA and the CJEU delivered its judgment in *Remondis* subsequent to the awards of exclusive rights under consideration. The municipalities have therefore not explicitly relied on Article 1 (6) and/or *Remondis*. An assessment of the facts may nevertheless show that the arrangements under consideration should be regarded as transfers of powers and responsibilities/ competences in the sense described in Article 1 (6) and/or *Remondis*. It is not decisive whether the municipalities have described the arrangements as awards of "exclusive rights".

[1] Doc No 1074450.
[2] Judgment of 21 December 2016 in Case C-51/15 – *Remondis GmbH & Co. KG Region Nord v Region Hannover,* EU:C:2016:985.

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Article 1 (6) and/or *Remondis* have not previously been considered in the case. At the outset, the Norwegian Government would therefore like to make certain general comments.

As we understand the CJEU's judgment and the Opinion of the Advocate General ("AG")[3] in *Remondis,* it is the arrangement *as a whole* that must be examined in order to determine whether it constitutes a 'public contract', or rather, should be regarded as transfer of powers and responsibilities/competences that falls outside scope of Directive 2004/18/EU or Directive 2014/24/EU, see in particular para 37 and 38 of the CJEU's judgment.

Further, a transfer of powers may be achieved using a multitude of different forms, including legislative or regulatory acts, decisions by an authority, or agreements governed by public law concluded between several authorities. One must therefore look at the totality of the legal instruments that together constitute a transfer of powers and responsibilities, see para 48 and 49 of Opinion of the AG.

As we understand the CJEU's judgment, an arrangement must meet three key conditions to be considered a genuine transfer of powers:

First, the transfer of competence must be comprehensive, encompassing not only the obligation to perform the task, but also the powers that are the corollary thereof. This means that the public authority on which competence has been conferred must have the power necessary to organise the performance of the tasks and to draw up the regulatory framework and procedures for the performance of the tasks. The transferring authority must, on the other hand, relinquish the powers relating to the public service task in question.

Second, the entity to which powers are transferred must be able to carry out the task in full decision making autonomy. This means that the transferring authority must no longer be able to interfere in the performance of tasks, for instance through giving prior approval of decisions. However, it may retain a certain degree of influence over the new entity, which may be described as "political control".

Third, the entity to which powers are transferred must have financial autonomy in the performance of the public task for which powers are transferred to it. This means that it must not depend financially on the transferring authority in the performance of the task. The transferring authority must provide it with the necessary resources to perform the task, but such provision must not correspond to a remuneration to be given for contractual performance.

In several of the arrangements under consideration, the municipalities have chosen to *delegate* their competence in accordance with Section 83 of the Pollution Control Act. In Norwegian administrative law, the term delegation refers to the act of one body providing

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[3] Judgment of 21 December 2016 in Case C-51/15 – *Remondis GmbH & Co. KG Region Nord v Region Hannover,* EU:C:2016:985, Opinion of AG Mengozzi.

another body with the competence to make decisions with legal effect on their behalf. As such, delegation is a legal instrument available to achieve a transfer of powers/competence. Section 83 of the Pollution Control Act provides a legal basis for delegation of the competence to make individual decisions where particular considerations call for it. It does not provide a legal basis for delegation of the competence to make general decisions such as adopting administrative regulations. This competence is reserved for the municipalities.

It follows from the preparatory works to section 83 that providing municipalities with a clear legal basis to delegate competence was considered necessary to establish effective inter-municipal undertakings within waste management, and that the provision would place municipalities at liberty to carry out their tasks according to the Pollution Control Act as they see fit.

Delegation must be held separate from the act of *entrusting another body with the execution of tasks*, which does not necessarily require that body to have the competence to make decisions with legal effect. According to the Pollution Control Act section 29 and 30, municipalities are required to "have" facilities for the treatment of household waste and to "make sure" such waste is collected. However, it is not necessary for the municipality to carry out the waste management itself. Municipalities are afforded a wide access to leave these tasks to other legal entities, including inter-municipal companies and limited liability companies.

There is no requirement in Norwegian law on delegation in general or under section 83 of the Pollution Control Act in specific to enter into a contract following the delegation. As mentioned, delegation refers to giving another body the competence to make decisions on the delegating body's behalf. The limits of the delegated competence follow from the resolution to delegate, as well as from the legal basis for delegation.

In sum, under Norwegian law, municipalities are afforded a wide access to transfer their powers and responsibilities/competences within waste management to other legal entities, including inter-municipal companies and limited liability companies. Whether municipalities choose to do so, must be considered a matter of internal organisation that is not affected by EEA public procurement rules.

Question 1

The Directorate's first question concerns the arrangements between Follo REN IKS and its owner municipalities. The following answer is largely based on information provided by Follo REN IKS and its owner municipalities. The Norwegian government is asked to clarify :

1. *Whether it is of the view that the arrangements between Follo REN IKS and its owner municipalities should be regarded as a transfer of powers and responsibilities/competences in the sense described in Article 1 (6) and/or* Remondis.

The owner municipalities of Follo REN IKS have not previously considered the application of Article 1 (6) of Directive 2014/24 and/or *Remondis.* Based on an assessment of the arrangement in light of the CJEU's judgment and the Opinion of the AG in *Remondis*, Follo REN IKS and its owner municipalities are of the opinion that the arrangements should be regarded as a transfer of powers and responsibilities/competences in the sense described in Article 1 (6) and/or *Remondis.*

In the case of Follo REN IKS, the transfer of powers was organised through the establishment of the inter-municipal company Follo REN IKS by five municipalities, to which said municipalities entrusted the tasks incumbent on them as the public-law entities responsible for management of household waste.

The transfer of powers was achieved through the adoption of the partnership agreement of Follo REN IKS, as well as the adoption of municipal waste management regulations. Both were adopted through administrative decisions by the municipal boards of each municipality.

Under the partnership agreement, Follo REN IKS is an inter-municipal company established according to the Inter-municipal Companies Act, to serve as a substitute for its owner municipalities in ensuring the collection, transportation and sound treatment of waste that falls within the municipal responsibilities according to the Pollution Control Act and supplementing provisions at any given time.[4]

It follows from article 2.2. of the partnership agreement that Follo REN IKS is at liberty to organize its activities as it sees fit, within the relevant legal framework. Follo REN IKS is also free to cooperate with other entities and to transfer responsibility for its tasks to others through what is referred to in the partnership agreement as "delegation" of its exclusive rights.

Further, Follo REN IKS may engage in other activities as a natural extension of its primary purpose, provided these activities are not in conflict with its main purpose. To this end, Follo REN IKS may acquire holdings in undertakings or establish its own undertakings, see section 2.4. of the revised partnership agreement.[5]

The owner municipalities may exert influence on the activities of Follo REN IKS through the general meeting, where each municipality is represented. The authority of the general meeting follows from the Inter-municipal Companies Act. The general meeting is the highest body of the inter-municipal company and oversees the accounts, budget and financial plan, see section 7. The management of the company is under the authority of the board of directors, and the day to day management is the responsibility of the general manager.

It follows from the partnership agreement that matters of principle or of great political or financial importance to the company, its owners or the residents of the owner municipalities,

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[4] Attachment 7 to Doc No 1052794, section 1 and 3.1.1.
[5] Attachment 8 to Doc No 1052794.

shall be decided by the general meeting following a recommendation from the board. The owner municipalities shall also be afforded the opportunity to express their views in matters regarding substantial changes in the waste management system and matters of principle and of political and financial importance to one or several municipalities

In sum, Follo REN IKS is characterised by autonomy in the performance of its tasks, but must abide by the decisions of the general meeting in certain matters.
Upon establishing Follo REN IKS, the owner municipalities delegated to Follo REN IKS the competence to make individual decisions with legal effect in relation to the municipal responsibilities within waste management, in accordance with the Pollution Control Act section 83. This was achieved through resolutions in each municipal board to adopt municipal waste management regulations that lay out the extent of the competences that were delegated to Follo REN IKS.[6]

It follows from the municipal waste management regulations that Follo REN IKS has been given the competence to make decisions with legal effect relating to, among other things: Individual exemptions from the scope of the act, requirements for sorting of waste and method of delivery, placement and volume of waste containers, sanctions where the requirements for sorting are not followed in the form of refusal to collect the waste, and approval of containers, including special containers. The municipalities have retained competence to set and collect waste management fees, handle and decide complaints, issue fines and oversee that waste management happens in accordance with health regulations.

As regards the financing of Follo REN IKS, each owner municipality made an initial payment to the company in relation to their ownership shares, amounting to a total of 1,2 MNOK. According to the partnership agreement and the Inter-municipal Companies Act, the municipalities have no further obligation to make payments to the company. However, the municipalities are fully responsible for the financial commitments of Follo REN IKS within their ownership shares. This is a subsidiary duty, for the event that the company is unable to fulfill its commitments, similar to the arrangement in Remondis (see para 46).

The day-to-day operation of Follo REN IKS is financed through the waste management fees paid by the inhabitants of the owner communities. Waste management fees are set by the municipalities, in accordance with the Norwegian Waste Regulation chapter 15 on fees for the management of household waste.[7] It follows from section 15-3 of the regulation that waste management fees shall be determined according to the principle of cost, meaning that the fees must fully cover, but may not exceed the municipalities' costs. As a result, Follo REN IKS may neither gain profit nor suffer loss from their activities. Rather, the waste management fees are set in such a way as to provide Follo REN IKS with the necessary resources to perform the task.

[6] Attachment 2-6, Doc No 105794.
[7] Attachment 1.

Waste management fees are set based on Follo REN IKS' yearly budget, which is set at cost and adopted by the owner municipalities. Fees are collected by the municipalities, who in turn provide quarterly financial contributions to Follo REN IKS.

In sum, taking into account the arrangement *as a whole*, in our view the arrangement between Follo REN IKS and its owner municipalities should be regarded as a transfer of powers and responsibilities/competences in the sense described in Article 1 (6) and/or *Remondis.*

First, the transfer of competence may be regarded as comprehensive in the sense that it encompasses not only the obligation to perform the task, but also powers that are the corollary thereof. Follo REN IKS has been given the competence necessary to organise the performance of the tasks as they see fit and to exercise public authority vis-à-vis inhabitants in the performance of the tasks. However, the municipalities have retained certain competences, most notably the competence to determine waste management fees and handle complaints.

Second, Follo REN IKS is able to carry out the task in full *decision making* autonomy. The partnership agreement explicitly affords Follo REN IKS wide discretion in how to perform the tasks, and Follo REN IKS has been delegated the competence necessary to make decisions regarding e.g. requirements for sorting of waste and method of delivery. The municipalities are not able to interfere in the actual performance of the public task, but they retain a degree of influence through the general meeting.

Third, Follo REN IKS has financial autonomy in the performance of the public task in that they are provided with the necessary resources through financial contributions corresponding to the waste management fee, which is paid by the inhabitants of the municipalities. In our view, the fact that the municipality has retained the competence to set waste management fees and handle complaints does not hinder the application of article 1 (6). It is a regulatory requirement that waste management fees be set according to the principle of cost. Therefore, it would not influence the autonomy of Follo REN IKS if it were given the competence to set the fees. According to Norwegian administrative law, handling of complaints would nevertheless be done on the level of the delegating authority in the final instance. Therefore, the fact that the municipalities handle complaints in the first instance does not influence the autonomy of Follo REN.

Question 2

The Directorate's second question concerns the other arrangements under consideration in the case. The following answer is largely based on information provided by the relevant entities. The Norwegian government is asked to clarify:

2. *Whether it is of the view that any other arrangements under consideration in the case should be regarded as a transfer of powers and responsibilities/competences in the sense described in Article 1 (6) and/or* Remondis.

BIR AS

Bergen municipality and BIR AS have not previously considered the application of Article 1 (6) of Directive 2014/24 and/or *Remondis.* Based on an assessment of the arrangement in light of the CJEU's judgment and the Opinion of the AG in *Remondis*, Bergen municipality and BIR AS is of the opinion that the arrangement should be regarded as a transfer of powers and responsibilities/competences in the sense described in Article 1 (6) and/or *Remondis.*

In its previous letter[8], the Authority was particularly concerned with the arrangement where contractors are required by contract to deliver municipal commercial waste for incineration to BIR Avfallsenergi AS. However, the complaint concerns the award of exclusive rights to BIR AS for collection and treatment of household waste, as well as the further delegation of parts of this exclusive right from BIR AS to its subsidiaries. We have therefore chosen to comment on the applicability of article 1 (6) and *Remondis.*

BIR AS is an inter-municipally owned company with limited liability. It was established to handle the statutory tasks of its owners according to the Pollution Control Act section 30.[9] To this end, all owner municipalities awarded exclusive rights to carry out these tasks to BIR through administrative decisions in the respective municipal boards. Additionally, all municipalities delegated to BIR AS the competence to make individual decisions with legal effect on their behalf in relation to these statutory tasks, in accordance with the Pollution Control Act section 83. This was achieved through the adoption of municipal waste management regulations by each municipal board.

The transfer of powers was thus organised through the creation of a common structure between several municipalities on which the municipalities conferred powers previously exercised by those municipalities themselves. Neither the award of exclusive rights to perform the municipalities' statutory tasks, nor the delegation of competence as a corollary to these tasks, bear resemblance to the entering into of a contract. Rather, the transfer of powers was achieved through administrative decisions.

The relationship between the municipalities that own BIR AS is regulated through the shareholder agreement.[10] The purpose of the shareholder agreement is to ensure that the BIR group (BIR AS and its subsidiaries) carries out the municipalities' obligations according to the Pollution Control Act section 30. It follows from the articles of association[11] that BIR AS

[8] Doc No 930863.
[9] It was initially established as an apportioned liability partnership (DA), converted to a limited liability company in 2001 and restructured with a holding structure in 2002.
[10] Attachment 2.
[11] Attachment 3.

is free to have recourse to the services of third parties to perform the waste management tasks, through cooperation agreements or participation in other companies. BIR AS has chosen to do so, conferring upon its fully owned daughter companies to perform different tasks. In accordance with the articles of association, BIR AS may also freely engage in other tasks that have a natural connection to those conferred upon it by the municipalities.

Neither the shareholder agreement nor the articles of association further regulate the performance of the waste management tasks.

The municipalities may exert influence on the activities of BIR AS through the general meeting. The general meeting of BIR AS is composed of the mayors of the owning municipalities and the City Government member for finance, property and innovation from Bergen municipality.

The general meeting is the highest body of the limited liability company and selects the board of directors. According to the articles of association, the general meeting shall decide on the profit and loss account and balance and elect members for the corporate assembly, as well as other matters that belong to the general meeting according to the Companies Act. The management of the company is under the authority of the board of directors, and the day to day management is the responsibility of the general manager.

The municipalities that own BIR AS have adopted virtually identical waste management regulations that delegate competences to BIR AS. The administrative regulation from Bergen and Askøy municipalities are used as the reference in the following.[12]

According to section 12, BIR AS has been given the competence to make individual decisions with legal effect on behalf of its owner municipalities under the entire scope of the waste management regulation. This includes, among other things: Granting individual exemptions from the obligations in the regulation, supervising/inspecting the adherence to these obligations, issuing orders to remove waste that has been left, emptied or kept in violation of the Pollution Control Act section 28 or the municipal regulation, and, if necessary, issuing fines, and handling complaints, and deciding them in the first instance in accordance with the Public Administration Act. In addition, BIR has been given the competence to adopt guidelines that clarify the interpretation of the waste management regulation. The municipalities have retained competence to set waste management fees.

As regards the financing of BIR AS, the company has a share capital of approx. 50 MNOK, from initial payments upon its establishment. The municipalities have no further obligation to make payments to the company. In accordance with Limited Liability Company act, the municipalities are not responsible for the financial commitments of BIR AS.

As is the case for Follo REN IKS, the day-to-day operation is financed through the waste management fees paid by the inhabitants of the owner communities. Waste management

[12] Attachment 4.

fees are set by the municipal boards in accordance with the principle of cost. As a result, BIR AS may neither gain profit nor suffer loss from these activities. Rather, the waste management fees are set in such a way as to provide BIR AS with the necessary resources to perform the task. Bergen municipality collects the fees themselves, whereas the other municipalities have left collection to BIR AS. BIR AS has in turn entrusted the collection to its fully owned subsidiary BIR Privat AS. In these municipalities, BIR Privat AS directly invoices home owners the fees set by the municipal boards.

In sum, taking into account the arrangement *as a whole*, in our view the arrangement between BIR AS and its owner municipalities should be regarded as a transfer of powers and responsibilities/competences in the sense described in Article 1 (6) and/or *Remondis.*

First, the transfer of competence may be regarded as comprehensive in the sense that it encompasses not only the obligation to perform the task, but also powers that are the corollary thereof. BIR AS has been given the competence necessary to organise the performance of the tasks as they see fit. The only competence retained by the municipalities is that of setting the waste management fees.

Second, BIR AS is able to carry out the task in full *decision making* autonomy. The municipalities exert their only influence through their ownership in accordance with the Private Limited Liability Companies Act. BIR AS has full discretion in how to perform the tasks, and has been delegated the competence necessary to make individual decisions covering the totality of the waste management regulations in each municipality.

Third, BIR AS has financial autonomy in the performance of the public task in that they are provided with the necessary resources through the waste management fee, which is paid by the inhabitants of the municipalities. It is a regulatory requirement that such fees be set according to the principle of cost. As such, it would not influence the autonomy of BIR AS if it were given the competence to set the fees.

Midtre Namdal Avfallsselskap IKS

The questions raised by the Directorate in previous letters regarding the arrangement between Namsos municipality and MNA IKS, concern the award of exclusive rights for the collection and treatment of municipal commercial waste. MNA IKS also handles household waste on behalf of its owner municipalities. The transfer of powers for this task is however not at issue in the complaint, and our comments are therefore limited to the question of the transfer of powers and responsibilities/competences for the handling of municipal commercial waste.

As previously stated in our letters 14 February 2019 and 2 February 2017, Namsos municipality and MNA have informed the Norwegian Government that the administrative decision of the municipal board 26 March 2015 to award an exclusive right to MNA for the collection and treatment of commercial municipal has not been given effect. Awaiting

clarification from the Authority, the municipality issued a tender competition for the collection and treatment of municipal waste which was won by Retura Nt AS.

Although the decision to award an exclusive right for the collection and treatment of municipal waste to MNA has not been given effect, Namsos municipality is of the opinion that the arrangement should be regarded as a transfer of powers and responsibilities/competences in the sense described in Article 1 (6) and/or *Remondis,* in the event that the exclusive right is given effect.

Namsos municipality has noted, in this regard, that Article 1 (6) does not discriminate between the transferral of powers and responsibilities related to the handling of household waste, on the one hand, and municipal commercial waste, on the other hand. The handling of municipal commercial waste constitutes the performance of a public task, being the responsibility of the municipality as the waste producer.

Under the partnership agreement,[13] MNA IKS is an inter-municipal company established according to the Inter-municipal Companies Act, which is responsible for the collection and treatment of the waste that falls within its owner municipalities' waste management regulations in accordance with the relevant legal framework, see article 2. It follows from article 2 of the partnership agreement that MNA IKS is free to decide whether, and to what extent, to attend to waste fractions not covered by the municipal waste management regulations.

The owner municipalities are able to influence the activities of MNA IKS through the general meeting, where each municipality is represented. The authority of the general meeting follows from the Inter-municipal Companies Act. The general meeting is the highest body of the inter-municipal company and oversees the accounts, budget and financial plan, see section 7. The management of the company is under the authority of the board of directors, and the day to day management is the responsibility of the general manager. It follows from the partnership agreement that matters of importance to the company, such as future plans and expansions shall be decided by the general meeting.

As regards the financing of MNA, according to the partnership agreement and the Inter-municipal Companies Act, the municipalities have no further obligation to make payments to the company. However, the municipalities are fully responsible for the financial commitments of MNA within their ownership shares. This is a subsidiary duty, for the event that the company is unable to fulfill its commitments, similar to the arrangement in Remondis (see para 46). Additionally, it follows from the partnership agreement that MNA is at liberty to engage in commercial activity related to commercial waste.

[13] Since its establishment, the partnership agreement of MNA has been revised several times through decisions by the municipal boards. Additional municipalities have also joined the company. In the following, reference will be made to the partnership agreement in force at the time of the decision to award an exclusive right in 2015.

Namsos municipality has noted that a decision to award an exclusive right for the collection and treatment of municipal commercial waste to MNA, would entail that the municipality transfers the powers and responsibilities/competences required to solve this task to MNA. Although the owner municipalities would exert a certain influence through their ownership, MNA would be at liberty to decide whether to carry out the task using its own resources or through entering into a contract, and would have the competence to set requirements for e.g. sorting of waste vis-à-vis municipal institutions.

Namsos municipality have informed the Norwegian Government that the owner municipalities of MNA have commenced a process to transfer additional powers and responsibilities/competences for the handling of waste to MNA. This will be achieved through a revision of the partnership agreement and the municipalities' administrative waste regulations. The process is still ongoing, and the Norwegian Government is unable to offer any further details at this time.

Question 3.
The Directorate's third question concerns the existence of service contracts between the transferor authority and the transferee authority. The following answer is based on information provided by the relevant entities. The Norwegian government is asked to clarify:

3. *In the event that any arrangements are considered capable of being regarded as transfers of powers and responsibilities/competences, whether any service contracts have been entered into by the transferor authority with the transferee authority.*

As regards Follo REN IKS, no contract has been entered into between Follo REN IKS and its owner municipalities. The relationship between Follo REN IKS and the municipalities is wholly regulated by the partnership agreement and the provisions of the Inter-municipal Companies Act. The owner municipalities exert their only influence over Follo REN IKS through their ownership, and may not interfere in the performance of the tasks. If any of the municipalities should wish to use their own resources to collect and treat household waste, they would have to they would have to withdraw from the inter-municipal company. This would entail a further reorganisation of the public task in question.

As regards BIR AS, the same applies. No contract has been entered into between BIR AS and its owner municipalities. The owner municipalities exert their only influence over BIR AS through their collective ownership and may not interfere in the performance of the tasks. If any of the municipalities should wish use their own resources to collect and treat household waste, they would have to withdraw from the inter-municipal cooperation in owning BIR AS. This would entail a further reorganisation of the public task in question.

As regards MNA IKS, no contract has been entered into between MNA IKS and its owner municipalities. As mentioned in our letter 14 February 2019, although Namsos municipality originally intended to award a contract to MNA on the basis of an exclusive right, it was decided not to award any such contract awaiting clarification from the Authority.

Yours sincerely

Pål Spillum
Deputy Director General

Kirsten Lange
Higher Executive Officer

This document is signed electronically and has therefore no handwritten signature

Attachments

Attachment 1 – Norwegian Waste Regulation chapter 15 on fees for the management of household waste
Attachment 2 – Shareholder agreement, BIR AS
Attachment 3 – Articles of association, BIR AS
Attachment 4 – Municipal waste management regulation for Askøy and Bergen