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Complaint against Norway regarding the granting of exclusive rights for collection and handling of household waste

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1. INTRODUCTION

This complaint concerns the granting of exclusive rights by Norwegian municipalities to inter-municipal undertakings, for the collecting and handling of household waste; and the subsequent direct awarding of contract for the performance of such tasks to the undertaking entrusted with an exclusive right. At present, 60-70 of Norway's 430 municipalities have granted such exclusive rights. In all cases, the exclusive right is granted to a predefined service provider.

By entrusting a public undertaking with an exclusive right, the municipality enables itself to award contracts for waste management services directly to that undertaking, without a prior public call for tenders. Furthermore, the undertaking entrusted with the exclusive right remains free to carry out commercial activities, and may be subject to less direct control by the municipality than what is acceptable under the "in-house" jurisprudence. The objective of avoiding a competitive award procedure while allowing the undertaking in question unrestricted commercial freedom, seem to be the central motivation for the practice of granting exclusive rights.

In the complainant's view, such decisions by individual municipalities – and the legal framework permitting it – violate Article 36 EEA, since the granting of exclusive rights restricts the freedom to provide services. Since the same quality of service is achieved by a majority of Norwegian municipalities without restricting trade, the exclusive rights cannot be justified by mandatory requirements. In addition, the municipalities' direct award of public service contract to the holder of such exclusive rights violates Directive 2004/18.

The complainant respectfully submits that the infringement procedure provided for in the ESA/Court Agreement should be initiated as regards these infringements of the EEA Agreement.

2. THE COMPLAINANT

The complainant in the present matter is Norsk Industri – Federation of Norwegian Industries. Norsk Industri is an industry and employers federation within the Confederation of Norwegian Enterprise ("Næringslivets Hovedorganisasjon"). Norsk Industri represents approximately 2000 member companies within a wide range of industries, hereunder waste management and recycling industries.

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3. BACKGROUND – SECTION 1-3 OF THE REGULATION ON PUBLIC PROCUREMENT

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the award of public works contracts, public supply contracts and public service contracts is transposed to Norwegian Law through regulation 402/2006 on public procurement, which is adopted pursuant to act 69/1999 on public procurement. Both pieces of legislation are annexed hereto as Annex 1 and 2.

Section 1-3 of the regulation on public procurement defines the scope of the provisions in the regulation, and in subparagraph (h) of paragraph (2), it is stated that the regulation does not apply to (office translation):

”h. public service contracts awarded to a contracting authority or to an association of contracting authorities as defined in § 1-2 (bodies covered by the regulation) on the basis of an exclusive right which the body enjoys pursuant to a published law, regulation or administrative provision which is compatible with the EEA Agreement, (..).”

The essence of the provision is that if a public body has an exclusive right to produce a certain service, the awarding by a public body of a contract to such a body falls outside the procurement rules, and may be awarded directly without competition. The provision mirrors Article 18 of Directive 2004/18.

The criteria for applying the exception are i) an exclusive right must be laid down in an act, regulation or an administrative decision, ii) the holder of the exclusive right must be a public body as defined in Section 1-2, i.e a separate legal body which serves the needs of the general public and not be of a commercial character, and which is financed and controlled by a public body. The third criterion for the provision to apply is that the exclusive right complies with the EEA Agreement – which is rarely the case in the complainant’s view, hence the present complaint.

A more detailed analysis of Section 1-3 is provided in section 4 of Annex 3, which is a legal analysis of municipalities’ ability to avoid the requirements of public procurement procedure by granting exclusive rights, by Advokatfirmaet Haavind Vislie AS on behalf of Kommunenes Sentralforbund – The Norwegian Association of Local and Regional Authorities.

4. BACKGROUND – OUTLINE OF NORWEGIAN LEGISLATION ON WASTE HANDLING

In Norway as in most if not all states within the EEA, waste handling is an industry which is both heavily regulated for obvious health and environmental reasons, and also to a large extent seen as services that lie within the public domain, particularly regarding the collection and disposal of household waste. This section is intended to give an outline of the role of Municipalities in waste handling in Norway, the essence of which is that municipalities are responsible for collection and disposal of household waste, while undertakings, public administration and organisations are responsible for collecting and disposing of their own waste. This is regulated by the pollution control act, ref. Annex 4.

Section 30 of the pollution control act provides that municipalities are obliged to collect and handle household waste. The provision reads as follows (in the official translation¹):

“§ 30 Municipal collection of household waste, etc.

The municipality shall make arrangements for the collection of household waste. The pollution control authority may by regulations or in individual cases order the municipality to introduce schemes for sorting waste. Such an order must be based on an overall evaluation of the costs that will be incurred and the environmental benefits that will be gained.

The municipality may issue regulations requiring that municipal waste collection shall apply only in built-up areas, that certain types of household waste shall be excluded from municipal waste collection, and that certain types of waste shall be kept separate. The municipality may on application exempt certain properties from the requirement for municipal waste collection.

The municipality may issue the regulations necessary to ensure appropriate and hygienic storage, collection and transport of household waste. No person may collect household waste without the consent of the municipality. In special cases, the pollution control authority may by regulations or in individual cases decide that the consent of the municipality is not necessary.”

Further, the third paragraph of Section 29 of the pollution control act requires that municipalities shall have facilities for treatment of household waste:

“§ 29 Requirements for waste treatment and disposal plants

The municipality shall have waste storage sites or waste treatment and disposal plants for household waste and sewage sludge and has a duty 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 such facilities.”

The financing of the services provided by the municipalities is regulated in the first paragraph of Section 34, which provides that the municipalities shall determine a fee which is limited by the costs of producing the service:

“§ 34 Waste management fee

The municipality shall determine a fee to cover the costs associated with the waste sector, including collection, transport, reception, storage, treatment, control, etc. The costs shall be fully covered by the fee. The term costs includes both capital and operating costs. For waste which the municipality has a duty to collect, receive and/or treat pursuant to section 29, 30 or 31, the fee must not exceed the costs incurred by the municipality.”

Section 32 stipulates that waste from commercial undertakings (hereinafter referred to as “industrial waste”) is the responsibility of the undertaking itself. The provision reads as follows:

¹ Published at <http://www.regjeringen.no/en/doc/Laws/Acts/Pollution-Control-Act.html?id=171893>

“§ 32 Management of industrial waste

Industrial waste shall be delivered to a lawful waste treatment and disposal plant unless it can be recovered or used in another way. The pollution control authority may consent to other forms of waste disposal on further conditions.

The pollution control authority may by regulations or in individual cases order the manufacturer to deliver industrial waste to a municipal waste treatment facility. The provision of section 31, second paragraph, applies correspondingly.”

While it is common parlour that the effect of these provisions is that the municipalities have a legal monopoly in the handling of household waste, a more precise description is that the municipalities have both an exclusive right and a legal obligation to perform such services within their geographical area. This does obviously not prevent municipalities from letting others perform the services on their behalf. As will be further elaborated on below, municipalities organise the collection and handling of waste in a variety of ways, within the limits set by sector regulation concerning health and environment. Briefly, the municipalities can produce the services themselves, or otherwise in compliance with the case law on in-house service production, or they may acquire the services in the market from commercial service providers selected by public tendering, or they could grant exclusive rights such as described in this complaint. All these methods are perfectly in line with Norwegian law on waste management – though in Norsk Industri’s view the exclusive rights violate EEA Law. To Norsk Industri’s knowledge there are no legal requirements, or policy statements that require or induce municipalities to prefer exclusive rights over either in-house production or the acquisition of services in the market.

5. THE PRACTICE OF GRANTING EXCLUSIVE RIGHTS

5.1 Overview

Norsk Industri has collected a non exhaustive list with examples of granting exclusive rights among municipalities in Norway, and at present, some municipalities have organised their collection and handling of household waste management in this way. As the services normally are produced in regional cooperation, exclusive rights have been granted to a total of at least 14 undertakings.

Annex 5 provides an overview of some undertakings that have been granted such exclusive rights to date, the scope of the exclusive right, by which municipalities the exclusive right has been granted, and references to public documents describing the decision-making procedure. For the sake of good order, it should be pointed out that this list is produced by Norsk Industri, and should be read with the caveats that it may not be complete, and that the conditions for direct award of contract under the in-house jurisprudence might be fulfilled in some of the cases.

Some of the cases have been brought before the Public procurement complaints board (Klagenemnda for offentlige anskaffelser – hereinafter referred to by its Norwegian acronym “KOFA”) and the decisions are annexed at Annexes 6 and 7 regarding Ecopro, 8 regarding Returkraft, and 9 regarding HIAS IKS.

5.2 The rationale for granting exclusive rights

As indicated above, it seems clear to the complainant that the development of the current Norwegian practice of granting exclusive rights can be explained primarily as a response to the development over recent years of the limitations on inter-municipal undertakings' commercial freedom, under what is here referred to as the "in-house"-jurisprudence of the European Court of Justice in case C-107/98 Teckal etc. The essence of this case-law is as one will recall that public service contracts may be awarded directly without prior call for tenders to legal entities separate from the purchaser, if the separate entity is subject to a control similar to that exercised by the contracting authority over its own departments, and if the essential part of the turnover of the separate legal entity is derived from delivering services to the controlling authority.

The objective of avoiding the consequences of this case law is underlined in a report published in 2007 by Avfall Norge, an organization for approximately 90 Municipal and inter-municipal waste organizations, which is annexed hereto at Annex 9 (office translation):

"Should a municipality decide to conduct its tasks outside of its own legal structure; the principal rule is that the tasks be put out for tender. The European Court of Justice has accepted that the requirements for in-house production may be complied with even if the tasks are conducted by a company which is set up as a separate legal entity, if certain criteria are complied with. The development over later years in the practice of the Court of Justice concerning in-house does however leave the option of granting exclusive rights more of interest. In-house production will not be possible if there is private ownership, and is a very limited space for market activities in addition to the tasks that are produced in-house. As will appear from this guidance document, the granting of exclusive rights do not rule out a certain private ownership, nor that the body have market activities in market open for competition. If the municipal waste sector is to be able to solve the tasks it faces within waste handling, for example concerning investments in recycling facilities, biogas facilities and destruction facilities, this is an opportunity that one must be aware of."

One illustrative example of how similar arguments have influenced the decision by one municipality is the decision of Levanger formannskap of 12 December 2007 to grant an exclusive right to Innherred Renovasjon IKS for the handling of "wet organic waste from households and sewage sludge from Levanger municipality", in which it is pointed out that the exclusive right does not limit the ability of Innherred Renovasjon IKS to operate commercial activities as long as the activities for which the undertaking has an exclusive right are clearly separated and run at cost (office translation):

"Under an exclusive right, there are no limits on the possibility to offer services to the market. The part of the organization that operates under an exclusive right must, however, be kept separate and run at cost".

The decision is included in Annex 5. The exclusive right in this case had already at the time of its adoption been transported from the public undertaking Innherred Renovasjon IKS to Ecopro AS; see the reference to Innherred Renovasjon's decision of 27 April 2007.

The exact same reasoning was given by the Municipality of Steinkjer when granting an exclusive right to Ecopro AS in 2007, ref the quotation found in paragraph 2 of the decision in case 2008/7 Norsk Industri v Steinkjer kommune by KOFA, ref Annex 6.

5.3 Organization and financing of the undertakings

The undertakings that are entrusted with exclusive rights in the relevant administrative decision by the municipalities are normally organised as bodies governed by public law according to Article 9 of Directive 2004/18, thus being established for the purpose of meeting a need in the public interest, having legal personality and being financed for the most part by the municipalities. They are normally established by the municipality in conjunction with other municipalities in its vicinity. The legal form of the undertakings varies, but most are limited companies regulated by act no. 44/1997 on limited companies – aksjeloven, or inter-municipal companies which is a separate form of organisation, laid down in act no. 90/1999 on Inter-Municipal Companies – Lov om interkommunale selskap.

Thus, the standard model in this field is that several municipalities set up an inter-municipal undertaking which is granted an exclusive right. In certain cases the exclusive right is subsequently passed on to a larger entity which in several cases is a limited company, such as the example of Ecopro AS described above. The eventual holder of the exclusive right will normally operate in a corporate structure with several legal entities/subsidiaries. Examples of such corporate structures will be provided in Section 6 below.

The operation of the legal entity which has the exclusive right is financed via a transfer of funds from the municipality. The municipality collects these funds from its citizens through local taxation pursuant to section 34 of the pollution control act. This provision, cited above, provides that municipalities' taxes for waste management shall cover the cost of collection, transport, reception, storage, treatment and control etc, but cannot exceed these costs. Thus, the exclusive rights holder is regularly run as a not for profit organisation.

The commercial activities will normally be operated through one or more legal entities separate from, but still controlled by, the entity which enjoys the exclusive right. But as Levanger kommunes exclusive right to Innherred Renovasjon and finally Ecopro demonstrates, it appears that this is not always the case, as Ecopro AS seems to run commercial activities without such legal separation from the activities covered by the exclusive rights.

As illustrated with the case from Levanger above, the exclusive right is frequently transferred from a "local" inter-municipal company, to an organisation covering activities in a larger region. Another example of this concerns the municipalities Lillesand, Birkenes, Arendal, Grimstad, Froland, Kristiansand, Sogndalen, Søgne, Vennesla, Gjerstad, Risør, Tvedestrand and Vegårshei in southern Norway who have granted exclusive rights to their Inter-Municipal and limited Companies; LiBiR IKS, Agder Renovasjon DA, RKR AS, and Risør og Tvedestrandregionens Avfallsselskap AS, subsequently transferred to Returkraft AS, regarding waste incineration, ref Annex 5.

The exclusive right and the adjoining contract are normally adopted for very long periods of time, frequently lasting for 15 years or more.

6. THE COMMERCIAL ACTIVITIES OF THE UNDERTAKINGS ENTRUSTED WITH AN EXCLUSIVE RIGHT

As pointed out above, the objective of entrusting a public undertaking with an exclusive right to operate a given municipality's waste management services, is in part to avoid having to put waste management contracts on public tender, and in part to allow the undertaking to participate in commercial activities, such as the collection and handling of industrial waste. Further, another objective might be to grant the undertaking entrusted with the exclusive right greater autonomy in commercial and strategic decisions, than would be acceptable under the in-house jurisprudence, ref. Case C-458/03 Parking Brixen.

Again, an illustrative example is the above mentioned inter-municipal undertaking Innherred Renovasjon IKS, which enjoys exclusive rights granted by Levanger kommune and several other municipalities in Nord Trøndelag. Based on information in the company's recent 2009 annual report, annexed hereto at Annex 11, this company has holdings in six different commercial undertakings which operate a wide range of commercial activities;

- Retura Innherred Renovasjon AS (100 %) – marketing of waste management services to commercial undertakings
- Bruktbo Renovasjonsservice AS (100%) – sale of used goods and materials
- Trøndelag Gjenvinning AS (33,33 %) – collection and recycling of waste
- Ecopro AS (26,1 %) – treatment of waste and sludge, production of electricity and heat
- Fibernor AS (25 %) – development of fractions of recovered paper
- WEEE Recycling AS (20 %) – recycling of waste electronic equipment
- Miljøpartnerne AS (10 %) – coordinating the handling of industrial waste in Mid-Norway
- Retura AS (3 %) – sale of waste management solutions to undertakings
- Rekom AS (2,83 %) – sale of sorted fractions

As mentioned, Ecopro AS is the subject of KOFA's decision 2008/7, regarding the decision by the Municipality of Steinkjer to grant an exclusive right to this undertaking. The defendant in the case accepted that the in-house rules were inapplicable, see paragraph 39 of the decision, since Ecopro both has commercial activities and is open to private investors. Paragraphs 3 and 4 of the decision, shows that the company has as its objective i.a. to collect "wet organic waste and sludge from municipalities, inter-municipal companies, industry and the private sector in Mid-Norway [...]" and to "market and sell residue products and energy from the waste treatment". It is further underlined that "concerning tasks defined in Law, concerning which the company has been granted an exclusive right, the principle of operating at cost must be adhered to". Further, at paragraph 5 it is indicated that the company is open to private investors, and Trondheim Energi Fjernvarme AS owns 24,92 % of its shares.

Another example from a different region is provided by the inter-municipal undertaking Bergensområdet interkommunale renovasjonsselskap (BIR AS), which is granted exclusive rights by several municipalities in the Bergen area. The undertaking is organized as a limited company with several subsidiaries, ref the latest annual report for 2009 at Annex 12. According to the company's own account, some subsidiaries carry out the services covered by the exclusive right granted by the controlling municipalities:

- BIR Privat AS (100 %)
- BIR Transport AS (100 %)
- BossNett AS (100 %)

However, it appears from the website of BIR Privat AS that this company also has commercial activities, since they have published a pricelist for the handling of several types of waste for commercial clients. A printout of this page is annexed hereto at Annex 13.

On the other hand, other subsidiaries of BIR AS are operating a variety of commercial activities:

- Bossug AS (100 %) – builds pipe based waste systems
- Mjelstad Miljø AS (100 %) – waste disposal
- BIR Avfallsbehandling (100 %) – waste incineration
- BIR Bedrift AS (100 %) – handles industrial waste, and has two subsidiaries
 - TH Paulsen AS (100 %) – paper and board recycling
 - Retura Vest AS (50 %) – waste transport

A third example concerns HIAS IKS in the Hamar region, which is responsible both for waste management and water supply and sewage, and operates pursuant to exclusive rights granted by the founding municipalities. First it is interesting to note that according to the latest annual report for 2009, annexed hereto at Annex 14, one of the company's objectives is to "exploit its competence to create values for the shareowners through business development within and outside of the region". Further, in the partnership agreement for HIAS it is stated at Section 2 "when it promotes the company's competence or results in calculated technical/economical advantages HIAS IKS can form limited companies", ref Annex 9.

Consequently HIAS IKS has done so by forming the wholly owned subsidiary Hias Næring AS a holding company for its commercial activities, with the following subsidiaries:

- Hias Miljøpartner AS (100 %) – business consulting company with the agency on Molok waste systems, and which also operate and maintain a district heating central
- Hias Drift AS (100 %) – treatment and disposal of non hazardous waste
- Hias Bioenergi AS (100 %) – which does not seem to have significant activities

As pointed out above, the commercial activities are normally separated from the activities for which the undertaking enjoys an exclusive right by way of corporate organization, so that the commercial activities are undertaken by a subsidiary to the public undertaking. This is intended to avoid cross-subsidies between the public service activities, and commercial activities, which might cause problems under both state aid rules and other requirements of national law. This is, however not always the case. Both Ecopro AS and Returkraft AS seem to operate both commercial activities and activities covered by exclusive rights under the same legal structure, and without legal separation of the commercial activities from those financed by municipalities and covered by exclusive rights. To Norsk Industri's knowledge, approximately half of Returkraft's 120 000 tonnes per year incineration capacity is filled with household waste, and the other half is made up by industrial waste.

7. OVERVIEW OF MUNICIPALITIES' WASTE MANAGEMENT PRACTICE WITHOUT THE USE OF EXCLUSIVE RIGHTS

The use of exclusive rights in this field is a fairly recent development. In assessing the necessity of such arrangements under Article 36 and 42, the complainant considers it important to note that the vast majority of Norwegian municipalities undertake their waste management obligations in full compliance with all relevant requirements of environmental and public law without the use of exclusive rights.

Municipalities also organise collection and handling of waste, within the limits set by sector regulation concerning health and environment, through public tendering. Private companies carry out waste services in an efficient, healthy and environmentally friendly manner. Norsk Industri has collected a non exhaustive list of municipalities organising waste handling through public tendering, annexed at Annex 15.

This disproves any argument to the effect that the granting of exclusive rights is necessary to fulfil municipal obligations of seeing through that waste handling is carried out in a healthy and environmentally friendly manner, and complying with Norwegian environmental law.

Moreover, the handling of industrial waste is done in compliance with formal European tendering procedures and with great success in health, environment and efficiency.

8. LEGAL SUBMISSIONS – INFRINGEMENT OF EEA LAW

8.1 Introduction

As outlined above, it is clear that handling of household waste in Norway is a public service “monopolised” by the municipalities pursuant to Section 30 of the pollution control act, and financed through local taxation that may cover but not exceed the municipality’s cost of providing the service. On the other hand, handling of industrial waste is a commercial service for which any commercial undertaking or public entity needs to conclude agreements with and pay market prices to, undertakings offering such services in the market. Both services are economic activities to which the provisions on free movement of the EEA Agreement apply.

These findings are not controversial. The controversy relates to whether the municipalities may grant exclusive rights for the performance of their legal obligations, as described in the present complaint. The complainant’s principal view is that the granting of exclusive rights constitutes restrictions on the freedom of establishment and the freedom to provide services, which do not conform to the principle of proportionality. In the alternative, the complainant submits that even if the granting of an exclusive right should be considered to be proportionate as such, the obligation of transparency and non-discrimination nevertheless requires that the selection of the undertaking to which the exclusive right applies must be based on an adequate prior call for tenders.

8.2 The in-house exception from Directive 2004/18 is not applicable

As described above, the essential purpose for the Municipalities’ granting of exclusive rights is in part to avoid having to put waste management contracts on public tender, and in part to allow their own organization to take part in commercial activities, such as the collection and

handling of industrial waste, and the sale of residue products. In addition, a municipality may perform a more relaxed control over a body enjoying an exclusive right but still being governed by public law within the meaning of Article 1 (9) of Directive 2004/18, than what is required under case law on the in-house exception.

Thus, neither the municipalities, nor their legal advisers argue that the direct award of contracts is in line with this exception from Directive 2004/18 and the general principles of transparency and non-discrimination see Annex 3 (opinion by Haavind) at section 2.2, and Annex 9 (Avfall Norge Rapport 3/07) section 1. The same follows from the KOFA-decisions referred to above at Annexes 6, 7 and 8.

8.3 The granting of exclusive rights for management of household waste is a restriction on both the freedom to provide services and the freedom of establishment

The practice engaged by Norwegian municipalities create significant market disturbances, first in that the market for the core service – household waste management – is opened to commercial undertakings without competitive award procedure, and on contracts that last for very long terms. Second, the establishment of large undertakings financed through public taxation, will inevitably generate disturbances in the commercial markets where the undertaking is active, whether it be as a provider of waste management services to commercial undertakings, or as a vendor of waste products or by-products. Third, any private or commercial player who invests in such undertakings will enjoy benefits from the exclusive right that is unavailable to any of its competitors.

On this background it is not surprising that it does not seem to be a matter of controversy in Norwegian legal debate that the adoption of such local or regional exclusive rights are restrictions within the meaning of Articles 36 and 42 of the EEA Agreement, on the freedom to provide services in the territory in which the exclusive right is granted, and the freedom to establish such service providers in that territory. This is underlined inter alia in Section 2.2.2 of the guidance on public procurement published by the Ministry of Government Administration, Reform and Church Affairs (office translation)²:

“The exclusive right must be in compliance with the EEA Agreement.

The granting of an exclusive right is a restriction on the freedom to provide services, ref. Article 36 of the EEA Agreement. The exclusive right must thus be justified by mandatory requirements that take priority over free movement of services, ref. Articles 36-39 of the EEA Agreement, the prohibition against discrimination on grounds of nationality in Article 4, and the competition rules in Part IV of the Agreement, and in particular Article 59. However there must be a balancing of interests as to whether the non-economic interests have sufficient weight to be allowed to restrict the freedom to provide services. It is required that the granting of an exclusive right is necessary for attaining the relevant objectives and that the objectives could not be reached with other less restrictive means.

The European Court of Justice has recognized a series of objectives that may justify restrictions on the freedom to provide services. Examples are [...].”

² Published at: http://www.regjeringen.no/nb/dep/fad/dok/veiledninger_og_brosjyrer/2006/veiledertil-reglene-om-offentlige-anska.html

The same message is communicated to the Municipalities through the various legal analysis outlining the legal framework for the granting exclusive rights by municipalities, see inter alia Annex 3 (opinion by Haavind) section 4.1 and 4.5, and Annex 9 (Avfall Norge Rapport 03/07) section 3.

Still, Norsk Industri would like to underline that as restrictions on free movement, exclusive rights need to be justified on a case by case basis by mandatory requirements and each case must comply with the principle of proportionality. The importance of a rigorous enforcement of these principles is not set aside by the undeniable truth that household waste management is a service in the public interest, and that undertakings operating such services must be financed by the municipalities through local taxation. Similarly, the fact that EEA Law grants public authorities great discretion in organizing and financing such service provision does not in itself serve as justification for creating the market disturbances that the granting of exclusive rights do.

8.4 Exclusive rights are not necessary for the attainment of mandatory requirements

Introduction

Based on the above, the core legal question of this complaint is whether the granting of an exclusive right for waste management by Norwegian municipalities to public undertakings legally distinct from the municipalities controlling it, but which is free to operate commercial activities, may be justified by mandatory requirements, and whether the exclusive right is a proportionate means to attain such objectives.

Norsk Industri accepts that the environmental concerns that necessitate the performance of such services by the municipalities clearly qualify as mandatory requirements that may justify restrictions on both the freedom to provide services and the freedom of establishment. Thus, the exclusive rights may be considered to be motivated by a legitimate concern. The central point is, however, that the exclusive rights are unnecessary and disproportionate, since other less restrictive means – which are commonly used by Norwegian municipalities – lead to the same positive environmental effects without restricting interstate trade.

Less restrictive means are available

In the complainant's view, several less restrictive means of achieving the same health and environmental policy objectives are available to Norwegian municipalities; in full compliance with all relevant legislation and policy considerations in this area. The first solution – and obviously the one preferred by Norsk Industri's member companies – is for the municipalities individually or in conjunction with others to acquire the services in the private market. Another solution is for the municipalities to produce the services in-house, either within their own organization, or via public undertakings controlled by the municipality, but which carries out the essential part of its activities with the controlling municipalities. A third solution may be to establish inter-municipal cooperation such as in Case C-480/06 *Commission v Germany – Stadtreinigung Hamburg*. The two latter mechanisms may not be as economically efficient as the first, due to the apparent lack of competitive award procedures, but are nevertheless completely in line with EEA Law and do not create restrictions on interstate trade.

As outlined in section 7 above, other Norwegian municipalities' comply with their obligations to collect local waste under the pollution control act without granting exclusive rights, either through in-house service production, or through the acquisition of services in the market in compliance with laws and regulations on public procurement. Thus, the mere fact that a majority of Norwegian municipalities have chosen other solutions than the granting of exclusive rights – acting in full compliance with EEA Law – demonstrate that exclusive rights are not necessary within the meaning of article 36 and 42 of the EEA Agreement.

The legal opinions in favor of granting exclusive rights are too simplistic

In Norsk Industri's view the municipalities and the legal opinions supporting them, seem to conclude on the question of proportionality from the fact that the services in question are public services. Thus, the opinions – annexed hereto – draw the conclusion that since concerns relating to health and environment require that the services be performed by public authorities, the exclusive right is justified and necessary for attaining such objectives.

One example is the legal opinion produced by the law firm Haavind on behalf of Kommunenes Sentralforbund in Annex 3, section 4.5. This opinion presents the legal framework under EEA Law for granting exclusive rights on various sectors other than the waste sector, and presents a correct presentation of the proportionality principle (office translation):

*“The requirement that the granting of an exclusive right must comply with EEA Law implies that the exclusive right must be justified by:
Mandatory requirements that are sufficiently weighty to take preference over the right to free movement of services, and
That the granting of an exclusive right is necessary for attaining the relevant concerns, and that the objectives could not have been attained with less restrictive means.”*

However, throughout section 5 of the opinion, the conclusions are drawn that since the services being analyzed need to be provided by the public, the granting of exclusive rights for producing them are proportionate under EEA Law. Several policy documents are cited to demonstrate why the services in question are public services that for different reasons need to be organized and provided by the public sector and that the commercial markets for such services will not create sufficient supply or quality of service. Thus it is argued in sections 5.1 – 5.4 of Haavind's opinion that water supply, waste water treatment, and handling of sludge may justify the granting of exclusive rights.

Norsk Industri respectfully submits that this is an incorrect application of the necessity test, since there is no questioning in these opinions of whether alternative methods might serve the same purpose. It is thus of little surprise that the decisions of municipalities granting exclusive rights are rather silent on whether less restrictive means are available to the municipality. Both Haavind's opinion and other opinions with similar conclusions mainly refer to two judgments by the European Court of Justice regarding the use of exclusive rights; case C-360/96 Arnhem and case C-209/98 Sydhavnens Sten & Grus. Norsk Industry holds that these judgments have little relevance to the issue at hand.

The Arnhem case

First, the Arnhem-case is invoked *i.a.* in Annex 3 (opinion by Haavind) section 4.5, Annex 9 (Avfall Norge Rapport 03/07) section 3 and Annex 16 – an initial report by Avfall Norge, produced in 2006, at section 2.4.3, as basis for the conclusion that exclusive rights comply with EEA Law as long as the services in question are public services. The facts of the case relate to the granting of exclusive rights for *i.a.* household waste and industrial waste management by the Dutch municipalities Arnhem and Reden to ARA and Aracom, both public limited companies controlled by the municipalities via ARA Holding, in which the municipalities owned all the shares. The public service tasks entrusted to ARA Holding were split between the two subsidiaries, one of which – Aracom – did operate commercial services. The facts are thus similar to the situations described in this complaint. Nevertheless, the case does in Norsk Industri's view not relate to the conditions for granting of the exclusive rights.

The first issue raised in this case related to the definition of a contracting body governed by public law, and in particular the relationship between the terms 'needs in the general interest' and 'not having an industrial or commercial character' in Article 3 of Council Directive 92/50/EEC, which preceded paragraph 9 of Article 1 of the current Directive 2004/18. The court responded by stating that the provision distinguishes between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character. It continued by stating under the next question that the term 'needs in the general interest, not having an industrial or commercial character' does not exclude needs which are or can be satisfied by private undertakings as well. In reaching this conclusion, the Court clarifies at paragraph 52 that the removal and treatment of household waste is a need in the public or "general" interest, and that even if private undertakings might be offering such services to the households, local authorities may in the interest of public health and environmental protection decide to carry out the service themselves, or retain a decisive influence over the production of the service.

Further – citing case C-44/96 Mannesmann Anlagenbau Austria – the Court pointed out at paragraph 55-57, that a body governed by public law may have other commercial revenues the relative importance of which may even be greater than the revenues from the public service.

Thus, neither the questions put before the Court, nor the answers given by it, address the conditions under the EC treaty for granting the exclusive right in the first place. In Norsk Industri's opinion, great caution should be taken when reading this judgment in the context of granting exclusive rights for waste handling by Norwegian municipalities. Even though the facts of the case might be invoked to demonstrate that exclusive rights might be granted to undertakings which are governed by public law, but which still have commercial activities, the case does not provide any guidance on the conditions for granting exclusive rights to such undertakings and cannot be invoked as an authority for concluding that the exclusive rights conform with EEA Law.

The Sydhavnens case

In case C-209/98 regarding Sydhavnens Sten & Grus, the Court accepted that an exclusive right for a selected group of undertakings, to the exclusion of others, for the performance of a concession contract for processing building waste might be justified by the need to ensure a sufficiently large flow of such waste to those undertakings for the processing service to be profitable. Essential to the Court's reasoning is the finding that the system of exclusive rights – albeit restrictive of competition – is necessary for attaining the environmental objective, but still does not lead the selected undertakings to abuse the dominant position resulting from the exclusive right, see paragraphs 77-82.

The case demonstrates that the Court requires specific economic arguments in order to accept that the restrictions of competition are justified under Article 86 of the EC Treaty and Article 59 of the EEA Agreement. The assessment under Article 36 would be essentially the same. In the Sydhavnen-case, exclusivity could not be replaced by less restrictive means, while the situation is the opposite in our case; exclusivity is a recent development motivated by the municipalities' interest in awarding contract to predefined regional undertakings with commercial freedom and possibly less strict control than required under the in-house jurisprudence. As pointed out above, the alternatives to exclusivity are in common usage by the majority of Norwegian municipalities.

Again, similar to the Arnhem case, the facts of the Sydhavnens case provides another example of a case where an exclusive right has been accepted, but the case gives no authority for the exclusive rights dealt with in this complaint.

8.5 Should exclusive rights be considered necessary and proportionate, the selection of the undertaking nevertheless needs to comply with basic principles of EEA Law

Should the EFTA Surveillance Authority find that the granting of exclusive rights is a justified restriction on the freedom to provide services and the freedom of establishment, Norsk Industri would submit that the general principles of non-discrimination and transparency still would apply to the process of selecting the undertaking to which the exclusive right is to be granted. This is in line with the reasoning in case law regarding public service concessions (see inter alia case C-410/04 ANAV, and the recent case C-196/08 Acoset SpA), and based on the principles of transparency, equal treatment and non-discrimination. These arguments were presented in the context of exclusive rights in a report produced by the law firm Schjødt in 2008; see section 5.4.2 of Annex 17.

In an Opinion delivered on 19 December 2009 in joined cases C-203/08 Sporting Exchange and C-258/08 Ladbrokes, Advocate General Bot proposes that the granting of exclusive rights to carry on an economic activity should be subject to the principles of equal treatment and transparency in an equal manner as the granting of concession contracts. The cases relates to an exclusive licensing scheme for gaming services in the Netherlands, but the reasoning seems equally relevant to the issues raised in this complaint. First, the fact that exclusive rights are adopted by way of an administrative decision and not a contract or a concession does not reduce the negative effect of such a decision on the freedom of economic operators established in other EU or EFTA states to pursue economic activities in Norway (see paragraph 155 of the Advocate General's Opinion). And further, the risk of partiality seems to be even more imminent in this case, since the granting of exclusive rights

is motivated by the desire to avoid open tenders and limitations on the commercial freedom of the undertaking entrusted with the exclusive right.

An observation regarding the exclusive rights arrangements dealt with in this complaint is that the granting of exclusive rights are intended to give – and indeed do lead to – vast commercial advantages for local or regional incumbents in the waste management industry. In none of the cases of granting exclusive rights known to Norsk Industri, have the privileged undertakings been selected by way of an open and transparent procedure. Thus, the decisions to grant exclusive rights in favor of a public undertaking violate the principles of transparency, non-discrimination and equal treatment.

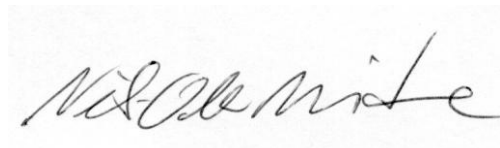
9. CONCLUDING REMARKS

Based on the above, Norsk Industri is of the opinion that Norwegian municipalities' practice of granting exclusive rights as a measure to carry out their responsibilities constitutes an infringement of EEA Law, and in particular Directive 2004/18 and Article 36 of the EEA Agreement. Norsk Industri respectfully submits that the EFTA Surveillance Authority open infringement proceedings against Norway in this matter.

The infringement of EEA Law consists first of the legal framework permitting Norwegian municipalities to adopt decisions granting exclusive rights for waste management services. The legal framework for the granting of exclusive rights, in particular Section 1-3 regulation 402/2006 on public procurement, explicitly states that decisions on the direct award of contract is only permitted if the exclusive right complies with EEA law. As demonstrated above, this provision does not preclude municipalities from adopting decisions on exclusive rights that in Norsk Industri's view violate the EEA Agreement. Thus by way of its application in Norwegian law, Section 1-3 (h) represents an infringement of the EEA Agreement. Second, the individual decisions by each municipality to grant such exclusive rights to a predefined undertaking violate Article 36 and 42 of the EEA Agreement, and thirdly, the subsequent direct award by the municipality of contract to that undertaking, violate Directive 2004/18.

Yours Sincerely,

On behalf of Norsk Industri



Nils-Ola Widme
Attorney at Law

ANNEXES

Annex 1 – Act on public procurement

Annex 2 – Regulation on public procurement

Annex 3 – Analysis by Advokatfirmaet Haavind Vislie AS (February 2008) on the granting of exclusive rights in the water and sewage sector

Annex 4 – Pollution control act

Annex 5 – List of undertakings granted exclusive rights, municipalities granting the exclusive rights and supporting case documents

Annex 6 – KOFA Decision 2008/7 Norsk Industri v Steinkjer kommune

Annex 7 – KOFA Decision 2008/8 Namdal Tankrens v Steinkjer kommune

Annex 8 – KOFA Decision 2008/77 Slagen Energigjenvinning v Risør og Tvedestrandregionens Avfallsselskap

Annex 9 – KOFA Decision 2008/76 Daimyo Rindi Energi AS v Hamar kommune

Annex 10 – Avfall Norge, Rapport 3/07 – Veileder om tildeling av enerett innen avfallssektoren, by advokat Hanne Torkelsen

Annex 11 – Innherred Renovasjon IKS – Annual report 2009

Annex 12 – BIR AS – Annual report 2009

Annex 13 – BIR Privat AS – pricelist

Annex 14 – HIAS IKS – Annual report 2009

Annex 15 – List of municipalities organising waste handling through public tendering

Annex 16 – Avfall Norge, Rapport 6/2006 – Juridisk betenkning (by advokat Hanne Torkelsen) vedrørende spørsmål knyttet til etablering av avfallsbehandlingsanlegg

Annex 17 – Legal analysis by Advokatfirma Schjødt on behalf of Norsk Industri, January 2008