



POLICY ROUNDTABLES

Waste Management Services

2013

Introduction

The OECD Competition Committee debated Waste Management Services in October 2013. This document includes an executive summary of that debate and the documents from the meeting: a background note, written submissions by Canada, the Czech Republic, Estonia, the European Union, Finland, France, Germany, Ireland, Italy, Japan, Latvia, Lithuania, Norway, Peru, Poland, Romania, the Russian Federation, the Slovak Republic, South Africa, Sweden, Chinese Taipei, Turkey, Ukraine, the United Kingdom, the United States, BIAC as well as an aide-memoire of the discussion.

Overview

Technological and policy changes have altered the economics of waste collection and treatment. Landfills are further away from cities and larger. More waste is diverted towards treatments that allow to re-use it, recycle it, or to recover energy from it. Secondary raw materials derived from recycled waste are being increasingly sought after, as primary raw materials are becoming scarcer and more expensive. Producers have been made responsible for the products they have put on the market at the post-consumer stage of the products' life.

All these changes are raising new competition issues, some relative to the conduct of firms operating in the markets for the management of waste, some raised by the ever-increasing amount of environmental legislation. This legislation is aimed at protecting the environment and the health of citizens, but may sometimes raise unnecessary barriers to competition and thus reduce the incentives towards efficiency.

This Roundtable examines recent developments in the management of municipal solid waste and discusses the experience of competition agencies in addressing the competition implications of these changes. Special attention is devoted to producer responsibility schemes, which have recently been introduced to full producers' responsibility over the waste they generate, and are already playing a major role in increasing the share of waste that is being recycled but also raising a number of competition concerns.

Related Topics

Horizontal Agreements in the Environmental Context (2010)
State Owned Enterprises and the Principle of Competitive Neutrality (2009)
Competition in Local Services: Competition in Bidding Markets (2006)
Solid Waste Management (1999)

Unclassified

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WASTE MANAGEMENT SERVICES

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Waste Management Services held by the Competition Committee (Working Party No. 2 on Competition and Regulation) in October 2013.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les services de gestion des déchets qui s'est tenue en octobre 2013 dans le cadre du Comité de la concurrence (Groupe de Travail N° 2 sur la concurrence et la réglementation).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat *

Considering the discussion at the roundtable, the delegates' submissions, as well as the panellist's presentation, several points emerge:

- (1) *Environmental objectives, taxonomy, and historical practices govern much of the law and regulation that applies to the waste sector, including the management of municipal solid waste ("MSW"). Although these regulations constrain the conduct of the firms operating in this sector, competition can nevertheless be relied upon to provide incentives for efficiency. Competition authorities' advocacy can help to ensure that laws and regulations achieve environmental goals in a least-anticompetitive way.*

Responsibility for the management of MSW is allocated among the municipality, the households and, where extended producer responsibility ("EPR") has been adopted for packaging waste, the producers, the importers and the retailers of the content of the packaging. EPR has given incentives to develop systems to collect or take-back the specified types of waste in order to reuse it or recycle it. Environmental preferences are often expressed as a "waste hierarchy:" The hierarchy states that not generating waste is most preferred, followed in order of decreasing preference by reuse, recycling, incineration for energy, and disposal.

The waste management sector is strictly regulated to achieve specific environmental objectives. These rules may have anticompetitive effects, and a recurring theme in the country submissions is the need for competition advocacy to ensure that this legislation is designed so as to allow for effective competition, which can help to achieve these environmental objectives at a lower cost.

The experience of competition law enforcement does not support any special treatment for the waste management sector. Several decisions have managed to balance the environmental and competition objectives. As in other areas where competition and regulation interface, the question is whether the competition restriction, e.g., the anticompetitive exclusivity agreement, is really necessary to the achievement of the environmental objective or whether this can be achieved in manner less harmful to competition.

- (2) *Collection of MSW is a natural monopoly under many, though not all, circumstances. Several empirical studies indicate that costs increase when more than one collector is used. Nevertheless, there are countries where there is competition in the market.*

Collection usually exhibits significant economies of population density and, therefore, is usually considered to be a local natural monopoly. This was also a finding of the 1999 OECD roundtable discussion on waste management¹. Several empirical studies indicate that costs increase when

* This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the roundtable, the delegates' written submissions, the panellist's paper and the Secretariat's background paper.

¹ See <http://www.oecd.org/daf/competition/sectors/1920304.pdf>.

more than one collector is used. Consequently, municipalities usually arrange for MSW to be collected from households by a provider that is granted the monopoly for this service, either the municipality itself (directly or as a municipal company) or a private company.

The collection of waste that requires special handling or waste produced in large quantities does not enjoy significant economies of density; hence it can be done by competing providers. In Sweden, for example, collection of recyclable fractions of MSW from multi-family apartment buildings is subject to competition among private firms, but collection from individual households is performed by the municipality.

Competition in the market for the collection of MSW from individual households is, or was, the norm in a handful of the jurisdictions studied. In Ireland and Poland, private firms vie or vied to collect from households in densely populated areas. In Finland where both competition in the market and competition for the market are used in different areas, studies have found that the price of MSW collection was one- to two-fifths lower in areas where competitive tendering rather than side-by-side competition is used.

A switch from side-by-side to for-the-market competition incurs costs. Private companies may sue to block changes that reduce the value of their sunk investments and municipalities may be unprepared to design effective competitive tenders for MSW collection.

- (3) *The benefits of competition for the short-term legal monopoly to supply collection and disposal services can be harmed by poor design of the tender. Two particular concerns are competitive non-neutrality and not taking into account the essentiality of disposal services for collectors.*

Where MSW collection is a legal monopoly, the supplier may be chosen by fiat or by a competitive process. Where the monopolist is chosen by competitive tender, a number of conditions should be met for the process to lead to the selection of an efficient supplier. Effective competitive tendering requires, as a minimum, no substantial relationship-specific investments, good information about costs available to outside bidders, and no preferential treatment for any bidder.

Non-discriminatory access to disposal facilities is essential for collectors to be able to offer their services. Where collection and disposal are subject to competition, then “collection-only” firms can be subject to raising rivals cost type strategies by vertically integrated collection-and-disposal firms, which exploits their control over the disposal facilities. Some municipalities respond to this by holding separate tenders for collection and for disposal services, or by owning the disposal facility themselves and tendering only for collection services, while specifying disposal in the designated facility. Others tender for an integrated collection-to-disposal service.

The absence of competitive neutrality limits the effectiveness of competitive tendering. Competitive non-neutrality can arise when a publicly owned company bids in competition with private companies. A publicly-owned company can offer below-cost prices because it has a lower cost of capital, as it cannot be declared bankrupt, and because it can cover any revenue shortfall from general tax funds. These advantages can discourage equally efficient private companies from bidding.

Other factors are also important in the design of the tenders. For example, the duration of collection contracts should be based on the length of time required to recover sunk costs. If duration is too short then the sunk costs must be recovered more quickly, resulting in higher prices. If duration is too long, then some of the benefits of competition, e.g., dynamic efficiency, are lost and entrants’ attainment of minimum efficient scale is delayed, since fewer contracts are tendered during a given period.

- (4) *Markets for collection and disposal tend to be geographically small. Nevertheless restrictions on disposal can harm competition among disposal options.*

Relatively high transport costs limit the distance over which MSW, once collected, is carried. Further, markets for disposal have high barriers to entry. This means that there is potential for local market power in the provision of disposal services.

Restrictions specifying in which facilities a municipality's MSW must be disposed and prohibitions on the acceptance of waste originating from outside the local area strengthen market power in disposal markets. Many countries have adopted regional waste management plans that specify where MSW must be disposed, or have drawn internal borders over which MSW must not be transported. By contrast, competition can be stimulated by not designating a disposal facility, so that the facilities may compete for a municipality's or a collecting company's custom. Alternatively, municipalities may hold competitive tenders for disposal among several of the nearer facilities. The balance between the "proximity principle" and the welfare gains from a reduction in market power should be examined to ensure overall efficiency.²

- (5) *Excess entry into incineration can divert recyclable waste from a higher rank on the waste hierarchy and can cause plants to operate below capacity, thus raising the cost of incineration. Entry into incineration depends in part on public subsidies. State aid decisions should take better account of conditions in relevant markets, as well as in related markets, such as those for alternative management of waste, to ensure overall efficiency.*

In some jurisdictions, the capacity of incineration exceeds the flow of MSW. This increases the incentives to incinerate recyclables with a high calorific value. The decision whether to build incineration capacity depends, among other factors, on the expected flow of revenues, on the costs of inputs, and on the fixed costs of building up incinerators. The latter costs can be reduced by the provision of public subsidy. This can lead to excess entry, which in turn can result in prices that do not cover costs, and in prices that divert inputs from other uses, such as recycling.

- (6) *The great variety of local solutions to MSW management as well as differences among competition authorities' treatment of particular conduct in this sector make it difficult for companies to formulate strategies that comply across the large number of jurisdictions where they are active.*

In much of the OECD area, municipalities are free to organize the management of MSW within a legal framework. The variety of solutions used creates a complex legal environment for private companies providing MSW services across municipalities and countries. Municipalities should clearly communicate their regulatory regimes.

Competition law and practice has established answers to many of the issues raised, such as when competitors may agree to pass on a recycling fee to consumers or when firms may appoint an exclusive collector/recycler. Competition authorities may allow firms to better understand the rules and comply with them through further bilateral communications with their respective waste management business communities (e.g. via specific guidelines).

² Hence movements of waste should be allowed assuming that all competing waste treatment facilities operate in an environmentally sound manner according to national laws, regulations and practices to which the facilities are subject.

- (7) *The conduct of extended producer responsibility schemes ("PRS") affects competition in markets for the services they buy, such as collection and treatment, and in markets for certain waste materials, as well as competition among PRSs themselves. Competitive tendering, limits on exclusivity agreements, and limits on tying and bundling are often imposed to reduce the harm to competition.*

The PRSs were created in response to the adoption of EPR. Cartons, cans, bottles and newspapers are examples of waste that is generated by households and often subject to EPR. A PRS must collect or take-back the relevant waste, sort it, and treat it so as to transform it into secondary raw materials or recover it. Some secondary raw materials have a market value; for example, waste glass is used to produce container glass at lower cost than virgin raw materials.

Evidence suggests that the PRSs have been successful in building markets for secondary raw materials and in promoting innovation in the processes that transform waste into secondary raw materials and residual waste, such as sorting. These changes have enabled the achievement of what were initially regarded as challenging recycling quotas.

Historically, many PRSs began as monopolies—although producers may usually also fulfil their obligations individually—but over time some PRS markets have been opened to competition. PRSs may be relatively dis-integrated into the three complementary activities, collection, sorting, and treatment/recovery, with competitive tendering determining the provider of the different services in different regions. The use of competitive tendering can greatly increase efficiency even of a monopoly PRS: While still a monopoly, the German waste packaging PRS introduced competitive tendering for collection of waste packaging in Germany. This reduced its costs by about 30% over the period 2003-2005.

PRSs are often monopolies or in dominant positions. Hence, the terms of their contracts with service providers may harm competition. These can include anticompetitive bundling, excessive contract duration, excessive charges and exclusivity terms that prohibit the provider from dealing with other PRSs. Indeed, access to the network of collection agreements has been a repeated concern in competition cases in various jurisdictions, based on the idea that the network of local collecting monopolies is an essential facility for competing in the PRS market or in downstream markets. PRSs' rules on the allocation of the recovered material, e.g., sorted glass and lead batteries, may harm competition in the downstream product market through their effects on production costs.

Opening the PRS markets to competition has led in some instances to large efficiencies. The market for waste packaging PRSs in Germany transformed from a monopoly to a market with ten competitors, although the ex-monopolist had a market share of 44% as of 2011. Annual recycling costs have fallen from €2 billion to €1 billion, which represents annual savings of €50 for a family of four. There has been innovation in sorting, which, in turn, has increased the market value of the secondary raw materials. The recycling quota did not decline with the introduction of competition.

BACKGROUND NOTE

By the Secretariat

1. Introduction

As social and legal norms have evolved over the years a number of markets for handling solid waste have been established. This paper focuses on solid waste from households, which is usually referred to as municipal solid waste (“MSW”).¹ Households generate a variety of waste that is collected and sorted into different streams to be variously reused, recycled, recovered, incinerated as fuel or buried in a landfill.² The desire to reduce the nuisance, health and environmental consequences of waste gives rise to laws and regulations that restrict the conduct of households as well as businesses in the waste management sector.

The legal framework designs the space where competition might operate in the waste management sector. Landfill-hosting municipalities may restrict access to waste that originates outside their boundaries. Municipalities may also require that locally-arising waste be taken to the local waste facility. International trade rules empower countries to restrict the export or import of various kinds of waste, including MSW. Legislation may apply command-and-control regulation by specifying the shares of various types of waste that must be recycled or it may prohibit new landfill or incinerator capacity, thus blocking entry. Other laws shift incentives in order to shift behaviour, such as those that raise or lower landfill taxes and gate fees³ at landfills, or feed-in tariffs for electricity or heat generated from waste. Command-and-control regulation in one market may be used to shift incentives in another, for example the regulations that specify the share of products that must use recycled materials increase the price of secondary raw materials and provide greater economic incentives for recycling. In other words, the legal framework constrains the geographic and product dimensions of markets, as well as the price levels of some inputs and outputs.

The “waste hierarchy” guides waste policy in many countries. It ranks options for handing waste, from the most to least preferred option as:

1. prevention, i.e., not to generate it;
2. prepare for re-use;

¹ Different jurisdictions use different terminology and definitions. Statistics and markets often combine waste collected from households and commercial establishments. For example, the EU’s Landfill Directive defines municipal solid waste as, “waste from households, as well as other waste which, because of its nature or composition, is similar to waste from households.” This paper does not address the disposal of vehicles nor of industrial or construction waste.

² When the legal disposal of waste becomes too costly or too burdensome, households can also dispose of the waste illegally, for example they can shove it off the back of a truck on a dark night on a lonely stretch of road. This risk is not trivial and it restricts feasible collection charges. In Ireland, an estimated 19% of households, rising to 54% of rural households, did not use a household waste collection service in 2009. (Gorecki and Lyons, 2011, citing Ireland Environmental Protection Agency 2011, p. 26.)

³ A landfill tax (incineration tax) is imposed by a public authority for disposal at a landfill (incinerator). A gate fee or “tipping fee” is imposed by a landfill (or incinerator) operator for disposal. Users pay the sum of tax and fee.

3. recycling;
4. other recovery, e.g., energy recovery; and
5. disposal.⁴

The outcome oriented approach of the waste hierarchy can be difficult to relate to the decentralized, market-oriented approach of competition policy.⁵ Hence, the hierarchy itself, but not the regulation it engenders, is not further discussed here.

The quantity of MSW has been increasing with population and living standards but there are also national differences. In the US, for example, per capita daily generation of MSW was about 2 kilograms in 2011 versus 1.7 kg in 1980 and 1.2 kg in 1960.⁶ Figures for EU countries are lower, with 1.4 kg per capita generated daily in 2010.⁷

MSW is also increasingly being recycled or incinerated in developed countries. For example, in 27 EU Member states the share of municipal waste that is recycled increased from 11% to 24% between 1995 and 2009, while over the same period the share sent to landfills declined from 68% to 38%. The averages hide significant variations, e.g., country-by-country rates of landfilling of MSW range from less than 5% to 100%.⁸ For the US, in 1960 only 6% of all MSW was recovered (roughly, recycled plus net exports) but in 2010 this figure had grown to 34%.⁹

International trade in MSW, as well as trade in hazardous waste, is to be reported to the Secretariat of the Basel Convention. Acknowledging their incompleteness and their age – they date from 2004-06 - the available data show that eight of the top ten importers, and all ten of the largest exporters of all types of waste reported by the secretariat, were OECD members.¹⁰ These countries represented about 80% and nearly 70% of the totals reported. MSW and its residuals after incineration constituted 10% of the total export. Anyway “the vast majority of hazardous and other waste is still treated within the country of origin.”¹¹ The clearly incomplete figures reported for the household waste generated annually range between 176 and 138 million tonnes in the three years, while the average amount of household waste exported annually is about 1 million.¹²

⁴ This hierarchy is from EU Directive 2008/98/EC, the Waste Framework Directive, Article 4. The United Nations’ version is broader, with the first two elements common with the EU’s first three, plus 3) promoting environmentally sound waste disposal and treatment; 4) extending waste service coverage. (UNEP n.d.)

⁵ It is difficult but not impossible. Gorecki et al. (2010) point out that the waste hierarchy may be consistent with the economic approach, if the price of each treatment option reflected its net cost and the price of the less preferred option was higher than that of the more preferred option, at each step. But there is no guarantee that would be the case. (p. 8) Imposing an additional requirement, that prices be the outcome of markets rather than administration, does not make the hierarchy’s quantitative outcome more likely.

⁶ US Environmental Protection Agency (2013), table 4.

⁷ Eurostat (2012).

⁸ Blumenthal (2011).

⁹ US EPA (2011).

¹⁰ The top importers are: Germany, Italy, Belgium, France, USA, Netherlands, Mexico, Canada (OECD members) and. Belarus and Malaysia (non OECD members). The top ten exporters are Netherlands, Germany, Italy, USA, Belgium, Switzerland, France, Austria, Canada, and Ireland (all OECD members).

¹¹ Secretariat of the Basel Convention (2010), p. 4.

¹² Secretariat of the Basel Convention (2010), Tables 8, 9, 10 and 15.

Competition issues have arisen and may arise throughout the MSW sector. The cost structure of collection and disposal leads to high market concentration. If there is competition to win the contract to collect MSW in a locality, it can be subverted by inadequate access to facilities such as a transfer station or landfill, or by unequal conditions of competition between public and private bidders, or by bid-rigging. Competition in markets for incineration services, landfills or waste transfer stations may be restricted by regulation based on the waste's geographic origin. Mergers may restrict competition in markets with high entry barriers. Schemes that collect, sort and recover recyclables into secondary raw materials, such as those for waste packaging, may enter into contracts that exclude rivals from markets or may price in a way that excludes rivals.

1.1 Earlier discussions on waste management by OECD Competition Committee

The OECD Competition Committee has discussed waste management on at least two previous occasions. Solid waste management was examined in 1999 during a roundtable on the provision of incentives on local government for efficient provision of local public services.¹³ The main findings that emerged from that discussion were:

- Waste collection and waste treatment are two distinct activities. Economies of density determine whether competition may take place in the market. Few countries rely on in-the-market competition for collection of household waste, whereas in-the-market competition is possible and common for industrial and commercial waste collection.
- Waste collection can be efficiently provided through for-the-market competition. However, the efficiency results depend on the characteristics of the competitive tendering procedure, of the contract and of its enforcement.
- Unit-based charging for waste for disposal enhances demand for recycling and discourages waste production; on the other hand, charging for waste collection provides greater incentives to illegally dump waste.

Industry joint ventures in waste management and recycling services comprised one part of an examination of horizontal agreements in the environmental context undertaken by the Competition Committee in 2010.¹⁴ The discussion highlighted that competition authorities have intervened against provisions in the agreements that form the basis for producer responsibility schemes¹⁵. In particular, they have intervened against those provisions that limit independent collection and recycling services, quotas allocating recycled products according to historical market share, and those that limited dealing with third parties which were seen as preventing the development of rival waste management and recycling schemes. Authorities have also prohibited and allowed, in different circumstances, agreements to pass on recycling fees to consumers. A key finding was that interventions to remove anticompetitive constraints in these schemes' agreements did not undermine the achievement of the environmental goals but, on the contrary, led to better functioning markets that increased incentives for efficiency. It was also concluded that, while there may be a case for a monopoly collection and recycling scheme at the outset, the arguments for a

¹³ OECD (2000).

¹⁴ OECD (2010).

¹⁵ As it will be explained in greater detail below (section 4) producers are increasingly considered responsible for the products it has placed on the market even at the post-consumer stage of the products' life¹⁵. They can fulfil this obligation individually, or by participating in a producer responsibility scheme along with other responsible parties, or by buying the service from third parties.

single system should be reviewed critically and, once underway, restrictions that prevent new entry should be phased out as soon as possible.

The current paper builds on the earlier two. Technological and political change in the past 14 years have altered the economics of waste collection and landfilling. Landfills are more distant and larger. More waste is diverted away from landfills and towards treatments that allow to re-use it and recycle it, as well as to recover energy from it. New structures, the producer responsibility schemes, now play a large role in the waste management sector.

The remainder of the paper is organized as follows. Section 1.2 briefly describes the physical processes waste undergoes after leaving the bin. Section 1.3 provides an overview of the international trade rules for MSW. The subsequent sections concern competition issues in, respectively, collection, (Section 2); waste transfer stations, landfills and incinerators (Section 3); and schemes to fulfil extended producer responsibility as well as markets related to such schemes (Section 4). The final section concludes.

1.2 Beyond the bin: physical processes

Waste is a substance that the holder discards or is required to discard. Once there is demand for it, it ceases to be waste.¹⁶ Thus, waste by definition has no or negative market value. In addition, waste often imposes costs on others, i.e., has negative externalities. Since waste is unwanted and population size and density means free disposal is no longer available, there is demand for services to remove it and transform it into not-waste.

After waste is placed by a household into one or more bins at the kerb, it is collected in specialized trucks and usually transported to a transfer station where it is unloaded.¹⁷ At the transfer station, the waste is often screened to separate out recyclable materials (“recyclables”), compostable materials, and hazardous or otherwise inappropriate waste. Recyclables include materials such as aluminum and steel cans, paper and cardboard, glass and other packaging. The various waste fractions are then compacted at the transfer station, loaded onto larger vehicles, railcars or barges and dispatched. Possible destinations include composting facilities, materials recovery facilities where the various recyclables are separated out and prepared for re-use or recycling, incinerators for energy recovery, and landfills.

In OECD countries this pattern has largely replaced the old pattern for handling household waste. No longer does the municipal garbage truck carry off the load, unsorted, to the town dump. Old, nearby landfills have closed because they are filled, or because there is less tolerance for locating landfills near human habitations or because stricter regulations make larger landfills serving a larger region more economic. The greater distance between collection points and landfill has prompted the use of waste transfer stations, which lowers the cost of transport over longer distances, both by removing material into recycling streams and by compacting the residual.¹⁸

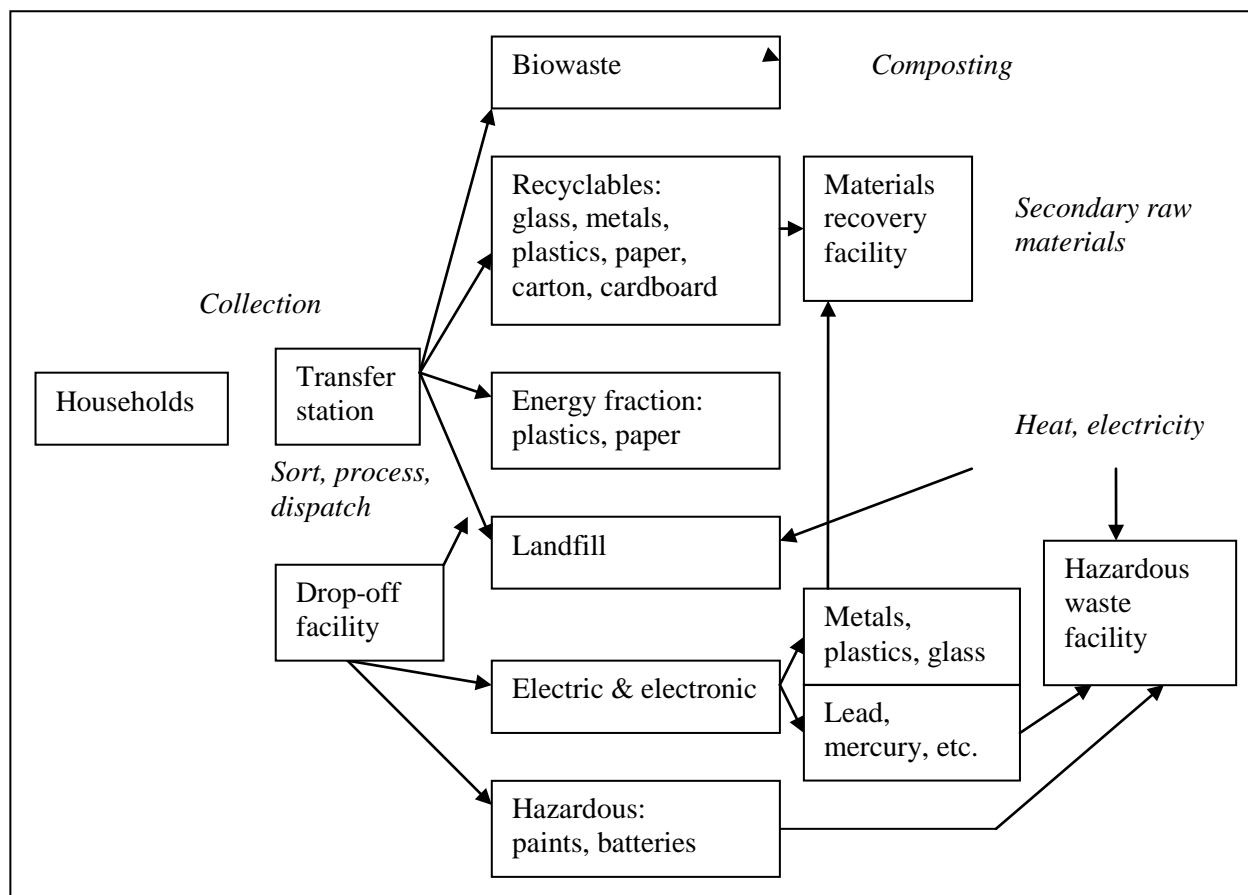
Figure 1 below summarizes the flow.

¹⁶ The definition is approximately that of EU Directive 2008/98/EC Articles 3.1 and 6.1.

¹⁷ Rather than kerbside collection, recyclables may be dropped-off by householders at nearby containers, from which they are collected. Or the transfer station may offer such facilities. In some areas, there may be no kerbside service at all and householders must arrange the transport of all their waste.

¹⁸ US EPA (2002).

Figure 1. Flow of MSW from households to secondary raw materials or disposal



Collection is the most expensive phase. Estimates range from 40% to 80% of the total cost. Even at the lower end of the range, an increase in the efficiency of collection would have a large effect on waste handling efficiency as a whole.

The details of collection have implications for the following stages. The separation of waste at source can yield higher quality secondary raw materials that command higher prices. Such separation reduces the chance of mixing different types of material which enables the sorting machines to work more effectively, reduces the mass that must be sorted to attain a given level of sorting, and results in more homogeneous secondary raw materials. In addition, mixing, for example, glass among plastics can increase wear and tear on the machines.

The introduction of extended producer responsibility for packaging waste has prompted the development of systems that support producers in fulfilling this obligation. In these systems, exemplified by the German “Green Dot” scheme, waste packaging is placed by households into a distinct bin, collected separately (albeit perhaps only a separate storage chamber within a common collection truck), and follows a separate stream through processing to be transformed into secondary raw materials. The same type of system has been adopted for other types of waste, notably for waste electrical and electronic equipment but also for car tyres, cars, batteries and accumulators.

Waste that cannot be recycled and re-used is often sent to incinerators, which yield heat for district heating, industrial processes, and electricity generation. Landfills are used less extensively.¹⁹

Having now described the main physical processes from kerbside to secondary raw materials or fuel or permanent disposal, the next section provides an overview of the relevant international trade rules. Subnational rules are touched upon in the section on collection and landfills.

1.3 International trade rules for MSW

A large number of countries have found that the liberalization of international trade in goods and services and competition policy play complementary roles in promoting economic efficiency, development and growth.²⁰ More recently, an OECD Council Recommendation on the Environmentally Sound Management of Waste²¹ pointed out the potential for trade restrictions to distort competition in markets where secondary raw materials compete with primary raw materials.^{22,23} In an analogous way, international trade rules may distort competition in markets for waste handling services and for waste destined for incineration.

The movement of waste across international borders is restricted by international treaty and agreement. Although the primary purpose of the international trade regime is to prevent hazardous waste from being dumped in countries unprepared to handle it in an environmentally appropriate way, the regime also restricts trade in MSW and the residue after MSW has been incinerated. Nevertheless, trade may occur among OECD countries. Indeed, EU countries do trade in waste. Some of this trade involves the movement of waste to specialized recovery facilities because not all countries have a complete portfolio of these facilities. Other intra-EU trade involves combustible fractions of MSW destined for incineration. By contrast, trade in MSW destined for disposal in landfills is largely blocked.

MSW is subject to specific international trade rules. World Trade Organization (“WTO”) rules allow members to impose restrictions on trade to protect the environment, if they meet certain standards. Both the Basel Convention and the 1990 OECD Council Decision-Recommendation discourage transborder movement of MSW and of hazardous waste. In addition to these international rules, EU countries are

¹⁹ Article 11 of the EU Waste Framework Directive 2008/98/EC specifies that Member States should establish separate collection from households of at least paper, metal, plastic and glass by 2020.

²⁰ WTO (1998).

²¹ OECD Recommendation of the Council on the Environmentally Sound Management of Waste [C\(2004\)100](#).

²² Trade in services that reduce the magnitude of waste’s negative value has the same efficiency effects as for other positively valued goods or services. However, if waste’s negative externalities are not properly internalized then trade in waste reduces the welfare of some persons. For example, if a waste importer does not ensure that no nearby resident suffers losses in environmental quality, then the trade harms those residents. “Host fees,” discussed below in reference to domestic trade, are one means of compensating for the cost of hosting a waste facility. If the recipients or beneficiaries of the host fee are not identical to those that suffer the negative externalities, then the trade harms them.

²³ Trade in services that reduce the magnitude of waste’s negative value has the same efficiency effects as for other positively valued goods or services. However, if waste’s negative externalities are not properly internalized then trade in waste reduces the welfare of some persons. For example, if a waste importer does not ensure that no nearby resident suffers environmental degradation, then the trade harms those residents. “Host fees,” discussed below in reference to domestic trade, are one means of compensating for the cost of hosting a waste facility. If the recipients or beneficiaries of the host fee are not identical to the persons who suffer the negative externalities, then the trade harms those persons.

subject to EU acts that also discourage transborder movement of waste, but which allow for trade in waste that will be incinerated in energy efficient facilities and for trade in materials recovered that are, by virtue of processing, no longer waste.²⁴ These legal instruments are briefly described below.

Article XX of the General Agreement on Tariffs and Trade (also known as GATT) contains the relevant WTO rules on trade restrictions to protect the environment. Box 1 contains some excerpts.

Box 1. GATT Article XX

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...

“(b) necessary to protect human, animal or plant life or health;...

“(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. ...”

A three part test has been developed for Article XX (b).²⁵ According to this test, a policy must:

- be designed to have the health policy objective,
- be necessary to achieve that objective, and
- meet the requirements of the chapeau of Article XX.

WTO jurisprudence and decisions have clarified how three key phrases in Article XX (g) should be interpreted. Two are relevant here. “Relating to” has been interpreted as “primarily aimed at”, while “measures made effective in” has been interpreted as a “requirement of even-handedness in the imposition of restrictions.”

Two other parts of the WTO regime could also be relevant to trade in MSW. The Agreement on Technical Barriers to Trade may apply to the establishment of standards for secondary raw materials.²⁶ It encourages but does not oblige to harmonize national standards with international standards, and it does not prevent to establish stricter national standards. The Agreement on Subsidies and Countervailing Measures concerns, *inter alia*, subsidies that are specific or that are contingent on the use of domestic over imported goods and that adversely affect the interests of another member. Whether a subsidy is specific in fact depends on the practical application, for example, if it were limited by the inherent characteristics of the good. The question of whether subsidies to, say, an incinerator that displaces or impedes a foreign incinerator’s access to waste, would be prohibited has apparently not been addressed.

²⁴ Although not discussed here, there is jurisprudence on when waste is no longer waste and how to distinguish waste from used products, and recovery from disposal. The distinctions affect which trade rules apply.

²⁵ Legal Affairs Division, WTO (2012), paragraphs 888 *et seq.*

²⁶ Low, *et al.* (2011). Although the paper addressed the assessment of measures against greenhouse gases, there is no reason to expect the legal principles would be different for other environmental measures.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (“Basel Convention”), despite its name, applies to MSW²⁷ and its downstream products destined for recycling, recovery and re-use.²⁸ The Basel Convention provides *inter alia* that states should reduce to the minimum the transboundary movement of hazardous or other wastes (a term that includes MSW) consistent with the environmentally sound and efficient management of such wastes²⁹ Parties have the right to refuse to import hazardous or other wastes for disposal.³⁰ Parties must block export to countries that have notified that they refuse to import waste, as well as exports to south of 60 degrees south latitude. The Basel Convention has a procedure to notify and object to transboundary waste movement.³¹

OECD Decision-Recommendation on the Reduction of Transfrontier Movements of Wastes applies to all waste covered by the Basel Convention, which includes MSW.³² OECD members should, consistent with environmentally sound and efficient management practices, dispose of the waste they generate in their own territories and reduce transfrontier movements to the minimum.

Two EU acts complement these more global rules with respect to trade in waste within the EU and generally guide the waste management conduct of Member States. The 2006 Regulation on shipments of waste³³ and the 2008 “Waste Framework Directive”³⁴ establish the legal framework. Among other things, they impose the obligation to handle waste in a way that harms neither the environment nor human health, encourage the use of the “waste hierarchy,” and require the costs of disposing of waste to be borne by the holder of waste, previous holders or by the producers of the product from which the waste was transformed.³⁵ Member States must establish a network of waste disposal installations and of installations

²⁷ The Convention lists in Annex I categories of waste, in Annex II wastes requiring special consideration, and in Annex III characteristics. The Annex II wastes are “waste collected from households” and “Residues arising from the incineration of household wastes.” The Convention controls the transboundary movement of waste which (1) belongs in Annex I and Annex III, or (2) is defined as hazardous by the domestic legislation of the exporting, importing or transit Party, or (3) belongs in Annex II. (Secretariat of the Basel Convention, “Manual for Implementation.”)

²⁸ Secretariat of the Basel Convention (2012).

²⁹ Article 4.2(d).

³⁰ Article 4.1(a).

³¹ The procedure for the transboundary movement of waste under the Basel Convention is as follows. Each State has a competent authority. The competent authority is the governmental authority responsible for receiving and responding to notifications of transboundary movements. The generator or exporter in the exporting state notifies, through the competent authority in the exporting State, the competent authorities of any State concerned in the proposed transboundary movement. Export, transit and import States are concerned. The same form is used for Basel Convention, OECD Decision, and European Community Regulation. A competent authority may object to the transboundary movement. Competent authorities may object to transboundary movements. The exporters and importers are waste generators, or owners of disposal or recovery facilities, or recognized traders and brokers. Waste carriers, traders and brokers must be registered, and any person who arranges or facilitates the shipment of waste must use only registered traders and brokers.

³² OECD Decision-Recommendation of the Council on the Reduction of Transfrontier Movements of Wastes [[C\(90\)178/FINAL](#)].

³³ Regulation on shipments of waste No. 1013/2006 of 14 June 2006 (OJ L 190, 12.7.2006 p. 1).

³⁴ Directive 2008/98/EC of 19 November 2008 (OJ L 312/3-30 22.11.2008).

³⁵ The “producer pays” principle refers to the generator or holder of the waste paying the costs of avoiding or alleviating adverse consequences of waste on the environment. An “extended polluter pays” principle imposes obligations on the original producer of the product which, over its lifetime has been transformed into waste, as well.

for the recovery of mixed municipal waste (approximately MSW) collected from private households. Waste is to be disposed of or recovered in one of the nearest appropriate installations. Waste shipments must be pre-notified, and either the dispatching or destination State may object to the shipment of mixed municipal waste. Member States may limit incoming waste shipments if it has been established that such shipments would force deviation from waste management plans, and to limit outgoing shipments of waste on environmental grounds.

There are, however, limits to the restrictions that may be imposed on trade within Member States. A European Court of Justice (“ECJ”) preliminary ruling in 1996 in *Dusseldorp*³⁶ found that an exclusive right to recover certain waste combined with a prohibition to export the waste favored the national undertaking and strengthened its dominant position. But in 2000 the ECJ found that a legal monopoly does not necessarily violate competition law, if it is the least restrictive way to achieve a mission of general economic interest.³⁷

Changes between the EU rules set out in the 2006 Regulation and in the 2008 Directive promoted the development of a market for waste for incineration in energy efficient facilities. This illustrates the degree to which the nature, and indeed the existence, of competition in the waste management sector depends on regulation. The 2006 Regulation specifies that Member States should prohibit generally or partially, or object systematically to waste shipments for disposal, and its definition of disposal includes incineration of MSW. The 2008 Directive defines as “recovery”, and no longer as disposal, the incineration in plants meeting a given standard of energy efficiency. It thus allows trade in waste for incineration in energy efficient plants.³⁸

Transboundary shipments of waste of all types within Europe were studied in a report by the European Topic Centre on Sustainable Consumption and Production.³⁹ The report’s brief literature review identifies possible reasons for waste being traded rather than treated domestically.⁴⁰ Among these reasons it lists; differences in environmental regulation, differences in market prices (such as gate fees), and differences in technology or capacity. The report also identifies factors that increase trade in waste within Europe, among which it lists differences in:

³⁶ Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV and others*, judgment of the ECJ of June 25 1998, ECR [1998] I-4075.

³⁷ A state-granted exclusive right to receive building waste was, in the circumstances, the least restrictive means to achieve a mission of general economic interest, that is, expansion in order to have sufficient capacity to recycle building waste. Case C-209/98, *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune*, judgment of the ECJ of 23 May 2000, ECR [2000] I-3743.

³⁸ One provision in the 2006 regulation defined mixed municipal waste (MMW, approximately MSW) shipments for disposal or recovery as shipments for disposal (Article 3, paragraph 5). Another provision defined a basis for refusal of a shipment of waste for disposal as the waste being MMW (Article 11, 1 (i)). Recital 20 of the Directive states that, “This Directive should also clarify when the incineration of MSW is energy-efficient and may be considered a recovery operation.” This was carried out by listing incineration of municipal waste in facilities meeting a specified level of energy efficiency in the list of “Recovery operations.”

³⁹ ETC/SCP (2012).

⁴⁰ The review also noted that the general literature is highly biased towards East Asian case studies. The characteristics that incentivise waste trade may differ between the sets of countries. For example, EU waste-related acts apply only to EU countries.

- gate fees and taxes;
- transport costs;
- treatment capacity and the specific treatments available;
- incentives for recycling or recovery, e.g., incentives on recovering energy from waste;
- stringency of classification of material.

Tariff and non-tariff border restrictions may impede trade. Anecdotal evidence supports these lists of factors. For example Denmark prohibits the shipment of waste destined for disposal into the country, unless the dispatching country has no suitable disposal options and the quantity of waste is too small for the establishment of a new, specialised disposal facility in that country to be economic.⁴¹ In the Netherlands, trade—import or export—in waste for landfill is prohibited, but trade in non-hazardous waste for incineration was liberalised in 2007.⁴² Since then the import of waste for incineration into the Netherlands has increased rapidly.⁴³ In Italy excess supply of compacted MSW is exported from some regions to other member states since access to landfill or incineration capacity in other Italian regions is refused on the basis of the “proximity principle” contained in the Waste Framework Directive.⁴⁴⁵

In summary, international rules generally discourage trade in waste, including MSW. They provide that waste shipments must be pre-notified and may be refused by the dispatching or destination country. Nevertheless, material that is derived from waste may be re-classified and not be subject to these rules, and waste that is destined to be incinerated for energy recovery may become subject to a somewhat liberalized trade regime. Consequently, international trade has developed in secondary raw materials as well as in waste destined for incineration.

2. Waste collection

In general municipalities are usually responsible for residential waste collection and they typically choose between performing the service themselves, perhaps jointly with other municipalities, and contracting with either a private or a public provider. Less frequently, individual households arrange individual contracts with collection providers who compete against each other. Where municipalities purchase these services through competitive tenders, possible competition issues include cartelization and competitive neutrality between public and private providers, as well as merger-induced restrictions on the pool of potential bidders. “Flow controls,” i.e., laws, regulations or contracts that restrict where the collected waste may be taken, or other barriers to accessing waste transfer stations, landfills or incinerators can distort competition as well by limiting the pool of potential bidders.

⁴¹ Danish Ministry of the Environment (2010).

⁴² Netherlands Ministry for Housing, Spatial Planning and the Environment (2008), pp. 11, 13, 14.

⁴³ ETC/SCP (2012).

⁴⁴ Idem. (2012).

⁴⁵ The “proximity principle” refers to a concept in the Waste Framework Directive according to which the network of waste disposal and recovery facilities “shall enable waste to be disposed of or...recovered in one of the nearest appropriate installations...” (Article 16, para. 3)

2.1 Collection markets as natural monopolies

Several studies have addressed the question of whether MSW collection markets are natural monopolies and therefore if it is economically more efficient to have just one provider. These studies have found that the existence of large economies of density justifies concluding that these markets are natural monopolies and, hence, that having a single provider is more efficient.

According to the empirical literature reviewed in OECD (2000) and in Irish Competition Authority (2006) if multiple providers are used for the collection of waste from households and small commercial establishments the unexploited economies of population density lead to significantly higher costs – estimates range between 26 to 48% –⁴⁶ Instead collection from large waste producers or collection of waste that needs timely or unusual handling, collection does not exhibit significant economies of population density and can be handled by competing providers. Antonioli and Filippini (2002) find that franchised monopoly was more efficient than side-by-side competition. Walls et al. (2005) claim that decisions by municipalities on whether to competitively tender waste collection from households are consistent with the existence of large economies of population density. Scale economies instead seem to be exhausted fairly quickly. OECD (2000) cites studies that suggest that scale economies in the US were exhausted at 50,000 inhabitants, while a study for the Italian competition authority found that scale economies are exhausted at 16,000 inhabitants.⁴⁷

Indeed the typical arrangement is for the provision of these services is to have a single collector of household waste that serves each area. Nevertheless, despite the cost structure just described, competition in the market for the provision of collection services occurs in places as disparate as Ireland, Poland, some regions of Finland and parts of the US.

Given its rarity, it is perhaps interesting to examine an example of “side-by-side” competition for household waste collection: Ireland. In 2011, the number of operators in each local authority areas ranged from two to fourteen, but the operators did not compete to serve all households in the areas - some operators only served a few households — and no collection was offered in some rural areas.⁴⁸ According

⁴⁶ Economies of population density should not be confused with economies of density. The latter term is related to changes in costs as output expands while maintaining a given network. An example is Waters (2007):

“A significant development in all of this research [in “rail cost analysis”] was refining the distinction between economies of scale and density. The latter is the behavior of costs as output expands over a given network, whereas economies of scale focuses on the behavior of costs if the network size increases as output expands.” Waters, W.G. II, “Evolution of Railroad Economics.” In Dennis, S. and W. Talley, ed.s, *Railroad Economics (Research in Transportation Economics, vol. 20)*. Oxford: Elsevier, 2007.

Since waste collection routes are flexible, the network is easily reoptimized and costs are consequently in general lower than with an inflexible network such as a railway.

Confusion of the two concepts can lead to erroneous analysis. Thus, in testimony before a High Court case in Ireland, one a witness testified that, although reducing the number of collecting trucks on a single route from two to one would speed up the operation, from 1.9 to 2.8 bins per minute, the limited capacity of the trucks meant this had no effect on the number of runs, thus amount of household waste, per day. The possibility of changing the routes to reduce costs, for example, to have an extra run per day, was not explored in the reported testimony or decision. *Neurendale Ltd t/a Panda Waste Services -v- Dublin City Council & Ors* [2009] IEHC 588. Testimony of the witness is discussed at paragraph 93 and of another witness on the same point at paragraph 89.

⁴⁷ OECD (2000), p. 112.

⁴⁸ Ireland EPA (2013).

to market enquiries conducted prior to 2005 by the Irish competition authority larger firms tended to control specific areas, with competition occurring over those households located at the boundaries. Evidence on consumer switching patterns further reinforces the picture of limited head-to-head competition: a 2011 survey reveals that households switch waste collectors at a rate (3% in the prior twelve months) lower than for electricity provider (9%) or fixed line telephone service (7%).⁴⁹

A decision by the Irish Competition Authority (2005) following an investigation of allegations of dominance abuse by a waste collection company, Greenstar provides a more detailed picture of competition in a specific geographic market where in-the-market competition was permitted, northeast Wicklow. In that area, Greenstar was the sole provider. No entry had occurred during the prior five years and providers in adjacent areas had offered no competition. There were significant barriers to entry and expansion in the form of scale and density economies, and regulatory barriers significantly delayed the establishment of sorting/recycling facilities.

Nevertheless in 2011 In a Submission to the Department of the Environment, Community and Local Government in 2011 the Irish competition authority changed its views are reported that, on balance, side-by-side competition may be superior for densely populated areas. It argued that this form of competition is more responsive to changes in technology and in market circumstances. Where different municipalities make different choices on the type of competition to allow side-by-side competition in one area may also improve competitive tendering in neighbouring areas by providing a ready pool of potential bidders. Further, competitive tendering must be well-designed and implemented to provide the advertised efficiency gains and not all local authorities may have the skills to do so. However, it also found that side-by-side competition may be unstable: if one firm gains a sufficient density of customers in a geographic area, this enables it to gain a cost advantage and to exclude equally-efficient competitors and, thus, to exercise market power.

The authority also pointed out that where a system of side-by-side competition has already been established, there may be economic and legal costs to switching to competitive tendering. The costs cited by the authority include “the need to develop expertise in public procurement at a central level,” and the high legal costs that may arise from litigation since “the private firms involved have made major investments and created vested interests”.

These costs may be absent in a switch from municipal provision to competitive tendering. This glimpse of “competition in the market” in the collection of MSW in Ireland suggest that, in practice, only a few households – those on boundaries and those in densely populated area – enjoy a competitive choice and that some are offered no service at all. The aggregation of demand through contracting by the local authorities could increase the density of population that is served by a single collector, thus decreasing costs. The aggregation of demand could also change the distribution of bargaining power and provide a mechanism to subsidize service to rural households.

In Finland there is side-by-side competition in waste collection in some areas, but competitive tenders are used in others. Evidence shows that the price for municipal waste collection is lower where competitive tenders are used: average savings are estimated to range from 20-25% to 40%.⁵⁰ Tukiainen and Mälkönen (2010) found that, on average, 0.39 fewer firms compete to supply municipalities using competitive tenders, than those which have side-by-side competition. Unlike in Ireland, Finnish householders must purchase waste collection services. Also, Finnish municipalities may direct the waste collector to transport and manage waste at local or regional facilities.⁵¹

⁴⁹ Ireland Department of Environment, Community and Local Government (2012), p. 24).

⁵⁰ The first figure is in Irish Competition Authority (2011) citing “A 1997 survey by the Association of Municipalities in Finland” (p. A2). The second figure is from Tukiainen and Mälkönen (2010).

⁵¹ Ireland Department of Environment, Community and Local Government (2012), p. 14.

The structure of costs for collection from households contrasts with that for collection from businesses, where indeed competition in the market is the norm.⁵² In the “small container commercial hauling market,” whose customers are apartment buildings, stores and restaurants, individual customers typically negotiate with the providers. In any given locality, the number of significant providers is nevertheless usually small: in the US these are four or fewer. Also for this kind of waste geographic markets are small, barriers to entry high, and scale economies significant.⁵³

2.2 *Choice of provider of collection services*

Municipalities typically are responsible for ensuring MSW collection in their area. Traditionally they performed this task themselves, but private firms may also be contracted to provide this service. In this respect, OECD members are on diverging trends, with some, such as Ireland and the US, moving towards greater private provision of residential waste collection and others, such as France, Germany and some countries in Eastern Europe, moving towards greater municipal provision.^{54,55} The shift towards public provision and away from competitive tendering is partly attributed to the need for local government to find means to increase their revenues.⁵⁶

Where a municipality does not provide the service in-house, it often chooses providers by competitive tender. Competitive tendering can involve just private firms bidding against each other or can include municipal departments or municipal companies bidding against private firms.

The next few paragraphs discuss competitive tendering and summarize the empirical literature on the cost differences between competitive tendering and monopoly municipal provision.

OECD (2000) identifies the conditions that are necessary for competitive tendering to yield lower costs than in-house provision by municipalities of local public services. These are:

- low sunk costs—here, meaning that key assets are not significantly more valuable within a particular commercial relationship than outside it,
- no informational advantage to the incumbent,
- ease of quality monitoring, and
- a sufficient number of competitive bidders.

OECD (2000) finds that these conditions are generally met in markets for the collection of household waste. However, more recent data suggests that there may be an incumbency advantage: a study of re-tendered waste collection contracts in the UK found that 42% of these were won by incumbents versus 27% won by non-incumbents.^{57,58}

⁵² In the 2008 Republic-Allied Waste merger in the US, for example, four was the largest number of pre-transaction significant competitors in a market.

⁵³ US Department of Justice, Antitrust Division (2003 and 2008).

⁵⁴ Veolia Environment (2013), p. 48.

⁵⁵ For example, in Ireland only three local authorities continued to collect waste in 2011, as compared with six in 2011 and fifteen in 2008. Ireland EPA (2013), p. 26.

⁵⁶ Handelsblatt (2013).

⁵⁷ No data or no previous contracts were available for the remaining 31 per cent of LAs' collection contracts. UK Office of Fair Trading (2006), p. 34.

A large number of empirical studies have been performed to estimate the effect of competitive tendering for the provision of household waste collection services. The literature review in Irish Competition Authority (2006), which partly incorporates that in the OECD report (2000), found evidence of cost savings from competitive tendering, ranging between 10% and 33.5% with many close to 20%. A few of the studies sought and found no evidence that quality had declined, but one found that quality had declined in 8% of instances where competitive tendering had replaced municipal provision. Thus, the empirical evidence suggests that competitive tendering for household waste collection results in large cost savings and, less reliably due to fewer studies, no quality deterioration.

However, the inclusion of a municipal company among bidders risks distorting competition if the company receives state funding as the monopoly MSW collector in other municipality. Hence accounting separation between monopoly and competitive activities, allocation of a “fair portion” of common costs across economic activities and the payment of income tax are important. These indeed were conditions imposed to limit state-funded activities subsidizing competitive activities in a recent decision concerning Norway.⁵⁹

A separate but related question is whether the inclusion of a municipal company among the bidders increases competition. The UK OFT (2006, p. 49) reports the result of a survey of local authorities that suggests that the presence of a public bidder slightly reduces the average number of bids from private suppliers, but increases the overall average number of bidders (because in addition to the private bidders there is also a public bidder).⁶⁰

2.3 *Improving competition in tenders for collection*

Both the details of the contract to collect MSW over a defined territory and the details of the tender procedure can affect competition in the immediate tender and in future ones. Contract duration affects competition where significant costs are sunk, because bidders shade their bid to account for the risk of hold-up. This may be less important for waste collection itself, but is significant for facilities where the waste is deposited, either temporarily or permanently. Access to or ownership of a disposal facility is necessary to participate in waste collection markets: if the municipality does not own such a right or facility, then bidders are limited to those who have or can acquire such a right. Competitive non-neutrality among the bidders can result in less-efficient bidders winning the contract and non-participation in the tender of disfavoured bidders.

Studies of successes and failures in infrastructure concessions provide more general guidance on how to structure the competition, as well as on the contracts and the renegotiation mechanisms. A stable regulatory regime, competitive rather than direct award, appropriate tariffs, clear rules for tariff readjustment and for other contract renegotiations, proper assessment of the residual value of the concession-specific assets, and sound regulatory accounting promote the efficient choice of the concessionaires and operation of the concession.⁶¹

⁵⁸ For all types of waste services contracts, an incumbent is more likely to win when a contract is re-tendered if it is a municipal entity (48%) than if it is a private company (30%).UK OFT (2006), p. 52.

⁵⁹ EFTA Surveillance Authority 2013.

⁶⁰ The survey shows that on average the number of credible bidders was 2.06 when there was no public bidder, but 2.57 when there was one. Competitive non-neutrality, or the perception thereof, results in an average drop from about two to about one and half of the private participants in the bidding, but it did not lead to an overall drop in the number of bidders because the presence of the public bidder more than compensated the reduction in the number of private bidders.

⁶¹ Further details about the design of concessions contracts generally are in Guasch 2004.

Access to a facility to deposit, temporarily or permanently, the collected waste is a prerequisite to compete in the waste collection market. Disposal facilities operate at larger scale than collection, and the barriers to entry in this market are much higher, both in terms of cost and time. Hence, if entry into collection also requires the simultaneous building of a disposal facility, then entry in the upstream market would be substantially delayed. Therefore, a strategy that avoids the need for simultaneous entry into the two activities increases competition in the collection market.

One option is for the municipality to own a disposal facility and allow access to the winner of the tender. Interestingly, one study found that municipalities in the US were more likely to use government provision of waste and recyclables collection services (i.e., to provide it themselves or as part of a group of municipalities) than either to contract for the services or use private markets, if they owned and operated a landfill or waste-to-energy incinerator. The ownership and operation of a materials recovery facility also increased the likelihood of government provision of recyclables collection.⁶²

If the municipality from which the waste is collected does not own a disposal facility, then the question is whether effective competitors in the collection market must have their own facility, or whether it is sufficient for them to have access to a facility owned by another company, who might be a rival in the collection market. Different jurisdictions have arrived at different conclusions, as illustrated by the following merger remedy decisions.⁶³

- A 2001 Canadian decision reasoned that “the small accommodations and goodwill that are required to make a long-run supply relationship work would not create the kind of climate that is desirable and necessary to restore the competitive situation disrupted by the merger”.⁶⁴ In other words, the decision said that the collection company needed to own its own landfill in order to preserve competition in the market for collection after the merger.⁶⁵
- In 2009, the US Antitrust Division explained that it did not consider the sale of 15-year contracts for space in the newly-merged firm’s landfills to be in the public interest. It was concerned that granting regulated access would interfere with a landfill owner’s ability to manage and operate the assets successfully, thus jeopardizing the competitive significance of the landfill assets. Rather, it was, “[I]mportant that a divestiture include all assets necessary for a purchaser to be an effective, stand-alone long-term competitor.” Airspace in certain geographic markets was divested for a transitional period until buyers had arranged a permanent solution.⁶⁶ Indeed, the assets that had to be transferred as a remedy in the Republic-Allied Waste merger, i.e., that were necessary for an independent competitor, included transfer stations, landfills, air rights, rights, permits (for example environmental), contracts (for example, with service providers), accounts, and trucks and other vehicles.
- A 2013 Canadian decision, in contrast with the 2001 decision reported above, found that the sale of 20-year contracts for space in a particular landfill would allow the buyer of the rights to effectively compete.⁶⁷

⁶² Walls et al. (2005).

⁶³ Although the cases concerned small container collection from commercial establishments, there is no reason to expect different arguments were they to involve MSW collection.

⁶⁴ 2004 FAS 273 (2004), Federal Court of Appeal Docket No. A-389-04 2004.

⁶⁵ The sale of “airspace,” i.e., the right to dispose of a specified amount of waste at a specified landfill’s marginal cost of disposal, was rejected as not constituting a legal remedy under the Competition Act.

⁶⁶ Antitrust Division (2009) Part III.A.2.c and d.

⁶⁷ Canada Bureau of Competition (2013).

When both integrated and unintegrated firms bid for a collection franchise, then their offers reflect their respective estimates of the cost of access to a facility. Non-discriminatory access would promote outcomes in which the most efficient collection firm wins the tender. It is not uncommon for waste transfer stations, landfills and incinerators to be required to offer third-party access or to be owned by the municipality or group of municipalities. Nevertheless, the large firms who own disposal facilities indicate that there are advantages to vertical integration between collection and disposal.⁶⁸ They did not specify what these advantages might be, that is, whether they arise from greater efficiency, better coordination and better information about the waste, or were purely pecuniary. The OFT (2006) had seen no evidence to suggest significant scope economies between collection and treatment or other services.⁶⁹

The absence of competitive neutrality between municipalities and private firms can result in less efficient bidders winning the contracts. This may discourage private bidders from participating. An increase in the number of credible bidders greatly increases the efficiency effects of tenders.

The OECD Competition Committee has discussed competitive neutrality in 2009. The discussion brought to light two instances where efforts were made to improve competitive neutrality in waste management.⁷⁰ One was in Finland where, following complaints as well as the adoption of the *Destia* decision by the European Commission,⁷¹ the Ministries of Finance and Environment established a working group to investigate competition neutrality in waste management. The working group proposed various changes, including pricing access to the municipal waste disposal sites on a commercial basis. Another instance was in Norway where Bergen's municipal waste management company was obliged to separate the corporate governance of the part engaged in the provision of monopoly services from that of the part engaged in the provision of competitive services.

Among the possible sources of non-neutrality between municipalities, or their companies, and private companies are different treatment under bankruptcy law, different treatment under corporate income tax law, and different tax treatment of their financing. Each of these lowers the cost of capital of these companies.

Participation to the tender can also be discouraged when it the bid is for running the existing collecting company, with its employees, facilities, contracts (for example, with service providers), trucks and other vehicles. This can happen when a municipal company existed and the introduction of competitive tendering does not allow dismantling it.

3. Waste transfer stations, landfills and incinerators

The markets for waste transfer stations, landfills and incinerators are quite different from those for MSW collection services. These facilities exhibit scale economies, high entry barriers and the relevant assets have long lives. The geographic extents of markets are determined by transport costs and by legal rules that restrict the movement of MSW. Waste transfer stations are sited to minimize transport costs

⁶⁸ Republic (2013), p. 3; Waste Management (2013), p. 6.

⁶⁹ OFT 2006 p37.

⁷⁰ OECD (2009).

⁷¹ Commission Decision of 11 December 2007 on the aid No. C 7/06 (ex NN 83/05) implemented by Finland for Tielikelaitos/Destia, 2008/765/EC, OJ L 270/30 10.10.2008. The decision found that non-coverage by the bankruptcy law and exemption from corporate income tax law constituted state aid to a road-building company. The decision was reached despite the fact that Finland imposed a guarantee fee for loans raised or debts incurred (paragraphs 277-8) and extracted profits meant to approximate the corporate income tax and dividends paid by competitors (paragraphs 282-284).

taking both collection truck and transfer truck costs into account. Hence they tend to have smaller geographical markets. Landfills and incinerators, particularly those reachable by barge, instead may serve larger areas. However, “flow control” rules may limit those disposal or recovery facilities to which MSW collected from specific municipalities may be taken.

Waste transfer stations, landfills and incinerators are facilities that operate at a larger scale than collection. Entry or expansion are costly and take several years. Partly, this is a consequence of their negative externalities they impose. A number of environmental, safety, zoning and permit laws and regulations dictate how MSW must be stored, handled, transported, processed and disposed. The regulatory requirements and local public opposition to new or expansion of landfills, transfer stations and incinerators combine to the above to raise substantial barriers.

The economic lifetime of these facilities is significantly longer than that of the collection trucks. Gorecki *et al.* (2010) reported that the lifetime of a large scale incinerator can range between 25 and 40 years⁷². A study by the OFT reports that incinerators last an average of 26 years and mechanical biological treatment plants 24 years.⁷³ Landfills operate over decades, e.g., capacity estimates are made for 20 years into the future. An estimate of the duration of contracts to build and operate waste processing infrastructure is up to 30 years.⁷⁴ Contract duration affects competition where significant costs are sunk because bidders shade their bid to account for the risk of hold-up. This risk may be significant for waste disposal facilities, whose economic lifetimes can span substantial changes in regulation.

The geographic scope of different waste disposal or treatment markets can vary substantially. For example, in the US these markets are small: MSW that is disposed of in landfills is transported no further than about 55 kilometres, and in congested areas it is disposed of in nearby transfer stations. MSW haulers would not substantially switch to more distant sites in response to a price hike.⁷⁵ In England, the pattern of supply of MSW treatment is regional, with one or two suppliers having a much greater share of contracts than others active in the region, and suppliers not serving other regions at all.⁷⁶ By contrast, in Europe MSW that has been sorted to be feedstock for energy efficient incinerators may be transported hundreds of kilometres, e.g., from Ireland to the Netherlands or from Italy to Germany.

Mergers may restrict competition in markets for landfills and transfer stations. The waste management sector in North America has consolidated over the past two decades, and at the same time as many landfills have closed.⁷⁷ A 2003 survey of US municipalities found that 43% of municipalities used the private sector for collection and hauling of residential solid waste, and 52% did so for its disposal at landfills.⁷⁸ And in 2005, the three largest firms in the market for waste handling, Waste Management, Allied Waste, and Republic Services, accounted for two-thirds of total revenues of the US industry’s 100 largest firms.⁷⁹ Note, however, that this figure refers to all waste handling activities and is not limited to MSW.

⁷² Gorecki et al (2010), p. 16.

⁷³ OFT (2006) , pp. 62, 64.

⁷⁴ Veolia Environment (2013), p. 25.

⁷⁵ US Antitrust Division (2008).

⁷⁶ UK OFT (2006), p. 68.

⁷⁷ The number of landfills in the US declined from over 8000 to fewer than 3000 between 1988 and 1997, while total capacity expanded. See Kinnaman (2006).

⁷⁸ Macauey (2009).

⁷⁹ Congressional Research Service (2007).

An example of an anticompetitive merger between landfill owners a Canadian case from 2001.⁸⁰ In this case entry into the market of disposal of solid non-hazardous waste that is generated by institutional, commercial and industrial customers in a defined geographic area was found to take several years due to regulatory processes, and entry costs were entirely sunk. The effect of transaction on shares of landfill capacity led to a finding that the merger would cause a substantial lessening of competition.⁸¹

Flow control” can restrict competition among landfills and incinerators. Flow control refers to restrictions on MSW shipments across borders, usually state or municipal borders. Controls may be imposed to require waste collected from a municipality, to be deposited in a given waste facility, such as a waste transfer station, a landfill or an incinerator owned by the municipality. The controls essentially make the facility a monopsonist. Controls may also be imposed to prohibit waste collected from outside a municipality to be disposed in the municipality’s landfill.

Export controls can be seen as a way to guarantee the flow of feedstock to induce investment to be sunk in specific facilities, such as a district heating-incinerator complex or a landfill. But the restrictions mean that the disposal facilities need not compete for an input and face less incentive for economic efficiency.

Import controls can be seen as a solution to too few policy instruments: tipping fees may need to be set below the total social cost of landfill in order to discourage illegal dumping. However, pricing below total social cost induces nearby municipalities to dispose of their waste in landfills located in other municipalities, since this allows them to avoid incurring the cost of providing their own. Municipalities, however, could impose “host fees” to equilibrate the private cost and social cost of “non-local” waste, and thus eliminate the need for import flow control.⁸²⁸³

Flow control has been found to violate the competition laws of both Lithuania and Poland. In Lithuania, the Competition Council found in 2008 that municipalities had violated the competition law by assigning regional waste management centres the exclusive right to recover and dispose of MSW, without following a competitive procurement procedure. This constituted discrimination by public and local authorities against other undertakings capable of providing identical services.⁸⁴ In Poland, several municipalities had forced firms active in the local waste collection market to dispose of the waste exclusively in the municipal landfill.⁸⁵

⁸⁰ *The Commissioner of Competition v. Canadian Waste Services Holdings Inc.*

⁸¹ 2001 Comp. Trib.3 File no.: CT-2000-002, “Reasons and Order.” Geographic market is addressed *inter alia* at paragraphs 100, 102, 107, entry at paragraphs 124-5, and effect on competition at paragraphs 204-5. http://www.ct-tc.gc.ca/CMFiles/CT-2000-002_0059a_49PXE-982004-5523.pdf.

⁸² Kinnaman (2006) found that “host fees” in 26 municipalities in Pennsylvania in the US averaged USD 4.05/ton, which is approximately the size of the estimated decline in the value of nearby housing of USD 3.05 to 4.39. Ley, et al. (2000) simulated the effects of various policy proposals for flow controls in the northeastern U.S. They found that flow control would reduce economic welfare, and predicted that import surcharges would reduce welfare by less than volume restrictions.

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⁸⁴ OECD (2009), p. 266; Lithuania Competition Council (2008).

⁸⁵ *Idem* (2009), p. 196).

3.1 *Markets for incineration*

Incineration converts feedstock into heat, carbon dioxide, water, and bottom ash. The resulting heat may be sold for district heating or industrial uses, or used to generate electricity.

Incineration exhibits economies of scale, with unit costs falling as more waste is processed. Hence costs increase significantly if less waste is processed than the plant was designed for. Waste with a higher calorific value generates more heat or electricity. Since incinerators are too small to affect downstream market prices, more output means more revenue. Therefore, incinerator owners prefer waste with a higher calorific value, other things equal. Higher emissions standards raise costs, as do higher costs of disposal of residues from flue gas cleaning.⁸⁶

An incinerator's technology, and hence its level of energy efficiency, affects the geographic area over which it might compete.⁸⁷ To oversimplify, in the EU regulatory framework, the waste a plant uses as feedstock is categorized as "waste for recovery" if the plant meets a given energy efficiency level, but is categorized as "waste for disposal" if the plant does not. And only "waste for recovery" may be transported across borders. By contrast, many countries prohibit the import of "waste for disposal." But the prohibition is not universal: Some countries no longer restrict trade in "waste for incineration", which is a broader category than waste for recovery".⁸⁸

Major importers of waste for incineration in Europe are Germany, Sweden, the Netherlands and Belgium.⁸⁹ The inconsistent, incomplete and out-of-date data on intra-European trade in waste show that about 1,183,848 tonnes of wastes collected from households and residue arising from the incineration of household wastes were exported from all EU member states in 2009, with Italy accounting for nearly a third, and about 635,541 tonnes were imported, with Germany accounting for three-quarters.^{90 91 92}

The Netherlands offers an example of a more liberalized market for incineration, and hints at the magnitude of the effect of restrictions on international trade. "[I]n recent years...an explicit choice has been made to deregulate the incineration market. The objective of this is to gain more incineration capacity and more competition in that market in the Netherlands."⁹³ Unsorted combustible residual waste is increasingly used. (op cit., p. 20) By 2011, the Netherlands imported about 300 kilotonnes of combustible waste for incineration, five times the 2010 figure, and had already imported 350 kilotonnes in the first six months of 2012.⁹⁴

⁸⁶ World Bank (1999).

⁸⁷ Advanced thermal treatment of two types, pyrolysis and gasification, generate a synthetic gas, which is then used to generate sellable energy, and other outputs. For the purposes of this paper, advanced thermal treatment is considered with incineration.

⁸⁸ Norwegian Ministry of Finance (2010); (2010b).

⁸⁹ Reuters (2012).

⁹⁰ Reported exports of hazardous waste were 27% higher than reported imports in 2009, and for other notified wastes—MSW and residue from the incineration of MSW—reported imports exceeded reported exports by 36%. Some countries submitted reports too late to be included.

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⁹² European Commission Staff (2012), tables 11, 32

⁹³ Netherlands Ministry for Housing, Spatial Planning and the Environment (2008), p. 13.

⁹⁴ Dutch Waste Management Association (2012).

Government policies can significantly increase demand for incineration. For example policies can promote demand for downstream products: In Sweden district heating has been promoted and now 20% of it is provided by incineration plants. About half of MSW in the country is treated in incinerators with energy recovery.⁹⁵ Other policies can suppress demand for substitute. An outright ban of landfilling combustible waste increases demand for incineration. The exemption of auto-generation from taxation and other electricity fees, and from green certificate obligations provides incentives on industrial firms to use waste incineration to generate heat and electricity. Demand for incineration falls when greater incentives are offered for recycling waste fractions that may be either recycled or incinerated.

Government policies may also affect competition in the market for incineration. Norway exports waste for incineration to Sweden. Sweden had decided to eliminate a tax on incineration. In response to concern that Norwegian incinerators would offer prices so low as not to cover their full, long-run costs, Norway eliminated its incineration tax on 1 October 2010, the same date as Sweden did so. An alternative response to the announced Swedish tax change, an export ban on waste, was considered. But it was rejected on the basis of legal advice that such a ban would need to be based on environmental grounds, which it was felt could not be applied to Sweden. (Norwegian Ministry of Finance 2010; 2010b)

Apparent excess capacity generated demands for intervention in Europe.⁹⁶ One response was a reminder of the legal basis on which imports of waste for energy recovery may be denied. Other observers pointed out that excess capacity would lead to exit of older, less efficient, plants. Flow control between municipalities can restrict competition in the incineration market. If some combustible waste holders have a choice of incinerators and other combustible waste holders are required to use an assigned incinerator, then in general the waste holders facing competition will pay a lower price. One study found that the average price charged for combustible waste for which there was competition was less than half that of prices charged for similar waste subject to a monopoly obligation.⁹⁷

The next section turns to markets for product take-back schemes that enable material to be re-used and recycled.

4. Producer responsibility schemes

Extended producer responsibility means that the producer or importer is responsible for the products it has put on the market at the post-consumer stage of the products' life⁹⁸. The focus here is on product take-back systems, where the waste is physically taken back from consumers. Packaging waste, electrical and electronic equipment and batteries/accumulators have, among other types of waste, been subject to take-back obligations. Processing of the waste yields *inter alia* secondary raw materials. In order to generate demand for these materials, waste-specific targets for recycling or recovery complement the assignment of responsibility. To further ensure that the waste does not leak out of the recycling scheme, untreated disposal of waste subject to extended producer responsibility is often prohibited.

⁹⁵ IEA Bioenergy (2012).

⁹⁶ A European parliamentary question concerned over-capacity. (E-010851-12 of 29 November 2012) According to *inter alia* Suez Environment, there is now significant overcapacity in the incineration market in Europe. (Suez Environment 2012, p. 58)

⁹⁷ Hjellnes Consult Report of Federation of Norwegian Industries (2013).

⁹⁸ The OECD guide on EPR defines it as "a policy approach under which producers accept significant responsibility - financial and/or physical - for the treatment or disposal of post-consumer products. Assigning such responsibility could provide incentives to prevent wastes at the source, promote product design for the environment and support the achievement of public recycling and materials management goals" (OECD 2010).

Responsible parties have a variety of choices as to how they fulfil their obligations. They may do so individually, or by participating in a producer responsibility scheme (“PRS”) along with other responsible parties, or by buying the service from third parties. Although markets for third party services may suffer from anti-competitive regulation, the main focus of this section is on PRSs. Since they involve collaboration among product market competitors and exclusive agreements with service providers, these schemes can restrict competition.⁹⁹

PRSs impose fees on their member that should reflect the net cost of handling the waste. In principle, the income from this fee and the sale of the secondary raw materials should pay the cost of the system.¹⁰⁰ The fees are intended to shift the cost of handling waste from municipal rate-payers to consumers. One of the original objectives of PRSs was to provide incentives for re-design for recycling. Thus, at least for those PRS that deal with packaging, the amount of the fee depends on the amount and type of packaging the “responsible party” puts on the market.¹⁰¹

PRSs typically contract with firms for the collection, sorting and recovery of the waste rather than perform these tasks themselves. Those PRSs that specialized in consumer packaging waste typically must contract with firms to collect house-to-house (as it is done with unsorted MSW). Collection of other waste may be from fewer, larger pick-up points, such as specific containers or retailers who take-back discarded electrical and electronic equipment, car tyres, batteries, and other hazardous waste. Sorting may be done by different contractors or it may be bound up with the collecting activity.

Thus, a number of markets are related to the fulfillment of extended product responsibility for waste of a given type:

- the organization of solutions to fulfill the extended producer responsibility obligation;
- the collection of the waste- there may be different markets depending on how the collection is performed, e.g. whether it is directly from households, from commercial establishments, or from specialized containers;

⁹⁹ A PRS may be a company or a joint venture. Duales System Deutschland (DSD), for example, began as a syndicate owned by over 400 retail and packaging firms and several large waste-hauling firms. It was subsequently sold to the private equity firm Kohlberg Kravis Roberts in 2004. In European Commission (2005), the PRS were described as including systems based on agreements among participants in entire industries. Some had significant commercial independence and others were subject to a “coordinating cross-sector ‘holding’ organisation.”

¹⁰⁰ Whether income covers cost in practice is unclear. A recent study found that three of 24 packaging producer fee schemes (eight of 25 WEEE schemes) in EU Member States covered their costs, and the situation was unclear for the remaining 21 packaging waste schemes. (Bio intelligence service 2012, pp. 6-8) Fees set too low weaken the incentives to lower waste handling costs. Insufficiently differentiated fees weaken firms’ incentives to lower the waste handling costs of their particular products. The cost of administering the fee system likely rises with complexity, limiting differentiation.

¹⁰¹ Shifting the cost of waste management and differentiating the fees to reflect the different costs was intended to give consumers incentives to choose product-plus-packaging systems with lower lifetime costs, since in principle lower waste handling costs are reflected in lower fees and lower product prices. In turn, producers are incentivised to redesign their packaging to lower the cost of waste handling. But research by the Dutch Ministry for Housing, Spatial Planning and the Environment in 2007 found that the insufficiently differentiated system meant that there was no incentive to re-design for recycling. Subsequently, other, more specific policy instruments have been introduced such as the Eco-Design directive and prohibitions on the use of lead and other hazardous substances in electronic products. (Netherlands Ministry for Housing, Spatial Planning and the Environment 2008, pp. 44-5)

- the sorting of the waste - there may be different facilities specialized in different sorting tasks;
- the recovery of the waste;
- the sale of the secondary raw materials derived from the waste.

These markets have different geographic scopes. Whereas the markets for collection are usually local, the markets for sorting, recovery and sale of the secondary raw materials can be much wider, even international.¹⁰²

4.1 Effects on product market competition

PRs may initially be formed as a monopoly, with the exception of those responsible parties that decide to fulfill their obligations independently. As monopolies, PRs bring together competitors into a cooperative structure, albeit limited to fulfilling waste obligations. As all those structure that allow repeated contacts between competitors, monopolistic PRs may have an impact on competition in the product market.

Information exchange through the PR may yield better intelligence about competitors' sales than would otherwise be available, for example, if the amount of a particular type of packaging waste were closely correlated with current market sales. However, waste that appears long after the initial purchase, e.g., electrical and electronic equipment, car tyres or car batteries, may have no informational value for market monitoring. Waste associated with many different products may similarly have no informational value.

Participation to a PR may reduce price competition as members of the scheme may agree on the fee to charge consumers for waste handling. A similar concern would arise if the PR fee, even if not charged separately, represents a large part of the final price. In this case, if the PR is a monopoly, then the waste fee would increase the commonality of cost among rivals. That is, there would be less scope for competition to lower costs.

The competition effects of PRs requiring participants to show separately the waste disposal levy on bills to the final consumer have been examined several times. In the 1992 VOTOB decision, the European Commission found that a waste management agreement among independent tank storage companies that established a fixed fee, separately listed on invoices, had the effect of excluding competition on an important cost component.¹⁰³ The Dutch competition authority reports that it has, in most instances, prohibited the practice of separately invoicing the handling fee by PRs, arguing that the practice constitutes price-fixing and that consumers do not share fairly in the benefits. However, in the white and brown goods case, the authority made an exception after appeal of its initial rejection and the entry into force of the European Directive on waste electrical and electronic equipment, which offered the option of showing an explicit levy. The authority also allowed a EUR 45 disposal fee for cars to be passed onto consumers on the basis that the fee was very minor in comparison with the total price of a new car.¹⁰⁴

The structure of the waste fee may harm competition in product markets as well as the market for PRs. For example, the structure of fee charged by the Duales System Deutschland ("DSD") was found to be an abuse of dominance. At the time, DSD charged customers according to the volume of packaging

¹⁰² Since countries may restrict or prohibit trade in waste, it is important for the materials derived from waste to no longer qualifying as waste.

¹⁰³ European Commission (2005), para 59.

¹⁰⁴ OECD (2010), p. 76, OECD (2004), p. 139, Netherlands Authority for Consumers & Markets (2003).

bearing the Green Dot trademark rather than according to the volume of packaging for which DSD provided the take-back and recycling service. The European Commission felt that, due to this provision, manufacturers and distributors would not contract with DSD's competitors, since doing so would not reduce the amount paid to DSD, given that the total amount of packaging would remain unchanged. DSD modified its pricing formulae to comply. This fee structure would also raise barriers to entry into the German market by foreign producers that mostly sold outside the country. The requirement to bear the Green Dot symbol combined with scale economies in using a single form of packaging, which arise if for example a firm has a single production line, would make it costly for the producer to supply small quantities to German consumers.

4.2 *Competition among PRSs*

Competition among PRSs can yield significant efficiencies. An example is packaging PRSs in Germany. Changes in the rules knitting together DSD resulted, over time, in increased vertical separation and the opening up of the market for packaging PRSs in Germany. Whereas in 2003 DSD was the monopolist, by 2011 entry into the market for PRSs had eroded its national market share to 44% and costs of PRSs had fallen from about EUR 2 billion in 2003 to less than EUR 1 billion in 2011. In addition new technologies had been developed and deployed, for example, for sorting lightweight packaging.¹⁰⁵

A 2006 study of PRSs for waste electrical and electronic equipment does not report empirical evidence on the effect of different structures.¹⁰⁶ The study argues that monopoly enables the exploitation of scale economies and the avoidance of the costs of a national clearinghouse and of separate collection containers. But it shows that competition between multiple suppliers keeps down costs and incentivizes the discovery of efficient, tailored solutions. The study reports that different EU countries have different market structures: at the time there were five to six schemes in the United Kingdom, France, Hungary and the Czech Republic, and a single national scheme in a number of other EU countries.

The documents accompanying a 2013 consultation by the UK Department for Business Innovation and Skills on the regulation of waste electrical and electronic equipment illustrate that having multiple schemes do not guarantee effective competition.¹⁰⁷ There are 37 PRSs for this kind of waste in the UK. However, manufacturers complain that charges are high, and few large manufacturers have switched between schemes. The Department for Business Innovation and Skills attributes the high prices to the design of the existing regulation. In particular, it argues that the obligation to collect and treat 100% of eligible waste and the criminal sanctions imposed on manufacturers that fail to meet their regulatory obligations generate a high willingness to pay. The Department attributes the low switching rate to the different schemes charging similar fees and imposing onerous exit clauses, and claims that the existing regulation provides disincentives for schemes to attract new manufacturers. The consultation documents suggest possible changes that would address these anticompetitive restrictions.¹⁰⁸

¹⁰⁵ German Federal Cartel Office (2012).

¹⁰⁶ European Commission DG Joint Research Centre (2006).

¹⁰⁷ United Kingdom Department for BIS (2013).

¹⁰⁸ The changes involve reduced regulatory requirements on small producers of EEE and giving collectors of WEEE the option to manage their own WEE streams. Other changes discussed would introduce a compliance fee to replace the quantitative requirement for evidence of compliance. The relationship between these changes and the predicted outcome is explained in the cited document.

Free riding is one of the arguments schemes make against competition.¹⁰⁹ Where enforcement is lax, manufacturers and importers may find it profitable to free-ride on the firms that do comply with their EPR obligation and reduce their costs, thus distorting competition in their favour.

Free-riding had been a significant problem in the early days of the German packaging scheme: The system nearly broke down in 1993 when, DSD estimated, a license fee had been paid for only 55 to 60% of all packaging bearing a Green Dot™ symbol, even though only packages for which the producer had paid into the system could have the symbol. Loans, contract renegotiations, and amendment to the Packaging Ordinance to encourage membership in the DSD system helped to improve the financial situation. Also, DSD gained the right to levy fines when the Green Dot™ symbol was used without payment of the license fee. Sufficient likelihood of detection and appropriate penalties can shift the free-riders' calculations and ensure compliance.

Some PRSs require participants to transfer all their obligations to a single system, that is the responsible parties may not use a PRS to handle only part of their obligations. This practice can raise barriers to entry into the market for PRSs, since entrants may be unable to provide the entire range of necessary services as soon as they enter. Nevertheless the EU has regarded the practice as “necessary to encourage vital investment in...collection and recycling infrastructure,” but it would no longer regarded it with such leniency if recovery and recycling targets had been reached.¹¹⁰

Despite their possible harmful effects, some schemes have been established as monopolies as there may be no less competitive harmful means to achieve the public policy goal with respect to the waste concerned. Indeed a monopoly may be necessary in order to aggregate demand to exploit scale economies or to give incentives for sunk investments. In *Sydhavnens Sten & Grus*¹¹¹ the state had assigned an exclusive right to receive building waste and the ECJ recognized that it was acceptable as waste management may constitute a service of general economic interest.

4.3 Competition among PRSs and related markets

PRSs often do not provide the collection, sorting and recovery services themselves, but rather contract for these services. When one market is a natural monopoly or has a large minimum efficient scale, then exclusive contracts may reduce competition in other markets as well. In particular, exclusive contracts may force new entrants to enter two markets simultaneously, or to operate below the minimum efficient scale in some markets, which may too costly and thus discourage entry. For example, a PRS that signs exclusive agreements with service providers in natural monopoly markets can foreclose entry by competing PRSs.¹¹²

A number of the services for which PRSs contract may be natural monopolies, or may have relatively large minimum efficient scales:

¹⁰⁹ Pro Europe (2012).

¹¹⁰ European Commission (2005), para.s 72-75.

¹¹¹ Case C-209/98, *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune*, judgment of the ECJ of 23 May 2000, ECR [2000] I-3743.

¹¹² The idea is that, for a PRS to have sufficiently low costs to be able to compete in the PRS market, it must have collectors that reach minimum efficient scale. But if the collection market is a natural monopoly, then at most one firm could reach minimum efficient scale.

- The collection of recyclables, such as packaging waste, from households may be a natural monopoly. A study found evidence that the presence of economies of density had a similar effect on local governments' choice between having a single or multiple collectors of recyclables and MSW from households, which was consistent with the authors' expectations that the economies of density of the two services were similar. (Walls et al. 2005)^{113 114}
- Plants that sort co-mingled recyclables enjoy economies of scale, and the costs of getting planning permission further increase scale economies. (OFT 2006, p. 58) With sufficiently high transport costs, this would imply local natural monopolies.
- Whether recovery plants are natural monopolies turns on the volume and the scale economies of the specific industrial process. The discouragement of international trade in waste means that countries with small populations are more likely to have natural monopolies in recovery.

The introduction of competitive tendering to choose the providers of collection, sorting and recovery services has led to significant cost savings for PRSs. However, the success of tenders in delivery cost savings depends on how the competition is run.

Competition authorities have found that excessively long exclusive contracts signed by PRS may harm competition in the collection markets. The EU Commission viewed the duration of DSD's exclusive agreements with local collecting companies in the 546 collection districts in Germany, of up to 15 years, as excessive.¹¹⁵ The cumulative effect of the long contracts meant that the minimum efficient scale was larger than the number of contracts available at any one time. This created barriers to entry for domestic and foreign collecting companies. Contract duration was reduced to four years. The EU reached a similar decision in *Eco-Emballages*.¹¹⁶ In this case, the scheme had to reduce contract durations to one year, with local authorities able to terminate them immediately, and to limit coverage to some or all of the collected packaging. The changes were intended to facilitate entry by competitors into the French packaging PRS market.¹¹⁷

The introduction of competition for collection and sorting services for DSD, partly in response to prompting by the German Federal Cartel Office, resulted in reductions in the cost of those activities by more than 20%. In 2003, collection was vertically separated and DSD conducted auctions for contracts in some areas. Following a poor response, DSD modified the conditions to improve the prospects especially for small and medium-sized disposal companies and conducted further auctions, covering almost half its contract areas, in 2004. The two sets of auctions resulted in the cost savings reported.¹¹⁸

¹¹³ Since research has found kerbside collection of unsorted MSW to be a natural monopoly, it would be relevant to know whether there are scope economies between kerbside collection of unsorted MSW and of recyclables. However, the author did not find research on this issue. Collection trucks with multiple chambers may collect simultaneously both types of waste. Such a truck exhibits scope economies, but its scale would necessarily be smaller. Other localities collect the different waste types in one run for sorting later. Yet other localities collect different types of waste on different runs, a practice that would seem to yield scope economies only from common vehicle depots.

¹¹⁴ Walls et al. (2005).

¹¹⁵ EC 2005, para. 65.

¹¹⁶ EU Commission decision of 15 June 2001, *Eco Emballages*, OJ 2001 L 233/37.

¹¹⁷ There are other Commission decisions concerning PRSs, e.g., Decision of 16 October 2003, *ARA, ARGEV, ARO*, OJ 2004 L 75/59.

¹¹⁸ OECD (2006), p. 125-6.

A 2006 review on PRSs for waste electrical and electronic equipment showed that in the Netherlands the schemes that used multiple recyclers and transport firms, chosen by competitive tender, reported lower costs than those that had chosen a single supplier.¹¹⁹ The introduction of competitive tendering reportedly also contributed to the development of new recycling technologies, suggesting that large scale guarantee of demand helped to overcome entry barriers.¹²⁰

Efficiency defences for exclusive agreements are usually based on their incentivizing firms to incur sunk costs, but another justification for exclusive agreements is based on the “market for lemons” argument. The idea is that the material collected is heterogeneous and can have a very different value. Hence, if the collector is able to sort the material into more and less valuable fractions and the PRS cannot cheaply audit what it receives, the collector may sell the high value material directly on the market and send only the low value one to the PRS. Since the PRS usually pays the collector on the basis of average quality of the material delivered, it would end up paying an excessive price. An exclusive agreement requiring all collected material to be delivered to the PRS would eliminate the possibility for the collector to discriminate in the material delivered. Provisions in the contracts between DSD and the local collecting companies had prohibited the companies from marketing the collected materials themselves. This was changed following discussions between the scheme and the European Commission.^{121 122}

The contracting practices of PRSs may distort competition in related markets. For example, discrimination in tendering for collection and recovery services by the Spanish glass packaging scheme, Ecovidrio, led to anticompetitive outcomes. The concern was that vertically integrated firms were able to coordinate and exclude competitors that were active only in the provision of collection or recovery services. Although the competition authority required Ecovidrio to apply objective, transparent and non-discriminatory conditions on the competitive tenders for contracts for these services, in 2010 the authority found that the scheme had violated this condition, favouring firms that were members.¹²³

Arrangements for the allocation to recovery companies may also impede competition among schemes.

- In the DSD system, recyclers initially received the sorted material from DSD at no cost. DSD then modified its system to charge recyclers when the market price of the material provided was positive, and to allow the sale of recyclable materials outside the scheme, provided rebates were paid to DSD.
- The Italian PRS for glass packaging, COREVE, used to allocate recovered glass to users according to their historical product market share at a price set by the scheme. The Italian competition authority argued that the allocation method did not allow entry by new users nor changes in shares, and that the administrative price did not reflect market price.¹²⁴ The PRS changed its allocation method to a system of auctions. Consequently, the price rose to reflect the market value of the recovered glass and included demand by those that had been excluded from the previous allocation method.

¹¹⁹ European Commission DG Joint Research Centre (2006), p. 38.

¹²⁰ Veerman in OECD (2004), p. 145.

¹²¹ EU Commission Decision of 20 April 2001 relating to a proceeding pursuant of Article 82 of the EC Treaty (Case COMP D3/34493 - DSD) 2001/463/EC OJ L 166/1-24 of 21.6.2001.

¹²² European Commission (2005), para. 65.

¹²³ OECD (2010), pp. 85, 142.

¹²⁴ Autorita Garante per la Concorrenza ed il Mercato, (2008).

- German manufacturers of container glass had jointly established a monopsony for purchasing glass recovered from household collections in connection with the establishment of the German scheme for packaging waste in 1993. Container glass uses a large fraction of secondary glass. In 2007, the German Federal Cartel Office found that, since the quotas for recycling of glass had long been met, the agreement amongst container glass manufacturers was not necessary to achieve the environmental goal. It thus prohibited the joint purchasing.¹²⁵
- The allocation rules of an industry-wide consortium for the recovery and recycling of lead batteries in Italy raised concerns that it would maintain market shares among smelters, reduce incentives for greater efficiency in recycling, and raise barriers to entry by rival collection systems once the initial exclusivity exemption expired.¹²⁶
- In Turkey, two schemes were set up for the collection and recycling of lead from accumulators, one by the producers and recycling firms and the other, much smaller, by importers. The larger scheme had agreements with dealers and distributors that prevented them from selling used accumulators to collectors acting on behalf of the other scheme. In addition, member recycling firms were banned from buying used accumulators from collectors acting on behalf of the other scheme. The prohibitions meant that the schemes could not compete in providing recovery services.¹²⁷

In addition to the effects of the PRSs, restrictions on international trade in secondary raw material may distort markets for secondary raw materials

Product standards may also facilitate or impede competition. Secondary raw materials are heterogeneous and there are incentives to misrepresent the true quality of the product. For example, green glass from containers is less valuable than clear glass, and glass with more impurities has a lower value and at some point, quality is too low to elicit any demand. Consequently, standards are established. Standards may give incentives to improve processes to yield higher quality products that command higher prices. If standards are credibly enforced, so that market transactions may take place and different recovery companies offer substitute products, then competition may develop.

PRSs form an important link in material flow in modern societies because they ensure that a given share of the products that have been put on the market are reused, recycled or recovered. Just as efficiency in manufacturing and in distribution can increase consumer welfare, so too does greater efficiency in closing the material flow. Monopolies have less incentive to seek more efficient suppliers than do competitive schemes, despite members having incentives for the schemes to be efficient.¹²⁸ The network of agreements within PRS can have anticompetitive effects, foreclosing entry by rival PRSs and excluding competition in the markets for collection and recovery, and poorly designed regulation can discourage competition among third parties providing the integrated collection and recovery services.

¹²⁵ Annual Report on Competition Policy Developments in Germany, DAF/COMP(2007)24/01.

¹²⁶ OECD (2010), pp. 64-5,140-1. The competition authority's decision against these provisions was recently upheld by the higher court.

¹²⁷ OECD 2010, p. 143.

¹²⁸ Members of PRSs have incentives to reduce the systems' costs. While this may be self-evident, the extent to which consumers would resist having this cost passed onto them is perhaps surprising. Procter & Gamble has researched consumer attitudes towards the tradeoff between environmental sustainability and product performance or value. Some 70% of consumers will not sacrifice performance or value for greater sustainability but prefer product choices to have environmental improvements. About half the remaining consumers (15%) are willing to make the tradeoff, and the other half (15%) do not make purchases based on sustainability. The differences were not great between consumers in the US, Japan and Europe. Procter & Gamble (n.d.).

5. Conclusions

Despite the highly-regulated nature of the waste management sector, competition can still provide incentives for efficiency. Greater efficiency reduces the cost of getting something of value from waste or of disposing of it without environmental damage.

Transport costs are important in the sector, and thus geographic markets can be small, even local. International rules and national laws can also restrict the size of markets through discouraging, and even prohibiting, international trade in many types of waste. Given the limited geographic extent of markets, competition is particularly exposed to distortion from local regulation. Flow control — barriers to the transport of waste — is an example. Access to local facilities, such as waste transfer stations or landfills, are necessary to compete in the market for MSW collection services, but there is not agreement on whether access to a competitor's facility would enable effective competition from those firms that are not vertically integrated into disposal facilities. Economies of population density make collection of MSW a natural monopoly. Where transactions costs are high, then municipal provision of MSW collection may incur lower cost than the choice of provider through competitive tender. But some observers express concern that remunicipalization of MSW collection may be due not to transaction cost considerations, but to the desire to enhance municipal revenue.

A second set of competition issues concern schemes that collect, sort and reuse or recycle waste subject to extended producer responsibility. These schemes may be organized to impose a network of exclusive vertical agreements and monopolies. Experience has shown that, at least for some waste streams, competition among these schemes gives incentives for efficiency. Such competition presupposes vertical separation and non-exclusivity so that, for example, waste collectors and sorters have a choice of recovery companies. For competition among these schemes to be effective, is also important that responsible parties can be able to compare the schemes' offers and to switch schemes.

Competition advocacy can play an important role in waste management. It could assist in the design of policies to attain environmental objectives efficiently, while helping to protect market competition from inadvertent negative spillovers. Examples of such spillovers are increased homogeneity of costs or design, and a greater likelihood of collusion from repeated contacts and information exchange. It is often difficult to quantify the dynamic efficiency effects of competition, but the stunning decrease in costs achieved by PRSs exposed to competition and the costs savings achieved through the introduction of tenders for collection and disposal of MSW are a powerful argument for the effects of competition. There is a long-standing argument on whether and when competition can spur innovation, but it seems that in waste management competition can definitely promote innovation.

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CANADA

1. Introduction

Canada's Competition Bureau (the "Bureau") is pleased to provide this submission to the OECD Competition Committee Working Party No. 2 October 2013 roundtable on "Competition Issues in Waste Management". The Bureau, headed by the Commissioner of Competition (the "Commissioner"), is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* (the "Act")¹ and certain other statutes. The Competition Tribunal (the "Tribunal") has jurisdiction to hear and dispose of all applications made by the Commissioner under certain sections of the Act. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers have the opportunity to prosper in a competitive and innovative marketplace.

*1.1 The importance of waste management services to the Canadian economy*²

Waste management services are widely used by residences and enterprises across Canada. In 2010, approximately 25 million tonnes of non-hazardous waste, 37% of which came from residential sources, were sent to private and public disposal facilities. Municipal governments expended more than \$2.9 billion³ on waste management services, an increase of 12% from 2008.

Waste collection and transportation costs represent the largest portion of these expenditures at \$1.2 billion, followed by the operation of disposal and processing facilities (\$517 million), and tipping fees (\$425 million).

The largest increases in local government expenditures between 2008 and 2010 were contributions to landfill post closure and maintenance funds (\$93 million; up 60%) and the operation of recycling facilities (\$157 million; up 38%).

Revenues of Canadian businesses providing waste management services increased 2% from 2008 to nearly \$6 billion in 2010.⁴

¹ R.S.C., 1985. c. C-34.

² For more information, please see the Waste Management Survey conducted by Statistics Canada in 2010, available online at: www.statcan.gc.ca/pub/16f0023x/16f0023x2013001-eng.pdf.

³ All figures in Canadian dollars unless otherwise noted.

⁴ Statistics Canada, "Waste Management Industry Survey: Business and Government Sectors", 2010, available online at: www.statcan.gc.ca/pub/16f0023x/16f0023x2013001-eng.pdf.

1.2 *Waste reduction and diversion*

Governments in regions across Canada have aimed to increase diversion and waste reduction. The amount of non-hazardous waste sent to disposal facilities decreased by 4% between 2008 and 2010. The amount of waste diverted to recycling or organic processing facilities decreased from 2008 to 2010 by 3% to 8.1 million tonnes, though this was the first decrease since 2002.⁵

2. *Waste management services and the Competition Act*

Given its economic impact and its importance to the day-to-day activities of Canadian consumers and businesses, waste management has been and continues to be an industry of focus for the Bureau. The Bureau has brought forward numerous cases to the Tribunal to mitigate anti-competitive concerns in this industry and has resolved a number of others on consent. These actions have sought to preserve competition at many levels in the waste management industry and have provided significant jurisprudence.

While any of the enforcement provisions of the Act could potentially apply to a waste management company under the right circumstances, and the Bureau has pursued conspiracy and bid-rigging cases in the waste industry, the Bureau has traditionally examined the waste industry in the context of its enforcement of the merger and abuse of dominance provisions of the Act. The majority of the Bureau's non-merger enforcement cases in the waste industry have concerned contractual practices in the lift-on-board market while the merger cases have focused on a range of collection and disposal markets within Canada.

The abuse of dominance, conspiracy and bid-rigging, and merger provisions of the Act are discussed in more detail in Appendix A. Attached as Appendix B is a list of Bureau cases related to the waste industry.

2.1 *The Bureau's approach to examining waste markets*

The Bureau's analytical frameworks for examining mergers and examining potential cases of abuse of dominance share several conceptual similarities. Accordingly, issues such as appropriate market definition, market power and market structure, barriers to entry, and potential anti-competitive practices and their impact on waste collection and disposal markets have historically been, and continue to be, an important part of the Bureau's investigations in this industry. These issues are discussed below.

3. *Market definition*

The seminal decision in Canadian jurisprudence with respect to the waste industry, *Laidlaw* in 1991, noted that:

*“Solid waste collection and disposal services can be classified into three categories: the collection and disposal of garbage which has been placed in bags or cans, usually at curbside; the collection and disposal of garbage which has been placed in bins which remain on the customer's premise at all times; the collection and disposal of garbage which has been placed in very large containers which are transported to the dump site to be emptied.”*⁶

⁵ *Ibid.*

⁶ *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (CT-1991-002), Reasons for Order, page 7, available online at: www.ct-tc.gc.ca/CMFiles/CT-1991-002_0072_38LSM-4132004-2121.pdf.

Market definition, as set out in Laidlaw has remained similar in succeeding waste cases. Subject to a distinction being made between collection and disposal services and some further refinement, the solid non-hazardous waste management collection business is consistently divided into four relevant product markets: residential, commercial, industrial, and recycling. The collected waste may be diverted to a recycling or recovery facility, but otherwise proceeds to a transfer station or a permanent disposal facility such as a landfill.

The residential market involves collecting small quantities of waste from individual residences and apartments, generally using rear-load or side-load trucks. This service may be performed by municipal crews or private collection companies, usually pursuant to contracts awarded by municipalities on the basis of tenders.

The commercial market is also known as front-end or lift-on-board market due to the types of trucks used by collectors. This involves the regular pick-up of waste in on-premise bins from customers such as restaurants, offices, and other small commercial establishments. Customers are generally under contract with private companies who perform this service.

The industrial market, also known as roll-off service, involves the collection of large quantities of waste from industrial customers. This waste may not be compactable and, as such, is generally collected in large containers that are loaded onto flat-bed trucks. Industrial customers may require this service on an as needed basis, known as temporary roll-off collection, or enter into contracts for scheduled pick-ups, known as permanent roll-off collection.

Finally, recycling involves the collection of recyclable material from individual residences or apartments, and commercial establishments. The former tends to be provided under contract with municipalities on the basis of tenders while the latter may be through contracts with industrial, commercial, and institutional customers.

Transfer stations act as temporary depositories that allow waste to be aggregated before being transported to a permanent disposal facility. Waste collection vehicles are weighed and unloaded at transfer stations, freeing them up to return to their collection routes. Waste from multiple collection vehicles is then consolidated and loaded onto large trailers for more economic transportation to a landfill.

Permanent disposal facilities tend to take the form of landfills or incinerators, with the former being much more prevalent in Canada. Tipping at a landfill involves the permanent disposal of waste by placing it in cells and covering it with soil or other material on a daily basis. These facilities are owned by public or private entities, the latter of which may also be involved in the waste collection business. Certain municipal landfills have allowed private companies to purchase the right to operate their landfills or even own the remaining airspace. Incinerators burn combustible items but may be limited in the types of waste they can receive. Municipalities often use tenders to seek a permanent disposal option for their residential waste or use their own facilities while other collectors pay gate rates⁷ or negotiate contracts with municipal or third party facilities.

Solid non-hazardous waste collection and disposal services are local or regional in nature. The geographic limits of the market are affected by factors such as permissible over the road payloads or other transportation capacity limits and regulatory requirements, the type and density of customers along a collection route, the time and cost of transporting waste, as well as the cost of disposal. In practice, the

⁷ Landfills post tipping fees by weight known as gate rates, which vary depending on waste type. These rates are non-negotiated, often public, and available to whoever is tipping the waste. As such, they are often the highest prices offered by landfills.

heuristic used to determine the relevant geographic area is often the distance from local landfills or the companies' operating hubs (where the collection trucks are parked). For example, one case focusing on collection and disposal in the Edmonton, Alberta area noted that the extent of the geographic market for the collection business is demarcated by a distance of 50 km from a relevant hub while the primary determinants of the geographic bounds of the disposal business are environmental controls and the distance between the customers and the disposal site.⁸ More distant landfills could be indirectly included in the relevant market if sufficient volumes could be consolidated at a transfer station and subsequently transported.

Hazardous waste collection and disposal are separate markets, due to the additional safety and environmental regulations involved, and the specialized equipment and sites needed for safe disposal. This will be further discussed below in "Other Waste".

4. Waste collection

4.1 Residential collection

Municipalities may choose to use their own resources to collect residential waste or may put out tenders for private companies. Those who choose to do the latter must proceed with their tender processes in accordance with provincial laws. For example, the province of Quebec dictates that the winning tender must be the lowest bid (assuming all qualifications have been met).

Municipalities will structure tenders to suit their needs. Often this takes the form of various qualifications; from the number of trucks to insurance requirements. Certain municipalities choose to include recycling, organics collection, or even disposal within one contract, though the latter is less likely as it tends to restrict the number of available bidders. Tenders for disposal are often held separately to ensure that non-vertically integrated companies may be competitive in collection without being responsible for the permanent disposal cost. Larger municipalities may also choose to sub-divide their area into numerous geographic zones and offer multiple tenders, thus encouraging smaller collection businesses to bid. Conversely, small municipalities may join together to develop a collective tender to attract additional bidders by offering more substantial and dense collection routes.

The use of tenders lowers barriers to entry and expansion in the residential market relative to the commercial market by regularly allowing competitors to bid for business and by removing contractual barriers. As described above, municipalities may also structure the tenders to encourage more bidders or new entrants. They also generally give an entrant time to set up a collection operation, acquire machinery, and hire staff such that these are not sunk costs during the bidding process. Despite these mitigations, the Bureau has sought to remediate anti-competitive conduct in a residential market (as well as other collection markets). For example, in 1997, in *The Director of Investigation and Research v. Canadian Waste Services Inc.*, the Director (now known as the Commissioner of Competition) sought the divestiture of commercial, industrial, residential, and recycling businesses (as well as a disposal agreement) in a number of cities in the province of Ontario.⁹

⁸ *Canada (Director of Investigation and Research) v. Canadian Waste Services Inc. / Capital Environmental Resource Inc.*, (CT-1998-001), Notice of Application for a Consent Order, paras 22-23, available online at: www.ct-tc.gc.ca/CMFiles/CT-1998-001_0001_38NYZ-4282004-1784.pdf.

⁹ *Canada (Director of Investigation and Research) v. Canadian Waste Services Inc.*, (CT-1997-001), Consent Order, para 1, Schedule A, available online at: www.ct-tc.gc.ca/CMFiles/CT-1997-001_0011a_38NTR-4282004-2556.pdf.

The tender process often used in the residential market may also provide important documentation to assess the closeness of competition between two merging parties, especially in determining if they are often the first and second choice for municipalities. Bid histories, if available, can also give a truer sense of the area over which firms compete and the overlap between competitors, as opposed to the contracts they currently service.

4.2 Commercial collection

Commercial collection markets may have many different waste service providers, so long as each has a sufficient number of customers to support its operations through economies of scale. Some markets are effectively monopolies, while others may have eight or more providers. Commercial waste service providers are frequently involved in other businesses, especially municipal waste collection and roll-off waste services.

Barriers to entry for lift-on-board services are relatively low. New firms face initial sunk costs from the purchase of one or two front-load trucks and an inventory of waste bins, although these items may occasionally be purchased used. The most significant barrier to entry is acquiring a sufficient customer base, with sufficient route density, within a reasonable period of time. The sooner new entrants can reach the required amount of business, the sooner they can reach a minimum efficient scale.

However, incumbent waste management companies may raise significant barriers to entry by using contractual terms that prevent new entrants from securing this vital customer base. Such contractual terms encountered by the Bureau in past cases include:

- Contracts with terms between 3 to 5 years, which lock in customers and make them unavailable to new entrants;
- Automatic renewal clauses, often with substantial and unwieldy notice requirements for termination;
- Rights of first refusal, which afford the incumbent opportunities to retain its customer base even in the face of better offers from new entrants; and
- Large liquidated damages for early termination.¹⁰

These contractual provisions may create significant barriers to entry and expansion. In order to achieve the required number and density of accounts, new entrants must have an available pool of customers from which to draw. These provisions make it difficult and costly for customers to cancel their long-term contracts, ensuring they infrequently become available to new entrants.

Anti-competitive contracts may be accompanied by other potentially harmful conduct, which often serve to support and strengthen the impact of these contracts. These may include:

- Acquisitions of local competitors, especially new entrants;
- Questionable sales tactics to convince customers to sign contracts, such as sending a customer only the first page of a two-page contract for signature, and ensuring that the customer remains unaware of the more onerous clauses;

¹⁰ See *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (CT-1991-002), Reasons for Order, where the cumulative effects of several such clauses were found to have substantially lessened competition in local markets for waste services.

- Aggressive threats of litigation against competitors and customers;
- Predatory pricing intended to induce customers to return to the incumbent, so that they may be locked into another long-term contract. Contracts often permit unilateral price increases during the contract term, allowing the company to swiftly recoup the costs associated with the predation; and
- Staggering of contract terms, such that only a small number of customers become available to competitors at any point in time.

These contractual clauses may form part of a standard contract used throughout a region or the country as a whole, with the result that although individual waste markets are local in nature, anti-competitive practices can have an impact throughout Canada.

4.3 Industrial collection

Due to the large size of roll-off bins, a collection truck can only transport one bin at a time. As such, route density and economies of scale are significantly less important in industrial collection, as compared to other types of collection.

Short term roll-off collection customers are more accessible since they require services on an “as-needed” basis and are not tied into contracts. Even permanent roll-off collection contracts do not tend to exhibit the same level of anti-competitive clauses that are often seen in commercial collection.

The primary cost of entering the roll-off market is the collection truck, followed by bins and perhaps compactors. The decreased contractual barriers and ability to build a business on a smaller scale lowers the barriers to entry. However, access to a disposal site remains important and can significantly increase costs for a non-vertically integrated competitor. As such, limited access to these facilities or their closure can serve to increase barriers.

4.4 Recycling

Recycling has not yet been a large focus in Canada with respect to competitive issues. However, municipalities have become increasingly interested in waste diversion, including recycling and other programs such as organics collection. These initiatives may increase the barriers to entry or expansion for disposal sites if cities wish to reduce their reliance on landfills or other permanent disposal options.

5. Disposal

5.1 Transfer stations

Since transfer stations act to consolidate waste, they are especially useful in areas where the permanent disposal facility is some distance from the collection area as it allows collection vehicles to spend more time collecting waste. In this case, they usually provide a lower transportation cost by weight than if the waste is sent directly to a permanent disposal facility. This may result in an expansion of the geographic markets for disposal as compared to the collection markets where the waste is generated.

Fees are typically charged to collectors on a per tonne basis for waste that has been unloaded. The price will incorporate the cost of handling the material and transporting it to a permanent disposal facility. It will often depend on factors such as waste type, volume, and whether a tolling arrangement exists between the collector and transfer station owner/operator. Certain private firms own both transfer stations and landfills, guaranteeing higher tonnages for their landfills while allowing them to internalize costs and

benefit from a lower price that may not be available to all competitors. Other transfer stations are owned by public entities and, as such, may view the efficient disposal of their city's waste as a primary incentive, as opposed to commercial profit, which could affect the prices they set.

Ultimately, access to a permanent disposal facility is vital to profitably operate a transfer station. This is often reflected in municipal tender requirements for the disposal of residential waste to ensure consistent pricing and access throughout the lifetime of the contract.

5.2 *Landfills*

Tipping fees are generally charged on a per tonne basis, and, like transfer stations, vary depending on waste type, volume, or pre-existing arrangements between parties. Certain provinces such as Quebec also mandate an additional tariff per tonne which may be re-distributed across municipalities to fund diversion programs. This fee has increased over time as a method to discourage landfill use.

Publicly and privately owned landfills may exhibit differing primary incentives. Private companies often strive to extract maximum profit, while municipally owned landfills may seek to serve the needs of their community or maximize the life of their facilities. As such, private companies may increase yearly tonnage by entering into put or pay agreements (where a customer agrees to tip a certain number of tonnes into the landfill at a given price) or swap agreements (where vertically integrated companies agree to tip waste collected near the other party's landfill at that landfill). Conversely, municipal landfills often restrict their geographic service area by either not accepting, or offering a significantly higher price for, waste originating from outside their surrounding area.

Vertically integrated disposal facility owners can leverage this advantage into the downstream collection market by internalizing their costs and achieving lower prices or by increasing the cost of disposal access to their competitors. As a result, a substantial lessening of competition ("SLC") in the disposal market can further reinforce a SLC in the collection market due to the rolled-in price of collection and disposal services to final customers.¹¹ In this situation, a municipally owned landfill or some other sort of equal access may put waste collectors on a more "level playing field".¹² The importance of access to permanent disposal facilities is reflected in a number of Tribunal cases and consent orders or agreements, which require incumbents to provide landfill airspace at reasonable prices as part of a remedy.¹³

5.3 *Incineration*

While incineration has not been a focus in Canada with respect to competitive issues, the Tribunal has recognized it as a permanent disposal option that may need further review in the future.

¹¹ *Canada (Director of Investigation and Research) v. Canadian Waste Services Inc. / Capital Environmental Resource Inc.*, (CT-1998-001), Notice of Application for a Consent Order, at para 45, available online at: www.ct-tc.gc.ca/CMFiles/CT-1998-001_0001_38NYZ-4282004-1784.pdf.

¹² *Canada (Director of Investigation and Research) v. Canadian Waste Services Inc.*, (CT-1997-001), Notice of Application for a Consent Order, at para 70, available online at: www.ct-tc.gc.ca/CMFiles/CT-1997-001_0001a_38NJS-4282004-5018.pdf.

¹³ See, for example, *Canada (Director of Investigation and Research) v. Canadian Waste Services Inc.*, (CT-1997-001), *Canada (Director of Investigation and Research) v. Canadian Waste Services Inc. / Capital Environmental Resource Inc.*, (CT-1998-001), *Canada (The Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, (CT-2000-002), and *Canada (The Commissioner of Competition) v. WM Québec Inc.*, (CT-2013-001).

“The Tribunal agrees with the approach to market definition... that the principal alternatives to landfill disposal are incineration and recycling...It appears to the Tribunal that, because incineration capacity is so low and cannot handle non-combustible waste, a hypothetical landfill monopolist could impose a significant and non-transitory price increase without losing so much business that the increase would not be profitable. This reasoning would suggest that there might be at least two markets for the purpose of merger review: landfill services, and disposal services (i.e., both landfill and incineration); the "smallest market principle" would lead the Tribunal to adopt the former as the relevant one... However, as neither side disputes this aspect of product market definition and because there is not sufficient evidence for the Tribunal to decide otherwise, the Tribunal accepts that the product market is disposal services.”¹⁴

5.4 Barriers to entry

The barriers to entry for transfer stations and landfills depend on the regulatory processes set out by the responsible provincial ministries, and may also include municipal regulatory approval and significant capital costs.

Most provincial ministries require disposal operators to apply for a certificate of approval which sets out the types of acceptable waste, maximum volume (daily, yearly, or both), lifetime capacity in the case of landfills, and applicable service area. These characteristics can vary widely between facilities; for example, certain disposal facilities can accept waste from an entire province while others are restricted to a set of municipalities. It is important to note that these service areas may be broader than the area over which the disposal facility is actually a viable competitor, depending on the distance to customers and the presence of other facilities.

These certificates often require a multi-step application, thorough environmental assessments and testing, public consultation, and a decision from the responsible ministry. Each step may be time consuming and costly, especially if any issues arise as a result of the environmental assessment or opposition from residents. Though certain jurisdictions have attempted to streamline their procedures, this is generally still a multi-year process. However, obtaining a certificate may be less onerous for transfer stations, given that they do not permanently dispose of waste and, as such, their requirements may be less onerous.

Municipal approvals may also be required to re-zone the site of a waste disposal facility or for compliance with by-laws such as maintenance and operation of waste management systems, and additional licensing or fee requirements. The time and cost to comply can vary widely depending on the city. Resistance from residents and municipal waste reduction plans are factors that may raise the barriers.

Finally, there are a number of capital costs involved, which vary based on the type and size of waste disposal facility but may include the cost to lease or purchase land; the cost to develop capacity including environmental monitoring, cell excavation, cell lining, leachate management, and gas collection; the cost to purchase equipment; and the cost to construct access roads, offices, etc.

Barriers to expansion often involve going through the entire process again, including obtaining another certificate of approval. Barriers may be slightly lower if any documentation for the regulatory process can be re-used, new municipal zoning is not required, or capital costs are smaller.

¹⁴ *Canada (The Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, (CT-2000-002), Reasons and Order, at paras 47-48, available online at: www.ct-tc.gc.ca/CMFiles/CT-2000-002_0059a_49PXE-982004-5523.pdf.

In a matter before the Tribunal in 2000, these facts led the Tribunal to conclude that “the time and cost associated with the regulatory approval process, and the capital costs and time to develop new capacity represent significant barriers to entry into the disposal market to the extent that they represent sunk costs ... additional significant investment is required to develop or expand capacity at the site. The majority of this investment constitutes a sunk cost that cannot be recovered in the event of exit”.¹⁵

As noted above, access to a permanent disposal facility (even indirectly, though a transfer station) is necessary to compete successfully in collection markets. As such, limited access to these facilities or their closure can serve to increase barriers in the downstream market.

6. Other waste

In 2011, the Bureau applied to the Tribunal to dissolve CCS Corporation's (“CCS”) acquisition of Complete Environmental Inc., owner of a proposed Babkirk Secure Landfill in Northeastern British Columbia. The Bureau challenged this closed, non-notifiable merger on the basis that it would substantially prevent competition for secure hazardous waste disposal.¹⁶ Complete Environmental had obtained regulatory approval to convert Babkirk into a secure landfill in February 2010. At that time, CCS operated the only two operational secure landfills in British Columbia. Had the Babkirk Secure Landfill opened, it would have been CCS's competitor.

The solid hazardous waste in question is generated by oil and gas companies as a by-product of drilling and contains contaminants which make it unsuitable for disposal in landfills which accept residential and industrial waste. As such, it must be disposed in a secure landfill which meets more stringent regulatory conditions to prevent pollution outside the facility.

The Tribunal determined the relevant product market to be “solid hazardous waste generated by oil and gas producers and tipped into secure landfills in NEBC [North-Eastern British Columbia]”,¹⁷ thus concluding that neither bioremediation (soil treatment using micro-organisms to reduce contamination), nor storage or risk management of waste at the drilling site were acceptable substitutes. Though the relevant geographic market was not precisely defined, it was identified to be at least a subsection of NEBC around the proposed secure landfill.

Certain characteristics of this market differ from the landfills described above. It is the norm in the industry to have private, third party ownership of secure landfills, though oil and gas operators (ultimately, customers) may also own facilities. In NEBC, CCS acted as a monopolist and owned the only two operational secure landfills. Solid hazardous waste may be generated at multiple drill sites in different locations and must then be transported by the generator (or a hired transporter) to a secure landfill where a tipping fee will be paid. Waste generators may enter into agreements with secure landfill operators to dispose of their waste at one or multiple disposal facilities for a given price. However, due to CCS's significant market power, generators in this area had limited, if any, market power despite these negotiated agreements.

¹⁵ *Canada (The Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, (CT-2000-002), Reasons and Order, at paras 122, 127, available online at: www.ct-tc.gc.ca/CMFiles/CT-2000-002_0059a_49PXE-982004-5523.pdf.

¹⁶ *Canada (The Commissioner of Competition) v. CCS Corporation, Complete Environmental Inc., Babkirk Land Services Inc., Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey*, (CT-2011-002), Reasons for Order and Order, available online at: www.ct-tc.gc.ca/CMFiles/CT-2011-002_Reasons%20for%20Order%20and%20Order_189_38_5-29-2012_5291.pdf.

¹⁷ *Ibid.* at para 61.

The barriers to entry in this market are also significant, as is the uncertainty and risk associated with entry. A potential secure landfill owner must first find an appropriate site, which likely includes drilling and environmental testing to ensure it is adequate. They must obtain the appropriate governmental authorizations which include both an environmental assessment certificate and a secure landfill permit as well as approval for their construction and operation plans. These processes generally include further environmental testing, the submission of reports, and extensive public consultations. The Tribunal determined that it would take a new entrant at least 30 months to undergo this process.¹⁸ Furthermore, a number of proposed secure landfills in this area had difficulty overcoming all the barriers and had not become operational.

This was a significant case for the Bureau for a number of reasons including the fact that the transaction had already closed, the merger was not subject to mandatory pre-merger notification under the Act, and it was the first challenged merger case based solely on a theory of prevention of competition. Ultimately, the Tribunal agreed that the purchase constituted a substantial prevention of competition and ordered a divestiture of the facility and its associated permits. This finding was upheld at the Federal Court of Appeal; however, the matter has been appealed to the Supreme Court of Canada and is expected to be heard in the spring of 2014.

7. Conclusion

Over the last two decades, the Bureau has sought to preserve competition through enforcement action such as the cases brought before the Tribunal and the consent orders and agreements outlined above. A more detailed list of Bureau cases in the waste industry is included in Appendix B. The Bureau will continue to investigate anti-competitive conduct and vigorously enforce the Act in the waste industry.

APPENDIX A

1. Abuse of Dominance

On application by the Commissioner, section 79 of the Act permits the Tribunal to issue a remedial order in respect of an abuse of a dominant market position. Under the Act, abuse of dominance occurs when: (i) a dominant firm or a dominant group of firms in a market; (ii) engages in a practice of anti-competitive acts; (iii) with the result that competition has been, is being or is likely to be prevented or lessened substantially. Where the Bureau establishes each of these three elements, the Tribunal may issue an order: (i) prohibiting the practice of anti-competitive acts; (ii) directing the respondent(s) to take actions that are reasonable and necessary to overcome the anti-competitive effects of the practice, including the divestiture of assets or shares; and/or (iii) requiring the respondent(s) to pay an administrative monetary penalty of up to \$10 million on a first order, and up to \$15 million for each subsequent order.

Subsection 78(1) of the Act sets out a non-exhaustive list of nine types of conduct that are deemed to be “anti-competitive acts” for purposes of section 79, including predatory pricing. Because the list is non-exhaustive, other practices aimed at excluding or disciplining competitors, such as exclusive dealing or tied selling, could also be examined as an anti-competitive act under section 79. Historically, the Bureau has

¹⁸ *Ibid.* at para 222.

treated most waste management-related cases that did not involve mergers as abuses of dominance pursuant to section 79. These cases have generally involved anti-competitive contractual clauses used in commercial markets for solid waste collection and disposal, and will be examined in greater detail below in the section on commercial collection.

2. Conspiracy and bid-rigging

Section 45 is the cornerstone cartel provision of the *Competition Act*. It makes it a criminal offence when two or more competitors or potential competitors conspire, agree or arrange to fix prices, allocate customers or markets, or restrict output of a product. This offence is known as a conspiracy, and is punishable by a fine of up to \$25 million, or imprisonment for a term of up to 14 years, or both.

The Bureau recognizes that some desirable business transactions require explicit restraints on competition to make them efficient or even possible. As a result, the *Competition Act* provides an "ancillary restraints defence" to ensure that strategic alliances or other types of legitimate collaborations between competitors are not treated as criminal offences.

To qualify for this defence, the agreement must be:

- "ancillary" to a broader or separate agreement that includes the same parties;
- directly related to and reasonably necessary for giving effect to the objective of the broader or separate agreement; and
- the broader agreement must itself be legal.

When the ancillary restraints defence applies, the Commissioner can still challenge the agreement before the Competition Tribunal as a civil matter, if there are substantial anti-competitive concerns.

Under section 47, it is a criminal offence for two or more bidders, in response to a call or request for bids or tenders, to agree on the bids submitted, to agree that one party will refrain from bidding or to agree that one party will withdraw a submitted bid, in each case without informing the person calling for the bids of this agreement. Penalties for bid-rigging include a fine in the discretion of the court and/or a prison sentence of up to 14 years.

3. Mergers

On application by the Commissioner, section 92 of the Act allows the Tribunal to issue a remedial order in respect of a merger or proposed merger which prevents or lessens, or is likely to prevent or lessen, competition substantially. The Tribunal may not make this finding solely based on concentration or market share; instead it may consider a range of factors laid out in section 93 of the Act including acceptable product substitutes, barriers to entry, effective remaining competition, or any other factor which is relevant to competition in a market. If the Tribunal chooses to issue an order, the remedy may include dissolution of the merger, disposition of certain assets or shares, or it may order the merger, or part of it, not to proceed. Section 105 of the Act allows the Commissioner and respondent(s) to come to a consent agreement, which will be registered with the Tribunal and be enforced in the same way as an order.

APPENDIX B

1. Concluded cases

1.1 *The Director of Investigation and Research*¹ v. *Laidlaw Waste Systems* (“Laidlaw”), 1991²

On March 25, 1991, the Director of Investigation and Research alleged that Laidlaw was in breach of section 79 of the Act, and applied to the Tribunal for a number of orders aimed at putting a stop to Laidlaw's anti-competitive acts related to commercial waste collection and disposal in certain local communities on Vancouver Island. At issue were anti-competitive contracting practices and creeping acquisitions of competitors, securing Laidlaw's dominance in the markets. The Tribunal Order dated January 20, 1992 required a number of amendments and deletions to Laidlaw's contracts and barred future acquisitions in the three affected local markets for three years. Further, Laidlaw was required to explain to its customers any amendments of contracts, and to provide copies of existing and future contracts to the Bureau.

1.2 *Gestion des Rebutis DMP Inc.*, 1996

In April 1996, Gestion des Rebutis DMP Inc. pleaded guilty under the conspiracy provisions of the Act and was fined \$1,950,000. The offence involved an agreement between competitors to share the market for the hauling and disposal of commercial waste in the Mauricie region of Quebec between 1989 and 1992. The victims of this conspiracy were businesses such as restaurants, corner stores, garages and shopping centres, which lease commercial waste containers.

Following that guilty plea, on January 29, 1997, a former senior official with Gestion des Rebutis DMP Inc. in Quebec's Mauricie Region, pleaded guilty to one count of conspiracy to unduly lessen competition and was fined \$550,000. The Court also imposed a one-year jail sentence to be served in the community on two former employees of Gestion des Rebutis DMP Inc. In addition, a prohibition order was imposed on the three individuals that required them to comply with the Act for a period of 10 years.

1.3 *The Director of Investigation and Research* v. *Canadian Waste Services Inc.* (“CWS”), 1997³

In January 1997, CWS entered into an agreement to acquire Laidlaw Waste Systems Ltd. (“Laidlaw”) including collection and disposal assets such as trucks, containers, maintenance garages, transfer stations, and landfill sites throughout Canada. On March 5, 1997, the Director of Investigation and Research applied to the Tribunal pursuant to sections 92 and 105 of the Act for a Consent Order to remedy a likely substantial lessening of competition in commercial collection in certain Ontario cities due to the proposed

¹ Prior to 1999, the Commissioner of Competition was known as the Director of Investigation and Research.

² *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (CT-1991-002), Reasons for Order, available online at: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=186.

³ *Canada (Director of Investigation and Research) v. Canadian Waste Services Inc.*, (CT-1997-001), Notice of Application for a Consent Order, Consent Order, Reasons for Consent Order, available online at: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=211.

acquisition by CWS of Laidlaw, as well as a substantial lessening of competition in commercial collection in Ottawa and the Outaouais arising from a previous purchase by CWS of certain Waste Management Inc. assets. The Tribunal Consent Order dated April 16, 1997, required the divestiture of all of CWS' non-hazardous solid waste businesses in Ontario (including municipal and roll-off contracts and equipment), as well as a contractual license for access to disposal facilities controlled or operated by CWS in affected markets.

1.4 *The Director of Investigation and Research v. Canadian Waste Services Inc. (“CWS”) / Capital Environmental Resource (“CER”), 1998⁴*

In April 1997, CWS proposed to purchase a number of non-hazardous waste management assets from Waste Management Canada Inc. in cities across Canada. On March 6, 1998, the Director of Investigation and Research applied to the Tribunal pursuant to sections 92 and 105 of the Act for a Consent Order to remedy the likely substantial lessening of competition in commercial collection and disposal services for residential waste in Edmonton, Alberta arising as a result of the acquisition. The Tribunal Consent Order dated April 23, 1998, required the divestiture of certain commercial routes and equipment, a transfer station, and a landfill tipping agreement directly to an identified purchaser. The Consent Order Impact Statement notes that the transfer station was a necessary element of the divestiture package because it provided an area where collected waste could be consolidated before subsequent shipment to the landfill. In combination with the landfill tipping agreement, the Consent Order replicated the effects of a complete divestiture of one of the landfill sites by maintaining two arms length operators able to effectively compete in the downstream commercial collection sector.

1.5 *Commissioner of Competition v. Canadian Waste Services Holdings Inc. (“CWS”), 2000⁵*

On March 31, 2000, CWS acquired the assets of Browning-Ferris Industries Ltd. (“BFIL”) including commercial waste, roll-off, and recycling businesses as well as a landfill and interest in a disposal business in cities across Canada. CWS agreed not to acquire the commercial collection assets in sixteen markets, residential collection operations in the province of Ontario, the entire collection business in Montreal, as well as the landfills and transfer stations in Montreal, Winnipeg, and Calgary to remedy the Commissioner's concerns. CWS also acquired a landfill in Ontario (the “Ridge Landfill”), which the Commissioner determined would likely result in a substantial lessening of competition with respect to the disposal of commercial waste in certain cities in Ontario.

On April 26, 2000, the Commissioner applied to the Tribunal pursuant to section 92 of the Act requesting that CWS divest the Ridge Landfill. CWS already owned or operated a number of landfills around Ontario and there were few remaining disposal options in certain cities. The Tribunal found that the acquisition led to a substantial prevention and lessening of competition in certain cities and, in an Order dated March 28, 2001, ordered the divestiture of the Ridge Landfill. On May 29, 2003, CWS subsequently applied to the Tribunal pursuant to section 106 of the Act⁶ requesting that the divestiture be rescinded on the basis that the circumstances that led to the making of the order had changed. Essentially, CWS no

⁴ *Canada (Director of Investigation and Research) v. Canadian Waste Services Inc. / Capital Environmental Resource Inc.*, (CT-1998-001), Notice of Application for a Consent Order, Consent Order, available online at: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=210.

⁵ *Canada (The Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, (CT-2000-002), Agreed Statement of Facts, Reasons and Order, available online at: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=207.

⁶ *Canadian Waste Services Holdings Inc. et. al. v. Canada (The Commissioner of Competition)*, (CT-2003-005), Reasons and Order in Section 106 Application, available online at: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=154.

longer intended to undertake expansion activities at two of its landfills due to regulatory denials and lack of municipal support; it argued that the development of excess capacity was a significant basis for the Tribunal's conclusion of the likelihood of a substantial lessening of competition. The Tribunal denied the motion, noting that CWS did not inform the Tribunal about the true state of affairs during the initial trial.

1.6 Johnson Waste Management Ltd. (“Johnson”), 2002⁷

In 2002, the Bureau investigated a complaint regarding Canadian Waste Services Inc. and BFI Canada Inc., which together dominated the Winnipeg waste disposal market. Their contracting practices at the time were allegedly making it difficult for Johnson, a potential new entrant, to establish a foothold in the market. The matter was resolved through an informal agreement between the three companies and the Bureau, which limited the use of the objectionable contractual clauses; the Bureau did not apply for a Consent Order from the Tribunal.

1.7 The Commissioner of Competition and Waste Services (CA) Inc. and Waste Management of Canada Corporation, 2009⁸

On June 16 2009, the Commissioner filed and registered a Consent Agreement⁹ with the Tribunal pursuant to section 105 of the act to remedy allegedly anti-competitive acts related to waste disposal in certain markets on Vancouver Island. Under the terms of the agreement, the companies agreed to stop using long-term contracts that locked customers into agreements with highly restrictive terms (similar to those in *Laidlaw*), which the Bureau alleged were foreclosing competitors from the market. The Bureau alleged that these contracts resulted in substantially less competition for commercial waste collection services, illustrated by higher prices and reduced choice for businesses.

1.8 The Commissioner of Competition and IESI-BFC Ltd. (“BFI”), BFI Canada Inc., Waste Services Inc. (“WSI”), and Waste Services (CA) Inc., 2010¹⁰

In November 2009, BFI announced its intention to purchase WSI including its commercial, municipal, and roll-off collection assets, recycling assets and facilities, transfer stations, and landfills located across the provinces of Ontario, Alberta, Saskatchewan, and British Columbia.¹¹ On June 30, 2010, the Commissioner filed and registered a Consent Agreement with the Tribunal pursuant to section 105 of the Act to remedy a likely substantial lessening of competition in the commercial collection services in certain cities in Alberta and Ontario as a result of the proposed acquisition. The Consent Agreement required the divestiture of contracts and assets related to commercial waste collection in the affected cities, as well as WSI's interest in an Ontario-based transfer station. It also included an agreement to supply

⁷ See: www.ecoweek.ca/issues/ISarticle.asp?aid=1000155271.

⁸ *Canada (The Commissioner of Competition) and Waste Services (CA) Inc. and Waste Management of Canada Corporation*, (CT-2009-003), Consent Agreement, available online at: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=306.

⁹ On June 4, 2002, the process to obtain a Consent Order from the Tribunal changed to the registration of a Consent Agreement. Whereas the issuance of a Consent Order by the Tribunal required a statement of grounds and material facts, a consent order impact statement, and Tribunal approval, a Consent Agreement is registered with the Tribunal by the Commissioner of Competition. Once registered, a Consent Agreement has the same effect as a Consent Order and is equally enforceable.

¹⁰ *Canada (The Commissioner of Competition) v. IESI-BFC Ltd., BFI Canada Inc., Waste Services Inc., and Waste Services (CA) Inc.*, (CT-2010-005), Consent Agreement, available online at: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=328.

¹¹ WSI also had assets and provided services in the United States.

transitional services at the option of the purchaser(s) including waste disposal in nearby BFI or WSI landfills, and transfer stations on the same terms as those previously agreed to between BFI and WSI or commercially reasonable terms; and short-term access to vehicles, bins, and parking spaces.

1.9 *The Commissioner of Competition and WM Québec Inc. (“WMQ”), 2013*¹²

In July 2012, WMQ proposed to purchase RCI Environnement Inc., Location P.S.M. Inc., and Gestion Environnementale Nord-Sud Inc., the assets of which included residential, commercial, and roll-off collection businesses, transfer stations, and the right to operate a landfill within certain cities in the province of Quebec. On February 6, 2013, the Commissioner filed and registered a Consent Agreement with the Tribunal pursuant to section 105 of the Act to remedy a likely substantial lessening of competition in the supply of disposal services as a result of the proposed acquisition. The Consent Agreement required WMQ to enter into an agreement that would allow a purchaser to dispose a certain yearly waste tonnage at one of the landfills WMQ would operate post-transaction. The agreement requires that the waste be generated from the municipalities that would experience the substantial lessening of competition and included a provision to modify the allowable tonnage if one of the municipalities chose to pursue a diversion option thereby requiring fewer landfill disposal services, as it had indicated it may do.

2. Ongoing Cases

2.1 *Canada (The Commissioner of Competition) v. CCS Corporation (“CCS”) et. al., 2011*¹³

In January, 2011, CCS acquired Complete Environmental Services (“Complete”), and the permit they had obtained to operate a secure landfill facility in North-Eastern British Columbia. On January 24, 2011, the Commissioner applied to the Tribunal pursuant to section 92 of the Act requesting dissolution of the merger. CCS already owned the only other two operational secure landfills in the province. The Tribunal found that the acquisition led to a substantial prevention of competition and, in an Order dated May 29, 2012, ordered the divestiture of the land and permits associated with the proposed landfill. This finding was upheld at the Federal Court of Appeal; however, the matter has been appealed to the Supreme Court of Canada and is expected to be heard in the spring of 2014.

¹² *Canada (The Commissioner of Competition) v. WM Québec Inc.*, (CT-2013-001), Consent Agreement, available online at: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=357.

¹³ *Canada (The Commissioner of Competition) v. CCS Corporation, Complete Environmental Inc., Babkirk Land Services Inc., Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey*, (CT-2011-002), Notice of Application, Reasons for Order and Order, available online at: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=336.

CZECH REPUBLIC

Introduction

The following contribution is dedicated to waste management services in the Czech Republic. Focus has been put on municipal solid waste sector. In the Czech Republic, provision of related services falls within the scope of competence of municipalities. Waste is collected from households and other places dedicated for such purposes¹ and transferred to transfer stations where it is sorted into waste for further use, for disposal in landfills or liquidation in incinerations. The text describes each part of the process of municipal solid waste management.

Waste management is a relatively young yet dynamically growing sector of the Czech economy and general support of recycling and further use of waste has given rise to development of new markets. At the end the text shows examples of competition law enforcement in this sector.

The current Act no. 185/2001 Coll., on Waste and Amendment of Some Other Acts (hereinafter referred to as “the Act on Waste”) emphasizes waste prevention, defines the hierarchy of waste management and promotes the fundamental principles of environmental and health protection in waste handling.

The goals and targets for the various waste management methods and the optimum ways of achieving them are set out by the Waste Management Plan of the Czech Republic for 2003-2013 which was published in the form of a Government Regulation in compliance with the Act on Waste. Since the year 2012 the Ministry of the Environment has worked on the waste management plan for the next period. The draft text has not been finished yet but the Ministry of the Environment declared it will be focused on the increase of further use of waste and reduction of waste disposed in landfills. This goal should be reached for example by increasing the fee for disposing in landfills, by new obligation to collect the biological waste separately and other tools and strategies for more efficient and environmental-friendly waste management.

1. Definition of the waste and its producers

Municipal solid waste is defined by the Act on Waste and related regulations. In the Czech Republic municipal solid waste represents all kinds of waste (mixed municipal waste, sorted waste, hazardous waste, waste collected from public areas) generated on the municipal territory by the activity of natural persons. Pursuant to the Act on Waste the municipalities are the producers of waste.

A waste producer is defined by the Act on Waste as a legal entity producing waste in connection with its operation or natural person authorized to do business producing waste in connection with their business activity. Municipal waste produced in the territory of a municipality by activities of natural persons not subject to the obligation of a waste producer, is considered as waste produced by the municipality. A municipality becomes the waste producer after a natural person deposits waste in a designed location; at the same time the municipality acquires ownership of the waste.

¹ For example bins for sorted waste located in public areas.

Legal entities as waste producers are responsible for the waste management. There are two possibilities how they can proceed with it: 1) conclude a contract with a municipality on which territory they operate and use municipality's waste management system, or 2) conclude a contract directly with a provider of collection services.

2. Municipal solid waste collection

As mentioned above, the provision of municipal solid waste collection and provision of other related services falls within the scope of competence of each municipality. In the Czech Republic, there are competitive tenders for municipal solid waste ("MSW") collection from households and facilities for waste collection located in public areas. Municipalities call for competition and choose the most suitable bid submitted by private undertakings. Crucial aspects when choosing the supplier includes the offered price and quality of required services.

The tender usually covers collection, transfer and liquidation of MSW for a fixed term (mostly for 4 years) or for indefinite period with set conditions for terminating the contract. The tender documentation sets the maximum price. Municipalities require provision of services including the necessary equipment by the supplier. Collection of waste produced by households, sorted waste² and other waste is usually covered by one tender.

Tender documentation also includes requirements regarding the qualitative standards. Contracting authority regularly requires the possibility to conduct controls of the quality of provided services.

As the municipalities choose the most suitable bid, the end consumers (households) do not choose its waste collector.

Households pay a waste fee per natural person to the municipality. The fee is set according to estimated costs of the municipality related to the waste management services and pursuant to the Act on Waste. The fee constitutes the income of municipality which pays the waste management supplier.

Sorting of waste and limitation of waste production are strongly supported by the Waste Management Plan of the Czech Republic. The document is focused on all kinds of waste produced by households and other entities. Fulfillment of set priorities is evaluated annually. According to the impact assessments the overall waste production has decreased by 16 % from the year 2002. The waste production per person has decreased by 19 % and the production of hazardous waste has decreased by 26 % in the same period of time. The general obligation to prevent waste production is included and supported also by the Act on Waste.

The Office for the Protection of Competition of the Czech Republic ("the Office") regularly monitors the market of waste management and if competition concerns arise, the Office initiates the investigation of the alleged competition infringement. See case examples in point 9.

3. Waste transfer stations

After the collection process the waste is transferred to transfer stations. Waste transfer stations collect the waste from each entity (private or public entity, natural or physical person) and charge a fee in accordance with the Act on Waste and related provisions.

Waste transfer stations as well as operation of facilities for further use or liquidation of waste can be operated only upon the municipality approval pursuant to the Act on Waste. Both private and public

² In the Czech Republic municipal solid waste is collected from households and sorted waste is collected from containers in public areas determined for collecting sorted waste (bottles, paper, plastic waste).

entities can submit a request for approval to operate the waste transfer stations. The approval is granted upon several conditions related to the station's code of conduct and technical and qualitative standards.

Operation of waste transfer stations is in most regions a part of the activity of the waste management services supplier, therefore, a part of the municipality's tender. However, in the Czech Republic business entities also focus solely on operation of waste transfer stations or facilities for further use or liquidation of waste.

Recently in several Czech regions an extension of existing waste transfer stations is needed as handling of waste in these facilities is a necessary part of waste handling process preceding the disposal of waste in landfills or its transfer and liquidation in incinerations. Effective and efficient storage and transfer of MSW is a crucial part of the long-term environmental strategy of the Czech Republic and competition in this sector is, therefore, strongly supported.

4. Landfills

In the Czech Republic, 55 % of waste is disposed in landfills. Currently, 298 landfills are operated in the territory of the state. They are divided into three categories: landfills for hazardous waste, landfills for inert waste and landfills for other waste (e.g. MSW). Nearly a half of the landfills (144) are suitable for MSW disposal. By 2025, all landfills for MSW shall be closed according to the plans of the Ministry of Environment.

Currently, the charge for disposal in landfills consists of two components. The first one, so called a basic component, represents the compensation to municipality in which territory the landfill is based. The charge is collected by the landfill operator who transfers the basic component to the municipality. The amount of charge is laid down in the Act on Waste. Since 2009, the charge paid for MSW landfilling has been EUR 20 per ton and EUR 68 per ton for hazardous waste landfilling. The second component of the charge is a risk component that is paid only for disposal of hazardous waste and is transferred to the State Environmental Fund.

The main goal of the charge is to encourage the use of more environmentally friendly ways of waste disposal. The amount of charge should economically disadvantage the waste landfilling and prefer the waste reuse and recycling. For this reason, until all landfills are closed, charges for landfilling will be continuously increased.

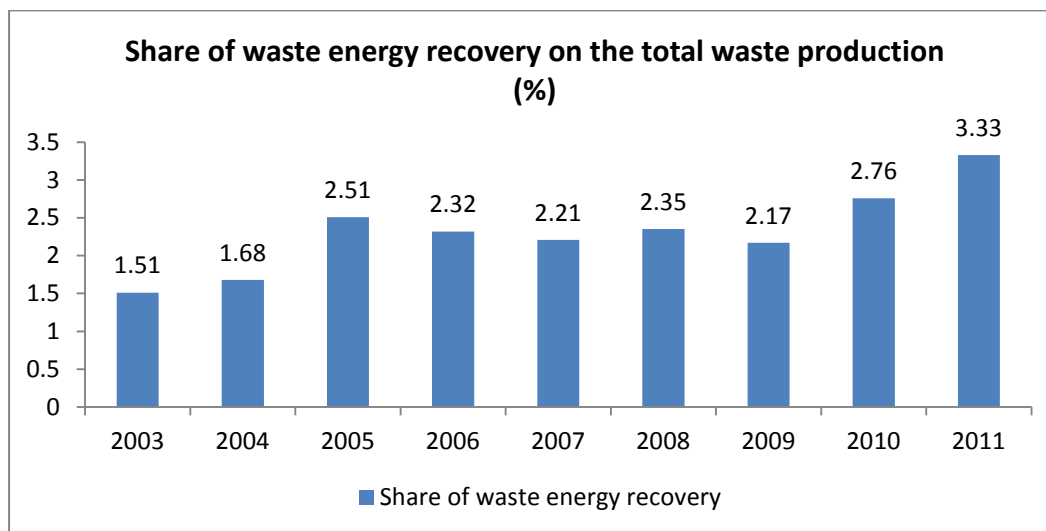
The landfills are operated both by public and private entities upon approval by the regional authority. The approval to operate landfill for hazardous waste disposal is granted for a fixed period not exceeding 4 years.

5. Incineration

Currently, three incinerators of municipal solid waste are operated in the Czech Republic. They are located in highly populated agglomerations. These incinerators are facilities for energy recovery (heat and electricity production) with a total capacity of 654 kt per year.

- **SAKO Brno, a.s.** – 100 % of the capital is owned by the city of Brno.
- **TERMIZO, a.s.** – 100 % of the capital is owned by the Czech branch of the German company MVV Energie. The acquisition of the incinerator by MVV Energie was subject to the approval of the Office for the Protection of Competition. As the Office did not regard the acquisition as distorting the competition, the Office issued a decision approving it.
- **Pražské služby, a.s.** – 77 % of the capital is owned by the city of Prague.

Two of these companies (SAKO, Pražské služby) exercise also the waste collection activities.



Besides incinerators of MSW, 28 incinerators of hazardous waste (hospital and industrial waste) are active in the Czech Republic with a total capacity of 97 kt per year.

Prices of disposal in incinerators are determined by investment and operating costs of the incinerator. They range from EUR 0.056 per kg to EUR 0.108 per kg based on the type of material. There is no tax on incineration of MSW or any other fee laid down by the Czech legislation.

The competition in this sector is not regulated and relies on intermodal competition. The biggest competitors of incinerators in the Czech Republic are landfills which represent the cheapest way how to dispose waste. The prices of disposal in landfills are up to six times lower than prices of disposal in incinerators. This situation, however, is in contrary to EU strategy focused on material reuse and recycling because with such low disposal costs the incentive to increase recycling rate is poor.

In September 2013, a construction of the new incinerator of MSW started in the town of Chotíkov (Plzeň region). The Czech Republic applied for subsidy from the European funds. The EU decision shall be known by end of this year. Apart from this subsidy, the construction is financed by Ministry of Environment of the Czech Republic. The incinerator shall be finished by the end of 2015.

In 2012, the similar project of MSW incinerator development was stopped following the European Commission decision to provide only 20 % subsidy under Cohesion money for incinerator projects, while the investor had been relying on 40 % subsidy. As the project financing was heavily dependent on public money, the project is not moving forward at this stage.

Under current market conditions, the provision of subsidies is necessary as even if the modern incinerators produce electricity and thermal energy, their construction is not economically worthwhile. In spite of this fact, the state supports the construction of new incinerators in order to limit the disposal of waste in landfills and be in compliance with the waste management hierarchy (reduction and reuse → recycling → energy recovery → disposal).

5.1 The Office's approach to incinerations

Liquidation of waste in incinerators lies between landfills and recycling from the environmental perspective. Waste is not stored in dangerous landfills which have the potential to endanger the

environment and is partially used for energy production. On the other hand during the incineration process a significant amount of residual unusable material is produced. This is the most significant difference compared to environmental-friendly and efficient recycling. Recent trend is to prevent waste production and to recycle, therefore support of waste disposal in landfills and waste liquidation in incinerators could be assessed as a step back in waste management development. The Office assesses waste management from the competition perspective; however, such basic principles must be taken into account as well.

It has to be mentioned that the current development in the Czech Republic in the form of establishing another incinerator does not reflect the current trend towards waste prevention and recycling. The majority of European incinerators have a spare capacity for handling bigger amount of waste and according to current estimations it is possible to presume that the spare capacity of European incinerators will rather increase.

From the competition point of view establishment of central incinerator means business opportunities for undertakings active in construction sector, significant public procurement and new jobs. On the other hand construction of such facility has significant impact on undertakings active in the market of waste handling. Local networks of waste handling companies that used to transfer waste to landfills or transfer stations concentrates, markets of further use of waste shrink or disappear as most of the waste is transferred to the incinerator. Therefore, the number of local markets and undertakings active in markets of waste handling decrease.

If the incinerator is operated in the region, only dominant undertakings are still active in the relevant market and transfer the waste to incinerator and there is no further possibility for the waste to become a subject of further supply and demand in the local markets (markets of waste collection, transfer and further use). For small and medium-sized enterprises active in waste handling, its recycling and further use, establishment of incinerator could have a liquidating effect which has also an impact on regional employment. Centralized incinerators support monopolization of the market which causes lower level of competition environment.

Establishment and operation of incinerator represent also a great burden for public resources as well as for consumers in the form of higher fees for the waste collection.

Therefore, the Office dares to say that liquidation of waste in incinerators has negative impact on environment and efficient competition in the relevant market. Developed economies should increase the use of other waste management possibilities as maximization of further use of waste supports sustainable growth and efficient competition in the local markets.

6. Systems to fulfil extended producer responsibility

In terms of the environmental-friendly waste management strategy, the Czech Republic has focused also on the product take-back systems and extended producer responsibility. An example is the packaging waste disposal through the Green Dot system³ which was implemented in the Czech Republic in 2000. The company EKO-KOM was authorized by PRO EUROPE⁴ organization as a licensee of this system.

The company EKO-KOM provides associated compliance of take-back and recovery of packaging waste, based on the authorized decision made by Ministry of the Environment in 2002. The take-back and

³ The Green Dot placed on packaging means that an obligatory entity pays a financial amount to the packaging recovery organization for take-back, sorting and recovery of packaging in accordance to Directive 94/62/EC.

⁴ PRO EUROPE = Packaging Recovery Organization, an international umbrella organisation for national member systems for the recovery and recycling of packaging waste in Europe.

recovery obligations based on articles of the Act No. 477/2001 Coll., on Packaging and on Amendments to Certain Other Acts, apply to any entity that puts into circulation any packages or package products, mainly those who produce, import or sell. The entities may join the EKO-KOM System and ensure obligations of take-back and recovery of packaging.

The EKO-KOM System provides collection and recovery of packaging waste mainly through municipal schemes of separate collection. EKO-KOM co-finance costs of municipal separate collection of packaging waste from households and cooperate with waste management operators to ensure collection of packaging from industry and retail.

This solution is based on legal framework given by the packaging law and waste law:

- Producers, importers, fillers, and distributors of packaging and packaged products shall ensure collection and recovery of packaging waste.
- Based on the Waste Act, the municipalities shall separate and recover waste. Part of sorted components of municipal waste is also consumer packaging, which should be recovered.

On the one hand, EKO-KOM enters into a Contract on Collective Compliance with entities which put packaging on the market or into circulation. Based on these contracts, EKO-KOM collects data concerning packaging production and accepts payments, the value of which depends on the reported packaging production.

On the other hand EKO-KOM enters into a Packaging Waste Collection and Recycling Contract with municipalities and entities authorised to handle waste. These subjects are then obliged to keep a register tracking the quantity of collected and recovered packaging waste, on the basis of which EKO-KOM financially contributes to the systems of collecting, sorting and utilising packaging waste.

EKO-KOM cooperates with waste service providers as well as waste sorting companies. They are integrated in the system indirectly through municipalities or directly on the basis of a contractual relationship (sorting companies).

7. Markets for secondary raw materials

The important component of the Czech economy is the market of secondary raw materials as the primary raw material base in the Czech Republic is insufficient. One of the sources of secondary raw materials is re-usable waste that after processing meets the requirements of the input material for other production processes.

Markets for secondary raw materials are specific by the fact that their supply cannot be regulated depending on the demand. System of MSW collection and transformation is a continuous process that has to be carried out even if the output is not required in the market at that moment. This fact was proved in previous years during the economic crisis when the production could not be stopped due to recycling obligation of the EU member states; however the demand for secondary raw materials was at the very low level. The most affected markets were markets of paper, glass and scrap iron. Moreover, some of the recycled materials were not possible to be stored because of unfavourable weather conditions, so they had to be disposed in landfills. This situation was for some of the recycling and transformation companies liquidating. As a reaction to this situation, the Czech government adopted Measures to solve current problems in the market of secondary raw materials.

Secondary raw materials are traded on the Waste Commodity Exchange which is a section of the Czech Moravian Commodity Exchange ("CMCEK"). CMCEK was established by an agreement on cooperation in the sphere of supporting the market with waste and secondary raw materials concluded

between CMCEK and the Ministry of the Environment in 1996. Its goal is to support the market with waste and secondary raw materials on exchange principles and by doing so to ensure greater transparency.

Trading with secondary raw material is regulated by the Rules on trading on the Waste Commodity Exchange, Rules on records of Waste Commodity Exchange participants and Rules on auctions of the Waste Commodity Exchange secondary market. Fees for contracted trades are governed by the Fee Regulations.

8. *Other waste*

Another issue which should be mentioned is the special (hazardous) waste management. Special waste is defined in the Act on Waste. This type of waste is most often disposed in landfills or incinerators.

In July 2013, Supreme Audit Office of the Czech Republic found out that nearly 99 % of hazardous waste is disposed in landfills free of charge. Landfill operators take advantage of incorrectly set law and treat the waste as a technological material for the landfill modification and landscaping. This category of material is exempt from the charge. On the contrary, the risk component of the charge for hazardous waste landfilling is EUR 180 per ton and this is an income of State Environmental Fund. The Ministry of Environment is now in the search for the appropriate solution which should include also legislative changes.

9. *Antitrust investigations and cases*

9.1 *Czech Waste Management Association influenced the market by estimating cost increases in waste management*

The Office stated that the Czech Waste Management Association (hereinafter referred to as “the CWMA”) adopted and enforced an anticompetitive decision of association of undertakings on prices which led to distortion of competition in the waste management market in the Czech Republic. The party to the proceedings was a civic association with approximately 110 members operating in the waste management market. The CWMA itself does not actively participate in competition in this market; however, it can affect such market by its activities.

According to the Office’s findings, every year, the CWMA would determine, announce, send its members and publish in the media (internet, the magazine Waste, etc.) the expected percentage increase in waste management costs for the following year. In its decision, the Office stated that the CWMA thereby infringed the Act on the Protection of Competition in the period from 11 November 2004 to 1 October 2008.

Geographically, the market was defined as the territory of the entire Czech Republic. The aggregate share of CWMA members in the above market is approximately 40 - 65%.

The fine was set at CZK 495,000 (approximately EUR 19,800). Since the party fulfilled all conditions for settlement, the Office reduced the fine by 20%. The party to the proceeding did not file an appeal and the decision of the Office became effective on 26 October 2011.

9.2 *Cartel in waste management*

In November 2012, the Office imposed fines of a total amount CZK 96,579,000 (approximately EUR 3,863,160) on A.S.A., spol. s r.o., van Gansewinkel, a.s., SITA CZ a.s. and AVE CZ odpadové hospodářství s.r.o. (“ASA”, “AVE”, “SITA” and “van Gansewinkel”). These undertakings, which are

active in the waste management market, and some also in road maintenance, divided the market through the manipulation of tender processes, leading to distortion of competition.

The Office detected the prohibited agreement following its own investigation, and in September 2010 initiated administrative proceedings with ASA, SITA and van Gansewinkel. In 2011, the administrative proceedings were extended to cover AVE. During its investigations the Office found that, between the years 2007 and 2011, the aforementioned undertakings divided customers amongst themselves, using mutual contacts and exchanges of information to help them coordinate their actions in public contracts in the field of waste management and road maintenance.

Agreements were not concluded among all parties to the proceedings simultaneously; instead, six bilateral agreements were made relating to individual award procedures in waste management and, in the case of ASA and AVE, also to road maintenance contracts. During the dawn-raid in the premises of the aforementioned companies, the Office secured evidence showing that contact had occurred between undertakings, slowly evolving into the close coordination of their approach to customers, i.e. anticompetitive behaviour. This manifested itself primarily in the submission of covering offers to tender processes (the submission of an offer, the intention of which was not to win a contract, but merely to create the impression that there is competition for the contract) or the failure to submit offers and contact customers of competitors requiring waste management services.

During the course of the proceedings, ASA and AVE applied for the leniency programme. In exchange for the provision of substantial evidence relating to anticompetitive behaviour, their sanctions were reduced by 50 and 30%, respectively. All participants in the proceedings further requested the application of settlement when they confessed to their unlawful behaviour within the terms specified by the Office, resulting in the reduction of their sanctions by 20%.

From the point of view of the sum of evidence found, sensitivity of the relevant market of handling of waste for consumers, use of a large number of type II leniency applications and the application of the settlement procedure, this was one of the most significant cases in the history of the Office; the administrative proceedings further led to the collection of fines in the first instance. This was also the first case of purely domestic leniency applications.

9.3 *Discriminatory Requirements of the Contracting Authority*

The Office imposed a fines of CZK 3 million (approximately EUR 0.12 million) on the city of Liberec, the contracting authority for errors in the one-billion-crown tender for the provision of services in the waste management sector. Liberec violated the principle of the ban on discrimination by stipulating a requirement to submit a decision granting of approval from the Liberec Region to operate a scrap yard in the tender documentation. This qualification requirement reduced the number of potential suppliers to three undertakings that had the consent to operate such a facility or that operated such a facility in Liberec. Thus, suppliers who did not have the consent to operate a scrap yard at the time of tender proceedings were discriminated against; if their offer had been chosen as the most suitable, they could have arranged the consent and set up a scrap yard subsequently, since the contracting authority wanted to commence the implementation of the project one year after the tender announcement. The contracting authority thereby discriminated against suppliers who did not have their own facilities in Liberec at the time of the tender announcement (scrap yard, administrative building) but who would have been able to arrange them in time for fulfilment of the public contract. This procedure could have had a significant impact on the selection of the most suitable bid as it resulted in restricting the competitive environment.

ESTONIA

According to the waste act local governments in Estonia are responsible for the municipal solid waste collection and transport within their administrative territories. The waste act¹ defines the system as organised waste transport. Organised waste transport means collection and transport of municipal waste from a designated area to a specific waste management facility or facilities by an undertaking chosen by way of a competition organised by the local government.

Most local governments organise a public tender and award the best offer with a concession agreement to collect and transport waste within the local government area to a specific waste management facility or facilities. A waste treatment facility is a structure technically equipped for the collection, recovery or disposal of waste. The municipalities sign waste transport contracts with one company for several years. During the contract period only the winner of the tender is allowed to collect municipal waste in that area. All the waste holders are automatically counted as joined and charged for the service.

According to the waste act waste transport may be organised such a way that the only customer of an enterprise selected by way of a competition and the party to pay charges to it is a local government. In such case, the local government has the duty to keep record of handlers of waste and settling of accounts with them. Currently the described system is only used by one local government in one of its organised transport areas.

This paper focuses primarily to the direction of municipal waste to the waste management facilities by local governments. Due to the fact that in previous years the Competition Authority has several times presented views to local governments condemning discretionary direction of waste to waste management facilities (mostly municipal). For example, such recommendations have been submitted to Narva (2009), Tallinn (2010) and Võru (2011) City Governments. Below the summary of the last two recommendations are provided.

In 2010 the Competition Authority received information (mainly through media) that the City of Tallinn was intending to conclude a contract for the directing of all municipal waste generated in the city of Tallinn to a single operator for handling, whereby the selection probably would have been made from among waste incineration plants. The Estonian Competition Authority is also a national regulator in the field of district heating and electricity markets, whose one task is the provision of opinion to the administrative restrictions established in the mentioned fields. Therefore the Competition Authority initiated the supervision procedure in order to assess the situation.

The Competition Authority found that the waste act does not oblige a local government to choose only one waste management facility, but there can be several such facilities. In addition to the issue, if a local government was obliged to choose one waste management facility, it is also important in this case if it still has the competency to make such a choice notwithstanding the lack of direct obligation. The waste act does not specify directly any such competency. The Tallinn City Government did not explain to the Competition Authority which legal acts provide its competency to conclude a contract, according

¹ Jäätmeseadus RT I, 14.06.2013, 6.

to which all municipal waste generated in the city would be directed to a single waste management facility. It is important to note that the Competition Authority does not dispute the competency of a local government to establish various legal requirements to waste management facilities, which has also been specified in the waste act. For example, a local government may restrict the number of waste management facilities proceeding from the geographic criterion or take account the waste hierarchy specified in the EU waste framework directive. However, this does not allow limiting the choice of waste management facilities to only one operator, and the possibility to provide the service must remain open to all operators meeting the legal criteria. Especially because there are several new waste management facilities, which are in the same level or could even be higher level according to the waste hierarchy. The answer sent from the Tallinn City Government to the Competition Authority did not provide a clear explanation as to what is the advantage of the reservation of waste to a single operator, compared to the situation where all operators meeting certain criteria would compete for the waste. Thus it also remained vague as to which public interests are served by the decision of the city government to grant the sole right to a single operator, while several operators would like to provide a similar service. Granting of any sole right by the state or local government is a serious restriction to competition and it can only be justified with dominant public interest.

Proceeding from the above, the Competition Authority recommended that the Tallinn City Government was not to grant the sole right or any other advantage to any waste management facility. If the city government still finds that granting of the relevant sole right would serve public interests, it should organise a relevant transparent competition. Therefore other operators providing the service could also make their offer under transparent conditions. The recommendation to the Tallinn City Government was fulfilled.

Another example, in 2011 the Competition Authority was informed that Võru Town Government wants to conclude an agreement which obliges the waste transporter Ragn-Sells AS to direct all mixed municipal waste which is collected in the framework of organised waste transport in the town of Võru to be handled by one undertaking – the waste management facility of MTÜ Võru Jäätmekeskus in Umbsaare, although Ragn-Sells AS had informed that it would be remunerative for the consumers if municipal waste will be driven to competing waste management facilities. At the same time, the new competition for organised waste transport was being organised by the Võru Town Government. In the Competition Authority's view a remarkable advantage had been given to the waste management facility in Umbsaare. It remained unclear from the information collected in the course of the procedure which public interests does the intention of Võru Town Government to prefer Umbsaare waste management facility serve, if many undertakings wish to provide a similar service and some of them allegedly at a cheaper price. The environmental objectives named by the town government may also be obtained by other means and are not actually related to the exclusive right.

Although, pursuant to waste act, the local authority designates *inter alia* the waste treatment facility in the contract documents concerning the organised transport of waste, that provision does not impose an obligation on the local authority to designate one specific installation by name.

The Competition Authority took the view that the activity of the Võru Town Government has restricted competition, undermining the interests of consumers. The Authority issued a recommendation to the Võru Town Government not to grant MTÜ Võru Jäätmekeskus waste management facility located in Umbsaare either directly or through public procurement conditions an exclusive right or other competitive advantages in the handling of waste collected through organised municipal waste transport in Võru. Võru Town Government informed the Authority of complying with the recommendation.

To conclude the Competition Authority doubts if local governments even have the competency to direct waste as the waste act does not include provisions that would clearly regulate this matter. For competition perspective it is important that the market would remain open to other eligible undertakings – this means that the waste transport provider must have a choice of operators meeting the legal criteria. If the waste management facilities are limited to one, the market will be closed for other alternative, potentially eligible desired locations. Maintaining free competition is particularly important with respect to investments made in the waste management that have already created new environmentally friendly solutions.

In addition, the Competition Authority highlights that giving a competitive advantage to certain undertakings must always be justified by indicating which public interests or requirements of the law it serves. Thus, when granting a special or exclusive right the local government has to clearly indicate the reasons why the free competition would lead to non-desirable consequences and why the interference to effective competition would lead to a better outcome. The decision taken by the local government has to be justified particularly in the light of consumer's interests.

In light of the above-mentioned cases, in the end of 2012 the Competition Authority sent to the Ministry of Environment an opinion with a proposal to change the current waste act and abolish provisions that allow the local government to designate a specific waste treatment facility.

EUROPEAN UNION

1. Introduction

This paper summarises past decisions and recent developments regarding competition enforcement by the European Commission in the waste management sector, in particular packaging waste. It focuses on the application of Articles 102 and 106 of the Treaty on the Functioning of the European Union (TFEU).

First, the paper briefly summarizes relevant Commission decisions and presents issues related to the pending investigation in Austria for an alleged abuse of dominant position (Article 102 TFEU) by the Austrian incumbent in packaging waste management, Altstoff Recycling Austria (ARA).

Second, the paper discusses the potential application of Article 106 in combination with Article 102 TFEU to the waste management sector, i.e. the abuse of a dominant position related to exclusive or special rights granted to an undertaking.

2. Previous commission decisions and the Ara investigation in the waste management sector

The Commission issued two decisions regarding systems organising the collection and recovery of packaging waste in 2001, Ecoemballages¹ and DSD² and one decision in 2003, ARA.³ These national collection and recovery systems (in France, Germany and Austria respectively) had notified their contracts with collectors, producers and recyclers to the Commission under the former notification procedure pursuant to Regulation 17/62. The Commission had cleared the contracts on the condition that they comply with certain principles (such as an adequate contract duration in case of exclusive contracts between the collection and recovery system and a single regional collector, as well as public tendering). The Commission also found that collection and recovery systems must not impose exclusivity conditions on their regional collectors, and that when such systems are offering a 'Green Dot' licence to producers, a fee can only be claimed for this licencing when a service is provided ('no service, no fee'). In addition, in the 2003 ARA decision, the Commission imposed an obligation on ARA not to prevent packaging waste collectors from contracting with competitors of the ARA system on (i) the sharing of containers and (ii) other arrangements for the collection and sorting of household packaging waste, in order to ensure access to the collection infrastructure by competing systems. ARA appealed this decision and the Court upheld the decision⁴.

The latest investigation of the Commission regarding packaging waste also concerns ARA. On 15 July 2011, the Commission opened proceedings against ARA regarding possible foreclosure under Article 102 TFEU of Austrian markets for the management of packaging waste. Under EU law, producers are

¹ Commission decision of 15 June 2001, OJ L 233, 31.8.2001, p.37.

² Commission decisions of 20 April 2001, OJ L 166, 21.6.2001, p.1, and of 17 September 2001, OJ L 319, 4.12.2001, p.1.

³ Commission decision of 16 October 2003 in cases COMP/35.470 and COMP/ 35.473.

⁴ Judgment of the General Court of 22 March 2011 in case T-419/03, *Altstoff Recycling Austria AG v European Commission*.

required to collect and recycle a set percentage of the packaging waste resulting from the use of their products. ARA, created in 1993, is the leading collection and recovery system in Austria, offering producers to discharge them of their obligation against a licensing fee. ARA is collecting and recycling various packaging materials such as wood, plastic, metal, glass or paper. In practice, ARA has set up a network of regional collectors and of recyclers to provide the waste management service. ARA is also generating revenues from the sale of collected packaging waste to recyclers.

In 2012, ARA had 15,500 licensing partners (producers, packagers or retailers subject to the producer responsibility and paying a fee to ARA), generating around 144 million Euro in licensing fees. It collected and recovered around 829,000 and 778,000 tons respectively⁵.

Today, ARA is *de facto* the only system authorised by Austrian legislation for all types of household packaging waste⁶. In the commercial packaging waste management sector, some other systems have been authorised and are competing with ARA, the leading player on this market. New systems can more easily enter the commercial waste market as such entry only requires setting up a limited number of regional collection centres.

In July 2013, the Commission sent a Statement of Objections to ARA. The Commission's concerns are that ARA may have infringed competition rules in two respects⁷.

First, the Commission has concerns that ARA may have prevented competitors from accessing the household collection infrastructure. This infrastructure is defined as all containers and bags under ARA's control, together with the collection services contracted between ARA and its regional collectors. Competing systems would need to gain access to such infrastructure as Austrian law requires that collection and recovery systems must have a nationwide coverage of collecting services, and since duplicating this infrastructure would be impossible in practice.

Second, ARA may have foreclosed competitors from the market for commercial packaging waste. The Commission has concerns that ARA may have offered certain companies to collect waste directly from their premises using ARA containers, as ARA does for households. As ARA containers may only be used for ARA-licensed products and as companies do not want to have several containers for the same type of waste on their premises, these companies may have made sure that their suppliers choose ARA as waste management system, thus possibly foreclosing competing systems.

The Commission's investigation is on-going. The sending of a Statement of Objections does not prejudge the final outcome of the investigation.

Recently the Austrian authorities adopted a new law for waste packaging management. The law aims to increase competition, *inter alia* by allowing competing systems to create their own infrastructure (physical infrastructure and network of contracts) for household waste in parts of Austria and by facilitating the access of competing systems to ARA's existing infrastructure in the rest of the country⁸.

⁵ Source: ARA website.

⁶ Another system, Oko-Box, is authorised for the household waste but it is only active in the segment of drink packaging.

⁷ We distinguish below between packaging waste occurring at households ("household waste") and packaging waste occurring at commercial sites ("commercial waste").

⁸ AWG-NovelleVerpackung, published in the Federal Law Registry (Bundesgesetzblatt) on 16 September 2013, see http://www.ara.at/fileadmin/user_upload/pdf/AWG/BGBLA_2013_I_193.pdf

3. Potential application to the waste management sector of Article 106 in combination with Article 102 TFEU

According to Article 106(1) TFEU, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular 102 TFEU in the area of antitrust.

An issue that frequently arises in this sector is that private waste management companies complain that public authorities (often municipalities) reserve to public companies the most profitable segments of household waste management, namely the packaging waste management. In several Member States, the waste laws have been amended in recent years so that municipalities – traditionally active in the segment of mixed municipal waste – can also become active in the segment of packaging waste.

The fact that special or exclusive rights are granted to a specific company (be it public or private) is not in itself a violation of Article 102 TFEU in conjunction with Article 106 TFEU, even where e.g. the collection and recycling services used to be performed by several competing players in the past. However, for there to be a breach of Article 106 TFEU in conjunction with Article 102 TFEU it is sufficient that the measure creates an inequality of opportunity which distorts competition⁹.

Since the waste management sector is generally highly regulated, it is important for a competition authority to distinguish between independent company behaviour and behaviour that is imposed on the company by legislation.

4. Conclusion

Competition enforcement plays an important role in the waste management sector. Competitive and efficient waste management markets will result in lower prices paid by consumers. DG Competition and the national competition authorities are active in enforcing competition rules in order to help achieving a level playing field. Competition problems in this sector traditionally stem from the dominant position of the incumbent system and the measures taken to exclude competitors from the market. The fact that the waste management sector is a highly regulated sector adds a further complexity to competition enforcement. A careful distinction has to be made between competition problems arising from company behaviour and problems arising from legislation. It is therefore also important that Member States design their waste management legislation in a way that allows for effective competition.

⁹ Commission Decision COMP 38700 Greek Lignite, para. 238. The decision was annulled by the General Court in Case T-169/08, DEI v Commission. This judgment is under appeal in Case C-553/12 P, Commission v DEI.

FINLAND

1. General

In Finland, the basic rights and duties of municipalities in waste management are stipulated in the Waste Act (646/2011), which entered into force on 1 May 2012. Pursuant to the Waste Act, municipalities are responsible for the management of municipal solid waste. In addition to this, municipalities are responsible for the management of comparable waste produced by public administration, services and the education sector. Municipal waste management authorities are responsible for the public administrative duties related to waste management, such as deciding on the municipal waste tariff and the waste treatment system. If several municipalities have co-operated to form a regional waste management company, the municipalities must also set up a joint organ to handle the administrative duties. In practice, waste management duties are nowadays typically transferred to local waste management companies who purchase the requested services by putting them out to tender among individual waste management enterprises.

Waste charges and their tariff structure are, within statutory limits, municipally determined. Municipal waste charges cover the cost of municipal waste management, such as the costs incurred by waste collection and transportation, as well as the establishment, maintenance, decommissioning and after-care of treatment facilities.¹ In practice, the type, quality and quantity of waste, as well as the frequency of collection and, for instance, the conditions for collecting and transporting waste on the property and in the transport area may affect the waste charges.²

Pursuant to the Waste Act, waste management should be steered by an order of priority principle (waste hierarchy) outlining a five-step waste management hierarchy: waste prevention – re-use – material recycling – recovery as energy – disposal at landfills.

2. Concern as to performance of the waste markets and revision of the Waste Act

In Finland, the performance of municipal waste management has been called into question. The Waste Act that was revised in 2012 and its application particularly resulted in tensions between private and municipal waste management companies. This resulted in complaints to the competent competition authorities. The FCCA has investigated some cases regarding potential antitrust problems in municipal waste management markets. Excluding one open antitrust case, all cases have so far been closed without affirmative findings as to antitrust infringements.

Previously, the FCCA has contributed to some liberalisation of the national waste management regime, but the legislative reform of 2012, in spite of FCCA efforts, turned out to be disappointing. Nonetheless, the problematic nature of the waste markets also became recognised by the Finnish Government. In order to ensure the functionality of the waste market after the revision of the Waste Act, an

¹ The waste charge should correspond to the level of services offered by the municipality and, among other things, steer waste management towards the order of priority set forth in the national Waste Act.

² In addition to this, municipalities are entitled to collect a separate basic charge, a so-called eco charge, which covers the costs resulting from the maintenance of registers and the provision of guidance.

investigation of the impact of practices on competition was called for in a program for promoting healthy competition drawn up by PM Jyrki Katainen's administration. The program aims at improving the workability of competition, particularly in home market sectors, including waste management.

The Ministry of the Environment was set to take the lead in the preparation of a report on the application of the 2012 Waste Act regarding its impact on competition. The FCCA is also involved, as it is represented in the steering group led by the Ministry of the Environment.

3. National survey of the functionality of municipal solid waste markets

As a response to the need for investigation set out in the program for promoting healthy competition, the Ministry of the Environment has put forward a tender for survey regarding, for instance, application practices and functionality of the 2012 Waste Act and municipal waste management.

Recently, the FCCA has also organised a national survey regarding the functionality of municipal solid waste markets in cooperation with the Regional State Administrative Agencies. The first findings of the survey have only recently been received. The more thorough analysis is yet to come, and thus far, only very preliminary results may be presented.

The preliminary results seem to indicate a potential need for further investigation as to problems arising, among others, from:

- Competition neutrality issues;
- The possibility that the official decision-making of local authorities may be de facto influenced by publicly owned companies;
- Non-transparency of charging for consumers;
- Conflict of interest between publicly-owned incinerators and private recycling companies competing for an increasingly inadequate waste flow.

An underlying issue of waste management appears to be institutionalised in a problem of how an increasingly inadequate waste flow should – and could – be best allocated in order to cover the capacity need of incinerators, yet at the same time also ensuring the fulfillment of waste hierarchy with a view of constantly enhancing the role of re-use and recycling.

4. Conclusions

In Finland, the potentially problematic nature of the municipal waste market has been recognised for some time. Notwithstanding recent legislative changes, the preliminary findings of the recent study coordinated by the FCCA regarding municipal waste management markets indicate that problems may indeed still persist. More thorough investigations of the waste management market are likely to follow.

FRANCE

(Version française)

Le Groupe de travail n°2 du Comité Concurrence de l'OCDE a inscrit à l'ordre du jour de sa session d'octobre 2013 le thème de la concurrence dans la gestion des déchets, lequel recouvre de nombreuses thématiques. Au vu de la pratique décisionnelle de l'Autorité de la concurrence (ayant succédé en 2009 au Conseil de la concurrence), des travaux les plus récents des commissions parlementaires, et des caractéristiques des modes de gestion des déchets en France, il est proposé d'axer les termes de la présente note sur la question de la concurrence au regard de la responsabilité élargie du producteur, qui s'est incarnée en France par le développement particulièrement soutenu des éco-organismes.

1. Les éco-organismes, instrument de mise en œuvre de la Responsabilité Élargie du Producteur

1.1 Les filières à Responsabilité Élargie du Producteur

1.1.1 Principes et objectifs de la Responsabilité Élargie du Producteur

Le principe dit de responsabilité élargie du producteur (REP) procède d'un concept formalisé par l'OCDE à partir de 1994, ayant abouti en 2001 à la publication d'un document intitulé « Responsabilité élargie du producteur, manuel à l'intention des pouvoirs publics ». Ce principe consiste à faire peser sur le producteur – désignation qui recouvre ici les metteurs sur le marché, en ce compris les distributeurs ou importateurs – la charge financière de l'élimination des déchets générés par ses produits. Ainsi, la responsabilité élargie du producteur s'analyse en une déclinaison particulièrement approfondie et structurée du principe « pollueur-payeur », lequel en France a reçu valeur constitutionnelle dans le cadre de la Charte de l'environnement, intégrée à la Constitution par la loi n° 2005-205 du 1^{er} mars 2005, et dont l'article 4 dispose en effet que « *toute personne doit contribuer à la réparation des dommages qu'elle cause à l'environnement, dans les conditions définies par la loi* ».

Ce faisant, la REP concourt à la réalisation de plusieurs objectifs. Elle tend d'abord à l'internalisation, dès le stade de la fabrication, du coût de la gestion des déchets résultant de la consommation ou de l'usage du produit, incitant en cela le producteur à la prise en compte *ab initio* de préoccupations environnementales en vue de minimiser les frais exposés par lui à ce titre. Par ailleurs, elle opère la privatisation, par transfert vers le producteur, d'une charge financière reposant, à défaut, sur les finances des collectivités territoriales, lesquelles la répercutent sur les contribuables. Enfin, la REP concourt à ce que des ressources suffisantes soient allouées à la mise en place de filières de traitement et de recyclage des déchets, autre objectif de l'instauration de ce mécanisme – correspondant en outre à une préoccupation grandissante de la société française.

1.1.2 Cadre normatif

Le premier texte ayant posé, au niveau européen, les prémices de la responsabilité élargie du producteur est la directive modifiée 75/442/CEE du Conseil du 15 juillet 1975 relative aux déchets, aux termes de laquelle « *conformément au principe du pollueur-payeur, le coût de l'élimination des déchets doit être supporté par le détenteur qui remet des déchets à un ramasseur ou à une entreprise, les*

détenteurs antérieurs ou le producteur du produit générateur de déchets ». La loi n° 75-633 du même jour, relative à l'élimination des déchets et à la récupération des matériaux, transpose cette directive en droit interne, et dispose à son article 2 : « *Toute personne qui produit ou détient des déchets, dans des conditions de nature [...] à porter atteinte à la santé de l'homme et à l'environnement, est tenue d'en assurer ou d'en faire assurer l'élimination conformément aux dispositions de la présente loi, dans des conditions propres à éviter lesdits effets* », et à son article 6 : « *Il peut être fait obligation aux producteurs, importateurs et distributeurs de ces produits [générateurs de déchets] ou des éléments et matériaux entrant dans leur fabrication de pourvoir ou de contribuer à l'élimination des déchets qui en proviennent.* »

Le même principe est désormais énoncé de manière explicite par l'article L.541-10 du Code de l'environnement, issu de l'ordonnance n° 2010-1579 du 17 décembre 2010, qui énonce : « *En application du principe de responsabilité élargie du producteur, il peut être fait obligation aux producteurs, importateurs et distributeurs de ces produits ou des éléments et matériaux entrant dans leur fabrication de pourvoir ou de contribuer à la gestion des déchets qui en proviennent* ».

En outre, les lois n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement¹, dite « *Grenelle I* », et n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement, dite « *Grenelle II* », qui marquent un essor important de la prise en compte des impératifs environnementaux de tous ordres, dont la réduction des déchets et la croissance du recyclage, ont donné une nouvelle vigueur à la concrétisation de ce principe – avec notamment l'introduction de sanctions administratives à l'encontre des producteurs qui ne s'acquitteraient pas de leurs obligations.

C'est pour assurer la mise en œuvre effective de ce principe de responsabilité élargie du producteur que se sont constitués les éco-organismes.

1.2 Fonctionnement et développement des éco-organismes français

1.2.1 Mécanismes de fonctionnement des éco-organismes

La REP s'est matérialisée par la mise en place d'une organisation par catégories de producteurs, ou filières, selon un schéma faisant interagir : le producteur, le détenteur, les collectivités locales (en ce qu'elles ont la charge de la collecte des déchets des ménages), le cas échéant le distributeur (lorsque c'est à lui qu'il incombe de regrouper le type de produits usagés constituant le déchet en cause), et les différents prestataires de transport, de tri, de traitement, de valorisation et/ou de recyclage, du déchet.

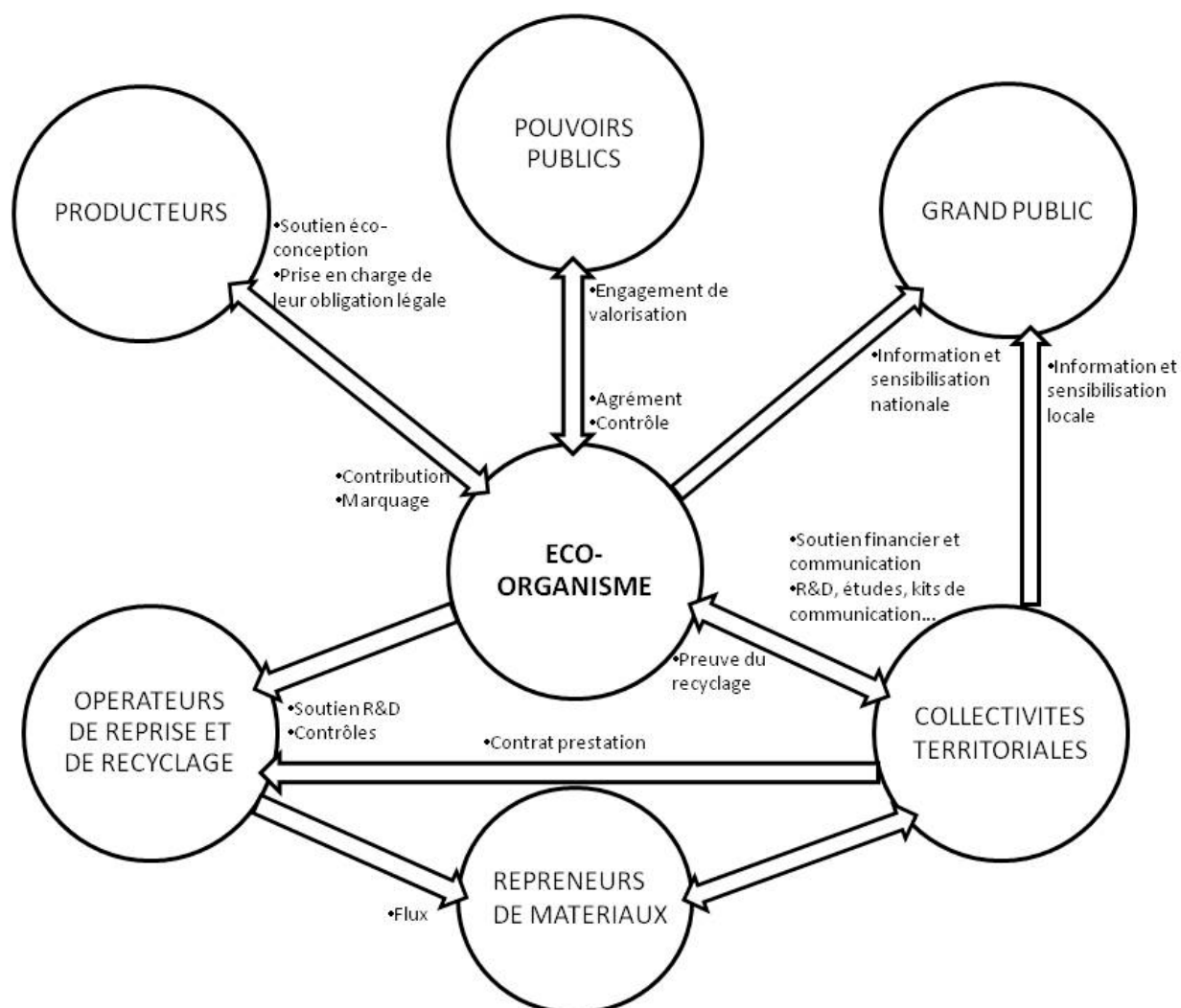
Les producteurs peuvent choisir d'exercer en direct leur responsabilité du fait des déchets générés par leurs produits en en organisant eux-mêmes la reprise et le traitement, soit à titre individuel, à hauteur pour chacun de la part de marché qu'il détient, soit par la mutualisation de cette charge, en choisissant en commun un mandataire, soit encore suivant un schéma dit « collectif » : celui de l'éco-organisme.

L'éco-organisme est une structure mise en place par les producteurs, à laquelle ils adhèrent, et dont ils assurent la gouvernance. Il lui est dévolu l'obligation de « *pourvoir ou de contribuer à la gestion des déchets* » incombant aux producteurs, lesquels lui versent en contrepartie le produit d'une « éco-contribution », dont le montant est déterminé en fonction de la quantité et de la nature – en termes d'impact environnemental – des produits mis sur le marché. Il existe concrètement deux types d'éco-organismes : l'éco-organisme financeur et l'éco-organisme opérationnel.

¹ Ensemble de rencontres politiques organisées en France en septembre et octobre 2007, rassemblant des représentants de l'État, des collectivités territoriales, des ONG environnementales, et des partenaires sociaux, visant à prendre des décisions de long terme en matière d'environnement et de développement durable.

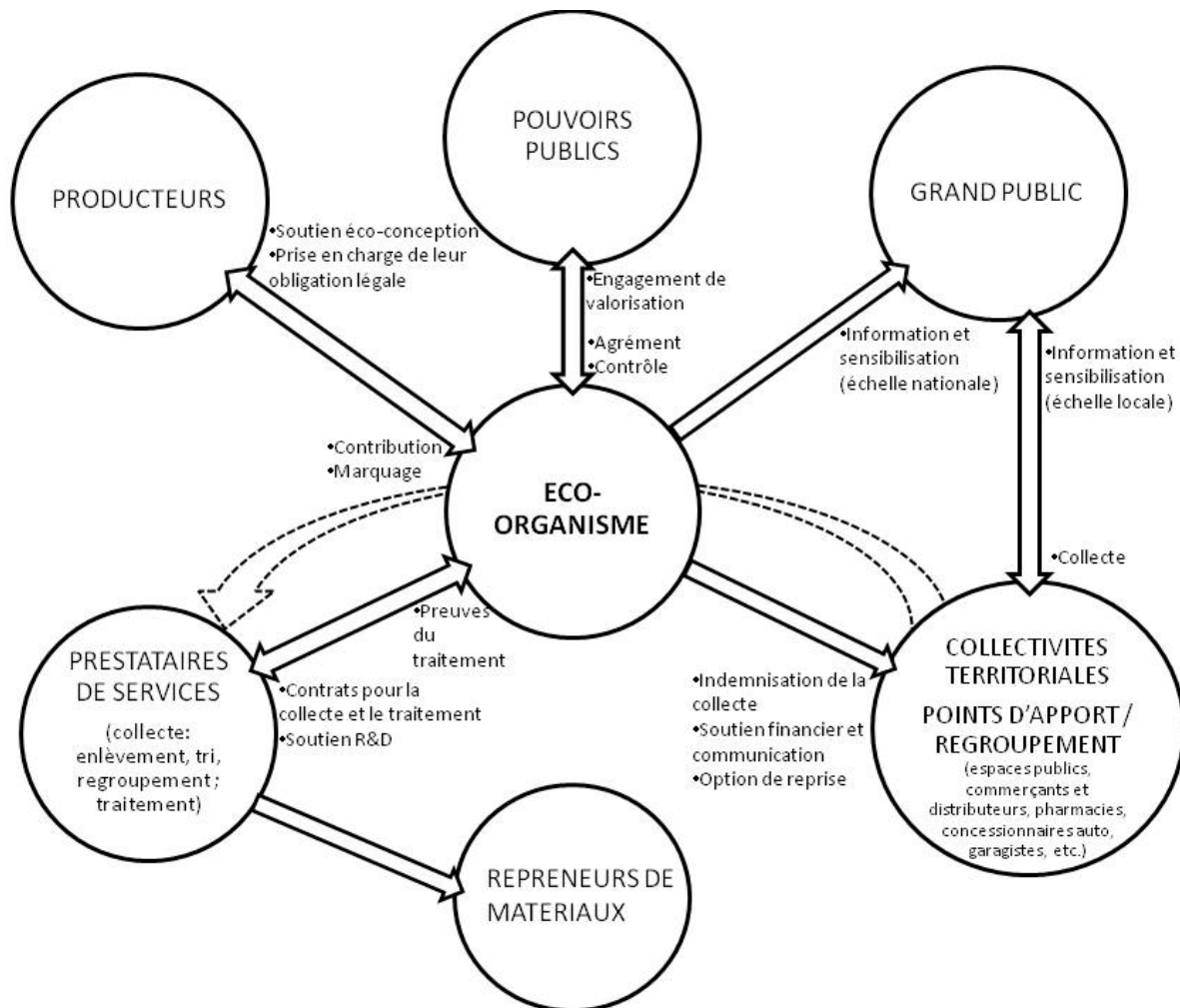
L'éco-organisme est de type financeur lorsqu'il n'assume que la responsabilité financière des producteurs au titre de la gestion des déchets. Il apporte alors des financements aux collectivités territoriales, dans le cas des déchets des ménages (ou aux autres acteurs en charge du regroupement des produits concernés), ainsi qu'une prestation d'expertise et de conseil, afin qu'elles assument la collecte et l'élimination des déchets. Les collectivités territoriales contractent avec les prestataires nécessaires pour assurer matériellement la collecte, le tri, le traitement des déchets, et le cas échéant la vente des matériaux valorisables qui en seraient issus.

Schéma de fonctionnement d'un éco-organisme financeur



L'éco-organisme est de type opérationnel lorsqu'il prend une part active à la gestion des déchets, en les récupérant auprès des détenteurs, des points de collecte ou des collectivités locales (s'agissant de déchets ménagers) et en contractant directement, sur appel d'offres, avec les prestataires chargés du tri et du traitement. Dans ce cas de figure, il peut s'ajouter un rôle de financeur.

Schéma de fonctionnement d'un éco-organisme opérationnel



L'importante filière des déchets d'emballage ménagers présente cependant un schéma d'organisation spécifique, et particulièrement complexe, par lequel l'éco-organisme exerce une intervention plus en aval dans la gestion des déchets, en offrant aux collectivités locales un service de reprise des matériaux issus du processus de collecte sélective et de tri. Cette reprise est proposée à un prix déterminé garanti, en tout point du territoire, auprès du repreneur désigné par l'éco-organisme. Cependant cette offre ne saurait revêtir un caractère obligatoire, les collectivités étant libres de contracter directement avec un repreneur, ou encore avec les fédérations professionnelles qui proposent également un système de reprise intégré. Quel que soit le mode de reprise choisi, les collectivités bénéficient du soutien financier administré par l'éco-organisme, en contrepartie du recyclage effectif des déchets considérés, attesté par la production d'un certificat de recyclage.

La REP constitue un mode d'organisation particulièrement méthodique et efficace en vue de l'exploitation des "mines urbaines", terme qui désigne le flux de matières contenues dans la consommation, les biens mobiliers et immobiliers et les infrastructures. En effet, les éco-organismes et l'Agence de l'Environnement et de la Maîtrise de l'Énergie (ADEME) constituent progressivement les bases de données nécessaires à la connaissance des gisements de déchets à venir – quant à leurs quantités, leur nature et leur contenu-matière.

L'effort collectif de mobilisation de ces gisements, pré-financé par le paiement des éco-contributions, permet d'amorcer le financement de nouveaux systèmes de collecte et de recyclage et, indirectement, les investissements industriels des opérateurs, les éco-organismes (ou les collectivités territoriales) apportant à ces derniers une garantie d'approvisionnement de leurs unités².

1.2.2 Le développement des éco-organismes en France

Il convient de relever d'emblée que la France est le pays européen ayant instauré le plus grand nombre de filières REP – une vingtaine aujourd'hui, étant observé que la tendance est désormais moins à la création de nouvelles filières qu'à l'élargissement du périmètre des filières déjà couvertes. Le plus souvent, il existe un seul éco-organisme par filière, mais certaines filières peuvent en comporter plusieurs (par exemple, les filières des déchets des équipements électriques et électroniques, ou des pneumatiques.) Certaines filières REP ne comportent aucun éco-organisme : c'est le cas par exemple des véhicules hors d'usage ou des batteries de démarrage et batteries industrielles. La majorité des éco-organismes ont été institués dans des filières de produits de consommation courante à destination des ménages, un petit nombre seulement concernant des biens intermédiaires destinés à l'industrie ou l'agriculture.

La première mise en œuvre en France d'une gestion des déchets reposant sur la responsabilité élargie des producteurs date, en pratique, de 1979, avec le financement de la gestion des lubrifiants usagés par une taxe payée par les metteurs sur le marché ; cependant, son montant venait abonder le budget général de l'État, et non financer les acteurs de la filière, et les producteurs n'exerçaient aucune responsabilité directe dans la gestion des déchets, dévolue à l'État, si bien qu'il ne s'agissait pas d'une filière REP proprement dite. Aussi, c'est du début des années 1990 que l'on peut dater le développement d'un véritable dispositif de filière REP avec l'instauration d'éco-organismes dédiés.

La constitution des éco-organismes procède généralement de l'adoption d'une réglementation. Celle-ci peut être d'origine européenne, soit qu'elle ait expressément rendu obligatoire la mise en place d'une filière à REP (directives 91/157/CEE du 18 mars 1991 et 2006/66/CE du 6 septembre 2006 sur les piles et accumulateurs ; directive 2000/53/CE du 18 septembre 2000 sur les véhicules automobiles hors d'usage), soit qu'une telle filière ait été constituée à la suite d'une directive ou d'un règlement à portée sectorielle se bornant à prévoir une obligation de collecte sélective et de traitement ou élimination des déchets (règlement 2037/2000 du 29 juin 2000 sur les fluides frigorigènes, directive 2004/27/CE du 31 mars 2004 sur les médicaments non utilisés...). Il peut aussi s'agir d'une norme de droit interne, par exemple dans le cas des filières REP des pneumatiques, des textiles usagés, des déchets d'activités de soins à risques infectieux ou, très récemment, des bouteilles de gaz. La création d'un éco-organisme compétent pour la filière des déchets ménagers – la plus importante en France par les tonnages et le nombre de parties concernés – est pour sa part issue d'une réglementation de droit interne (décret n°92-377 du 1^{er} avril 1992), qui se trouve avoir mis en œuvre les obligations fixées ultérieurement par voie de directive européenne (directive 94/62 CE du 20 décembre 1994). Certains éco-organismes cependant sont nés d'accords volontaires parmi les producteurs du secteur (déchets de l'agrofourriture tels que les emballages de produits phytopharmaceutiques ou de semences, cartouches d'impression bureautique...).

La gouvernance des éco-organismes est le plus souvent opérée par la constitution, par les producteurs concernés, d'une société anonyme – à l'exception des filières à enjeu sanitaire : médicaments et déchets d'activités de soins, dans lesquelles l'éco-organisme (respectivement Cyclamed et DASTRI) a une forme associative. Cependant, leur nature ambivalente, au confluent d'une logique de marché et de la mise en

² Sur le cadre juridique et le fonctionnement des filières REP, voir « Les filières à responsabilité élargie du producteur – Panorama 2011 », publication de l'ADEME (en français et en anglais), Collection *Repères*, octobre 2012, en téléchargement gratuit sur :

<http://www2.ademe.fr/servlet/getDoc?sort=-1&cid=96&m=3&id=85627&ref=&nocache=yes&p1=111>

œuvre d'une mission d'intérêt général, apparaît dans le fait que les éco-organismes procédant d'une obligation légale sont soumis à agrément de la part des pouvoirs publics, sur la base d'un cahier des charges qui fixe leurs objectifs, leurs relations avec les acteurs de la filière, et les conditions de leur contrôle. En outre, il est alors prévu la présence d'un censeur d'État, dont l'objectif principal est de suivre la gestion financière de l'éco-organisme. À cet effet, « *l'éco-organisme agréé communique au censeur d'État, à sa demande, tous documents et informations nécessaires* », celui-ci pouvant « *faire procéder à tout audit en rapport avec sa mission* » et adresser « *un rapport aux ministres chargés de l'écologie, de l'industrie et de la santé, chaque fois qu'il l'estime nécessaire* ». ³

2. Les éco-organismes et le droit de la concurrence

2.1 La soumission des éco-organismes aux règles de concurrence

Le droit français de la concurrence s'applique à l'ensemble des activités économiques, c'est-à-dire « à toutes les activités de production, de distribution et de services, y compris celles qui sont le fait de personnes publiques, notamment dans le cadre de conventions de délégation de service public ». ⁴

La Cour d'appel de Paris, devant laquelle sont portés les recours à l'encontre des décisions de l'Autorité de la concurrence en matière de pratiques anticoncurrentielles, a notamment précisé à cet égard, s'agissant de l'activité d'une association, que « *c'est la nature économique de l'activité affectée et non la qualité de l'opérateur ou la forme selon laquelle il intervient qui détermine l'application des règles de concurrence* » ⁵ Il n'est donc pas tenu compte du statut juridique (public ou privé, associatif ou commercial) de la personne morale auteur des pratiques, de son mode de financement, ou encore du but d'intérêt général ou du caractère non lucratif de l'activité. ⁶ Ainsi, comme l'a retenu le Conseil de la concurrence dans un avis de 1999, « *l'accomplissement d'une mission d'intérêt général telle que la protection de l'environnement ne dispense pas les opérateurs économiques de respecter le droit de la concurrence* ». ⁷

S'agissant de la compétence de l'Autorité à l'égard des éco-organismes, le juge judiciaire a eu l'occasion de souligner, dans le cadre d'un recours à l'encontre d'une décision concernant des pratiques reprochées à deux éco-organismes de la filière des déchets ménagers, que les règles de la concurrence « *s'appliquent à toutes les activités de production, de distribution et de services, notamment dans le cadre de conventions de délégation de service public et y compris par le biais de contrats administratifs* », étant rappelé que « *la forme juridique des personnes qui exercent une activité visée par l'article L 410-1 du Code de commerce, leur éventuel agrément par l'État, ou leur participation à une mission de service public, ne sauraient empêcher l'Autorité d'agir* » ⁸.

Dans ce contexte, l'Autorité, qui a analysé les filières à REP comme « l'introduction, par décision publique, de mécanismes de marché à des fins d'intérêt général de nature environnementale et sanitaire » et relevé que « les éco-organismes agissent selon les mécanismes du marché, tout en étant investis de missions d'intérêt général et dépourvus de but lucratif » ⁹, s'est de longue date saisie de l'examen de leur

³ Décret n° 2011-429 du 19 avril 2011.

⁴ Article L.410-1 du Code de commerce.

⁵ Cour d'appel de Paris, 8 février 2000, *association " L'Académie d'architecture "*.

⁶ Avis 10-A-21 du 19 novembre 2010, point 47.

⁷ Avis 99-A-22 du 14 décembre 1999.

⁸ Cour d'appel de Paris, 11 septembre 2009, *DKT*.

⁹ Avis 12-A-17 du 13 juillet 2012, point 28.

situation au regard des règles de concurrence, principalement au titre de sa fonction consultative à l'égard des pouvoirs publics et des acteurs économiques¹⁰, mais également dans le cadre de sa fonction contentieuse¹¹.

Elle a ainsi été conduite à rendre dès 1994 un avis sur un projet de décret portant réglementation de l'élimination des huiles usagées, qui créait un véritable régime de REP, à la charge des producteurs de lubrifiants, en lieu et place du système administré jusqu'alors en vigueur. En 1999, un avis a été rendu sur les conditions d'organisation et de financement de la filière d'élimination des accumulateurs usagés, puis à deux reprises, en 2005 et 2010, l'Autorité s'est prononcée sur des projets de décret concernant respectivement la gestion des déchets des matériels électriques et électroniques et celle des déchets d'activités de soins à risques infectieux (seringues, dispositifs d'injection) produits par les patients en auto-traitement. Enfin, par un avis de 2012, sur saisine de deux fédérations professionnelles actives dans le secteur des déchets ménagers, elle a eu l'occasion de conduire une analyse concurrentielle complète du secteur de la gestion des déchets couvert par le principe de la responsabilité élargie du producteur.

La pratique contentieuse a concerné la seule filière des déchets ménagers, avec une décision de 2009 relative à une demande de mesures conservatoires relative à un projet de système d'information sur la collecte et le traitement des déchets par la société Eco-Emballages, et une affaire en 2010 de pratiques mises en œuvre par les sociétés Éco-Emballages et Valorplast dans le secteur de la reprise et de la valorisation des déchets d'emballages ménagers plastiques, laquelle s'est résolue par l'adoption d'une série d'engagements.

2.2 *La position des éco-organismes sur les marchés des filières à REP*

L'intervention des éco-organismes est susceptible de s'opérer sur trois marchés, tels que définis notamment par la Commission européenne dans sa décision du 15 juin 2001 relative à Éco-Emballages¹² : celui du service offert aux producteurs (marché d'adhésion), celui de la collecte sélective, du tri et du traitement des déchets, celui de la reprise et/ou du négoce des matières issues du traitement des déchets.

En pratique, l'activité principale des éco-organismes consiste en une offre de service aux producteurs, par laquelle ils assument une prise en charge collective des obligations leur incombant au titre de la gestion

¹⁰ Avis 94-A-31 du 6 décembre 1994 relatif à une demande d'avis sur un projet de décret portant réglementation de l'élimination des huiles usagées.

Avis 99-A-22 du 14 décembre 1999 relatif à une demande d'avis du ministre de l'économie, des finances et de l'industrie concernant les conditions d'organisation et de financement de la filière d'élimination des accumulateurs usagés.

Avis 05-A-07 du 31 mars 2005 relatif au projet de décret concernant la prévention et la gestion des déchets des matériels électriques et électroniques.

Avis 10-A-21 du 19 novembre 2010 relatif à la gestion des déchets d'activités de soins à risques infectieux perforants produits par les patients en auto traitement.

Avis 12-A-17 du 13 juillet 2012 concernant le secteur de la gestion des déchets couvert par le principe de la responsabilité élargie du producteur.

¹¹ Décision 09-D-22 du 1^{er} juillet 2009 relative à la préparation d'un projet de système d'information géographique pour la collecte et le traitement des déchets par la société Eco-Emballages.

Décision 10-D-29 du 27 septembre 2010 relative à des pratiques mises en œuvre par les sociétés Eco-Emballages et Valorplast dans le secteur de la reprise et de la valorisation des déchets d'emballages ménagers plastiques.

¹² Décision 2001/663 CE, 15 juin 2001.

des déchets. Dans l'exercice de cette mission principale, il n'est pas relevé de préoccupations de concurrence, et en réalité il est permis d'estimer que la concurrence entre plusieurs éco-organismes sur une même filière n'est pas une garantie d'efficacité, les positions des éco-organismes étant largement figées dès lors qu'ils ne peuvent traiter qu'un nombre de collectivités territoriales en proportion du montant d'éco-contributions reçues des producteurs, lesquels tendent à rester impliqués dans l'éco-organisme qu'ils ont créé – le cas de la filière des déchets des équipements électriques et électroniques, dite D3E, où coexistent quatre éco-organismes, dont trois intervenant sur la gestion des déchets des mêmes produits, en fournit une illustration.

Sur le marché de la collecte sélective et du tri, les éco-organismes offrent leurs services aux collectivités territoriales. Les éco-organismes financeurs disposent envers elles d'un pouvoir d'influence qui « *se manifeste par la dualité du rôle qu'ils exercent auprès des collectivités territoriales : à la fois financeurs et experts. La détention du « savoir » et des moyens de financement auprès des collectivités territoriales, leur unité d'action sur tout le territoire face à 1.500 collectivités, donnent à leur intervention auprès d'elles un poids considérable*¹³ ». Quant aux éco-organismes opérationnels, ils détiennent un fort pouvoir d'influence et une puissance d'achat au titre de leur position de donneur d'ordre, puisqu'ils se substituent aux collectivités territoriales et à leurs regroupements, si bien que « *la création d'une filière REP opérationnelle a pour effet immédiat de concentrer la demande de 1.500 clients dans les mains d'un seul et même organisme*¹⁴ ». En outre, qu'ils soient du type financeur ou opérationnel, les éco-organismes soumettent les prestataires (de tri, de traitement, d'élimination ou de recyclage) à des audits et contrôles. Ils ne sont en revanche, dans un schéma comme dans l'autre, jamais eux-mêmes prestataires sur ce marché.

Sur le marché enfin de la reprise et de la valorisation, lorsqu'une filière s'est dotée d'un éco-organisme opérationnel, caractérisée par le fait que celui-ci s'est substitué aux collectivités territoriales pour contracter avec les prestataires, ces derniers sont les vendeurs de matériaux constitués par les déchets dont ils ont assuré le traitement, voire simplement le tri lorsque les déchets sont valorisables sans traitement (par exemple les textiles usagés). En présence en revanche d'un éco-organisme financeur, ce sont les collectivités territoriales qui sont les vendeurs de matériaux. En toute hypothèse, les éco-organismes n'interviennent donc pas directement sur ce marché de la reprise et de la valorisation – étant cependant rappelé que dans le cas particulier de la filière des emballages ménagers, l'éco-organisme Éco-Emballages intervient auprès des collectivités territoriales comme intermédiaire pour leur proposer une offre de reprise à prix garanti, en collaboration avec ses partenaires.

Ainsi, sans que les éco-organismes soient des intervenants directs sur ces marchés, leurs instruments d'action et leur capacité d'influence sont susceptibles de modifier les équilibres aux différents stades de la gestion des déchets. L'instauration et le fonctionnement des filières à REP, et des éco-organismes en particulier, peuvent donc, dans certaines circonstances, porter atteinte à la concurrence.

2.3 Les risques d'atteinte à la concurrence identifiés par l'Autorité

L'Autorité a eu à se prononcer, dans sa fonction contentieuse, au titre de la sanction de l'abus de position dominante, et de la protection de la concurrence dans son ensemble. Si son avis de 1999 (dont les termes sont cités ultérieurement par son avis 10-A-21) énonce que la création d'un éco-organisme « *associant les producteurs ne saurait être condamnée en elle-même dès lors, notamment, qu'elle peut favoriser la mise en place d'une filière d'élimination qui ne serait pas rentable dans les conditions économiques actuelles* », l'Autorité a cependant, au fil de sa pratique décisionnelle, précisé les risques d'atteinte aux règles de la concurrence qui pourraient être occasionnés par l'instauration ou le fonctionnement de ces organismes.

¹³ Avis 12-A-17, point 45.

¹⁴ Avis 12-A-17, point 44.

S'agissant du premier marché, celui de l'offre de service faite aux producteurs par les éco-organismes, le Conseil de la concurrence avait souligné dans son avis 99-A-22 le risque que la création d'un éco-organisme unique chargé de la gestion d'une filière REP vienne entraver l'entrée sur le marché de nouveaux producteurs, considérant que « *compte tenu de la taille de l'organisme commun et de l'importance des économies d'échelle qui peuvent être réalisées grâce à sa création, un nouvel entrant, s'il ne peut bénéficier lui-même de l'accès à ce réseau, devra supporter le coût de mise en place d'un système de collecte moins efficient. Il pourrait en résulter l'instauration d'une barrière à l'entrée de nature à restreindre la concurrence sur le marché (...)* ». Ce raisonnement et cette mise en garde ont été repris à l'identique dans l'avis 10-A-21, par lequel l'Autorité a rappelé que, s'agissant des relations de l'éco-organisme avec les nouveaux entrants sur le marché de la fabrication ou de l'exploitation des produits concernés, celui-ci « *bénéficierait d'une forte position sur les marchés amont de la fabrication et de l'exploitation des produits* », si bien que « *la création d'un organisme unique peut en conséquence gêner l'entrée sur le marché de nouveaux producteurs.* »

En outre, il avait été relevé que dans le cadre d'une prise en charge collective de la gestion des déchets par le moyen d'un éco-organisme, un mécanisme de fixation collective du niveau de l'éco-contribution était inévitable, et qu'il importait en conséquence que chaque opérateur veille à conserver toute liberté commerciale quant à son éventuelle répercussion dans ses prix, sans « *aucune concertation horizontale, ni entre producteurs, ni entre distributeurs, ni aucune concertation verticale entre les différents intervenants de la chaîne de commercialisation* ».

L'autorité française de concurrence a également mis en lumière un risque d'atteinte au jeu de la concurrence résultant du pouvoir d'influence détenu par les éco-organismes sur le deuxième marché identifié, celui de la collecte sélective et du tri. Dès son avis 94-A-31, le Conseil avait fait état de ce que l'éco-organisme dont la création était prévue dans la filière REP des huiles usagées « *aurait les moyens de limiter l'accès de nouveaux opérateurs au marché des lubrifiants dans la mesure où il pourrait exploiter l'état de dépendance dans lequel se trouveraient les ramasseurs à son égard pour les dissuader de collecter des huiles usagées* » pour le compte des producteurs non membres de cet éco-organisme unique et qui souhaiteraient assumer à titre individuel leurs obligations au titre de la gestion des déchets.

Dans sa décision du 1^{er} juillet 2009 relative au projet par la société Éco-Emballages de créer un système d'information géographique pour la collecte et le traitement des déchets, qui aurait été alimenté par les données et les informations détenues par cet éco-organisme sur les collectivités territoriales et les opérateurs du traitement des déchets, l'Autorité a souligné que « *la position d'acteur unique d'Éco-Emballages sur le marché de la collecte sélective et du tri des déchets des emballages ménagers par les collectivités, son rôle en matière de versement de soutiens aux collectivités territoriales, et le lien ainsi créé avec celles-ci, l'antériorité et le caractère suivi de ces relations, sa présence sur tout le territoire, sa notoriété, peuvent lui conférer, sur le marché qui pourrait être défini comme celui des logiciels liés à la collecte des déchets, une position privilégiée. Son arrivée sur ce dernier marché dans des conditions qui fausseraient la concurrence, par exemple en créant ou tolérant une confusion entre ses fonctions de distribution aux collectivités locales du soutien pour la réalisation d'études portant sur la connaissance des coûts ou des leviers d'optimisation de la collecte, d'une part, et ses activités de nature commerciale de vendeur de logiciel, d'autre part, pourrait le cas échéant être constitutive d'abus de position dominante* ». ¹⁵

S'agissant de même de potentiels dysfonctionnements sur le marché de la collecte sélective, du tri et du traitement des déchets, l'Autorité a encore eu l'occasion de relever dans un récent avis ¹⁶ que le risque

¹⁵ Décision 09-D-22, points 33 et 34.

¹⁶ Avis 12-A-17.

de pratiques anticoncurrentielles était limité, en l'état de l'absence d'intervention directe des éco-organismes en tant que prestataires et concurrents sur ce marché (cf. infra, 3.3).

Elle a cependant examiné certains des contrats-types conclus entre les éco-organismes opérationnels et les prestataires et a constaté qu'en première analyse, ils ne contenaient pas de clauses manifestement anticoncurrentielles. Un éventuel risque d'attribution des marchés à un seul opérateur serait également limité, dans la mesure où les éco-organismes ont spontanément mis en place une méthodologie transparente et non discriminatoire d'attribution de leurs marchés (avant même la négociation de « *lignes directrices des relations entre les éco-organismes organisationnels et les opérateurs de la gestion des déchets* » en mars 2012).

L'Autorité a surtout relevé qu'il pourrait exister des risques liés aux obligations d'information et de contrôle, lesquelles découlent du contrôle de la traçabilité du circuit des déchets, de la délivrance des soutiens financiers aux collectivités territoriales et de l'atteinte des objectifs fixés aux éco-organismes : la diffusion d'informations collectées par les éco-organismes sur le fonctionnement des centres de traitement serait ainsi susceptible de conduire à une violation des secrets industriels ou à des échanges de type collusif entre les entreprises. Ces risques sont toutefois limités par les lignes directrices précitées¹⁷ et par les stipulations contractuelles entre les éco-organismes opérationnels et leurs prestataires d'une part, et entre les éco-organismes financeurs et les collectivités territoriales d'autre part, puisqu'ils intègrent généralement des règles de confidentialité. Les nombreux contrôles et audits conduits par les éco-organismes sur les prestataires, qui conduisent parfois à des sujétions importantes (susceptibles de perturber le fonctionnement des entreprises), justifiées par la vérification de la traçabilité des déchets et de l'accomplissement par les prestataires de leurs obligations contractuelles, peuvent également conduire à des dysfonctionnements concurrentiels sur le marché s'ils visent certains prestataires plutôt que d'autres, sans raison objective. Ces risques doivent là encore être relativisés du fait de l'évolution de la rédaction des cahiers des charges fixés par l'État, qui limitent le nombre d'audits et imposent le principe de l'indépendance de l'auditeur. En outre, les lignes directrices prévoient le principe d'« *audits contradictoires programmés ou inopinés* », au maximum une fois par an et par éco-organisme, et la coordination des audits réalisés par plusieurs éco-organismes chez le même prestataire.

Par ailleurs, dans sa décision du 27 septembre 2010 relative au marché de la reprise des emballages ménagers plastiques, l'Autorité a eu à connaître de la plainte de la société DKT qui, souhaitant passer des contrats directement avec les collectivités territoriales, s'estimait victime de pratiques d'éviction sur le marché du négoce des déchets d'emballage plastique de la part d'Éco-Emballages et Valorplast (société représentant la filière plastique et intervenant dans le circuit d'Eco-Emballages). Les pratiques dénoncées couvraient la durée trop longue des contrats liant les collectivités à Valorplast dans le cadre de la garantie de reprise, l'impossibilité pour une collectivité de changer d'option en cours de contrat, l'absence de neutralité d'Éco-Emballages dans la présentation des différentes options aux collectivités, une attitude dissuadant les collectivités de recourir aux services du concurrent de Valorplast malgré des prix plus attractifs, et des exigences supplémentaires par rapport à celles pesant sur les recycleurs partenaires de Valorplast. Étaient notamment contestés les critères dont usait Éco-Emballages pour accepter la validité des conditions de recyclage de DKT, ainsi que la procédure dite de « non-objection » – formalisant l'accord *a priori* d'Éco-Emballages sur le recycleur final, laquelle ne reposait sur aucun texte et n'apparaissait « *entouré[e] d'aucune garantie d'objectivité* », si bien qu'elle représentait « *une barrière à l'entrée de nouveaux opérateurs* »¹⁸. L'Autorité ayant considéré que ces pratiques soulevaient des préoccupations de concurrence, Éco-Emballages et Valorplast ont proposé des engagements pour y remédier, en particulier la suppression de la procédure de non-objection, la publication d'un *vade mecum*

¹⁷ Qui prévoient que « *l'éco-organisme s'engage formellement à ne pas utiliser les données acquises dans le cadre de ces audits de manière déloyale y compris pour développer une activité concurrentielle* ».

¹⁸ Points 36-37 de la décision.

des aides financières aux collectivités selon les principes de neutralité et d'égalité entre les voies et options de reprise, et la faculté pour les collectivités de changer d'option de reprise.

3. Recommandations de l'Autorité de la concurrence

3.1 *Recommandations vis-à-vis des pouvoirs publics*

Dans son avis 12-A-17, l'Autorité a recommandé que la création de nouvelles filières à REP ou l'extension de filières existantes soit précédée d'une étude d'impact intégrant un volet concurrentiel, et plus généralement que soit assuré le respect des règles de nécessité et de proportionnalité par rapport aux objectifs d'intérêt général.

L'Autorité a également recommandé, dans le même avis, qu'à l'avenir tous les éco-organismes soient soumis au principe de l'agrément et du contrôle de l'État – l'agrément étant à ce jour requis pour la plupart des éco-organismes, mais cependant pas encore généralisé à tous. D'une part, « *issue d'une décision de l'État de créer un marché ex nihilo, l'action des éco-organismes doit naturellement être encadrée par l'État pour éviter les conséquences dommageables sur la concurrence sur les marchés aval* ». ¹⁹ D'autre part, l'agrément permet à l'État d'exercer un contrôle sur l'activité de l'éco-organisme, investi d'une mission d'intérêt général, et sur les objectifs publics en matière de réduction ou d'élimination des déchets. Enfin, la procédure de renouvellement de l'agrément permet aux représentants de l'État d'inciter les éco-organismes à corriger d'éventuels dysfonctionnements.

Par ailleurs, la commission du développement durable et de l'aménagement du territoire de l'Assemblée nationale a décidé la création d'une mission d'information sur la gestion des déchets dans le cadre des filières à REP en février 2013. Cette mission a auditionné l'Autorité de la concurrence, s'agissant des aspects concurrentiels de cette problématique, et a pris en compte dans son rapport définitif publié le 10 septembre 2013 certaines recommandations de l'Autorité, en proposant en particulier de généraliser l'agrément à tous les éco-organismes et d'en harmoniser la durée à 5 ans. Les co-rapporteurs ont en effet relevé que l'agrément constituait « *une garantie pour l'État que les « metteurs en marché » s'acquittent bien de leur obligation de prendre en charge la fin de vie de leurs produits* », permettait « *de cadrer les relations des éco-organismes avec les différents acteurs* », et prévoyait « *les conditions de suivi et de contrôle, notamment financier, en cours d'agrément* ». ²⁰ Ainsi, la généralisation de l'agrément à tous les éco-organismes permettrait l'homogénéisation de la structure des filières et de leur mode d'organisation, constituerait une mesure d'égalité de traitement de tous les organismes concernés, offrirait à l'État de nouveaux moyens de contrôle des éco-organismes (en particulier de leur politique financière : supervision des placements, gestion du niveau de provisions pour charges, modes de placement es excédents de trésorerie) et constituerait une garantie de supervision par l'État de l'ensemble des activités des éco-organismes. Enfin, cette solution mettrait fin à l'absence de contrôle spécifique des organismes non agréés, qui ne disposent pas de censeur d'État siégeant au conseil d'administration, ni d'obligation de diffusion d'éléments comptables. ²¹

¹⁹ Avis 12-A-17, point 116.

²⁰ Rapport d'information sur la gestion des déchets dans le cadre des filières à REP, MM. les députés Jean-Jacques Cottel et Guillaume Chevrollier, pp. 53-54.

²¹ *Ibid.*

3.2 *Recommandations vis-à-vis des éco-organismes*

Dans son avis 10-A-21, l'Autorité a émis des recommandations à destination des éco-organismes s'agissant de leur intervention sur les marchés des services offerts aux producteurs, et sur celui de la collecte, du tri et du traitement des déchets.

Afin d'éviter l'instauration de barrières à l'entrée du marché des services offerts aux producteurs, qui concerne les relations de l'éco-organisme avec les nouveaux entrants sur le marché de la fabrication ou de l'exploitation des produits, l'Autorité a rappelé les recommandations qu'elle avait précédemment formulées dans l'avis 99-A-22. Il importe ainsi, d'une part, que les concurrents aient accès aux services de l'éco-organisme à des tarifs et conditions non discriminatoires par rapport aux producteurs membres de celui-ci et, d'autre part, que l'éco-organisme soit ouvert à tous dans des conditions objectives, transparentes et non discriminatoires – c'est-à-dire que les nouveaux entrants puissent entrer dans le capital de l'éco-organisme afin de bénéficier de l'éventuelle redistribution des profits.

L'Autorité a également recommandé de « formuler une mise en garde des comportements [des producteurs] tendant à utiliser l'éco-organisme comme lieu de coordination commerciale lors de la délivrance de l'agrément », et de « sensibiliser le censeur d'État dont la présence est prévue au sein de l'organe délibérant de l'éco-organisme aux questions de concurrence et à la détection des comportements déviants ». ²²

Sur le deuxième marché, qui concerne les relations des éco-organismes avec les prestataires chargés de la collecte et du traitement, l'Autorité a recommandé que les contrats de prestation soient attribués par l'éco-organisme en application des règles de concurrence, que les prestataires soient choisis par la voie d'appels d'offres privés, que les contrats soient conclus pour une durée limitée, et qu'il soit fait recours à l'allotissement pour permettre l'accès de toutes les entreprises aux marchés de l'éco-organisme ²³.

En outre, l'Autorité a émis des recommandations supplémentaires dans son avis 12-A-17, en vue de limiter les obligations d'information et de contrôle à ce qui est nécessaire à l'exercice des missions statutaires des éco-organismes, de garantir le droit à la confidentialité des informations, d'observer une stricte égalité dans la mise en œuvre de ces obligations entre tous les opérateurs, et enfin de mettre en place des procédures transparentes de passation des marchés.

3.3 *Analyse prospective de l'intervention des éco-organismes en qualité de prestataires*

L'Autorité a également mené dans son avis 12-A-17 une analyse prospective par laquelle elle a identifié des risques potentiels d'atteinte à la concurrence liés à l'éventuelle intervention des éco-organismes en tant que prestataires – bien qu'ils ne soient actuellement pas présents à ce titre dans les filières de gestion des déchets et affirment ne pas avoir intérêt, en l'état, à exercer une activité d'opérateur proprement dite.

En premier lieu, sur le marché de la collecte sélective, du tri et du traitement des déchets, l'Autorité a relevé qu'une intervention directe des éco-organismes les conduirait à devenir en quelque sorte « juge et partie » : en effet, l'existence d'un droit de regard et de contrôle sur les autres opérateurs dont ils disposent

²² Avis 10-A-21, point 100.

²³ Avis 12-A-17, point 185 : « En raison de la concentration de la demande sur le marché du traitement des déchets, les éco-organismes opérationnels doivent passer leurs contrats selon le principe de la transparence, en adoptant des procédures d'appels d'offres privés et selon le principe de l'accès du plus grand nombre de prestataires à leurs marchés, en allotissant techniquement et géographiquement leurs marchés ».

n'est justifiée que par l'exercice de missions statutaires, qui ne prévoient pas l'activité d'opérateur. Les éco-organismes auraient ainsi accès au savoir-faire de leurs concurrents et à une information régulière sur leurs activités d'une ampleur telle que leur intervention sur le marché en tant que prestataires conduirait nécessairement à fausser le jeu de la concurrence. L'Autorité considère donc qu'il y aurait, *a priori*, « une incompatibilité, pour un éco-organisme, entre l'exercice de ses missions statutaires et l'exercice d'une activité commerciale de collecte, de tri et de traitement des déchets, au sein de la même structure ». ²⁴ En conséquence, l'Autorité a spécifié que dans de telles circonstances, une séparation structurelle serait requise : « les conditions d'une concurrence saine et régulée devraient exiger que les activités de financement des collectivités territoriales, les activités de prescription et les activités de contrôle des prestations de collecte sélective, de tri et de traitement des déchets soient effectuées par des entités indépendantes de celles qui offriraient des biens et des services sur le marché de la collecte sélective, du tri et du traitement des déchets. »

En deuxième lieu, si aucun principe de concurrence ne s'oppose à l'intervention des éco-organismes sur le marché de la reprise et du négoce des matériaux, cette intervention ajouterait au pouvoir de structuration et de contrôle qu'ils exercent de fait sur le marché de la collecte sélective, du tri et du traitement et risquerait de générer des restrictions verticales, dans l'hypothèse où les éco-organismes concernés y détiendraient une position dominante et seraient ainsi en mesure de verrouiller ou cloisonner le marché du matériau en question. Les éco-organismes devraient alors veiller à ne pas abuser de cette position dominante, par exemple en s'astreignant à traiter avec l'ensemble des repreneurs de façon équitable.

En troisième lieu, les éco-organismes pourraient se trouver dans une situation plus favorable pour l'accès au marché du conseil et de l'expertise en matière de gestion des déchets, en raison de la masse de données et d'informations stratégiques qu'ils détiennent, grâce aux obligations d'information et de contrôle pesant sur les collectivités et les prestataires du traitement des déchets. L'Autorité a considéré que si aucun principe de concurrence ne s'oppose à ce que les éco-organismes se livrent à des activités de conseil, c'est à la condition que soit observé un principe d'objectivité et de neutralité en délivrant « une information transparente, objective et non discriminatoire sur les techniques et les évolutions technologiques » ²⁵. Par ailleurs, l'Autorité a rappelé que si les données et informations devaient être considérées, au cas par cas, comme des ressources essentielles, « l'éco-organisme pourrait être conduit, sous certaines conditions, à donner accès aux données et informations qu'il détient ». ²⁶ Le rapport Cottel et Chevrollier sur la gestion des déchets dans le cadre des filières à REP précité propose ainsi d'imposer aux éco-organismes qui veulent diversifier leurs activités dans le conseil et l'expertise aux collectivités locales de le faire dans des structures distinctes.

²⁴ Avis 12-A-17, point 141.

²⁵ Avis 12-A-17, point 121.

²⁶ Avis 12-A-17, point 160.

FRANCE

(English version)

Working Party n°2 of the OECD Competition Committee's agenda for the October 2013 session included the theme of competition in waste management, which covers a number of topics. In view of the decision-making practice of the Autorité de la concurrence (which succeeded the Conseil de la concurrence in 2009), the most recent work by parliamentary committees and the characteristics of waste management methods in France, it is proposed that the terms of this document focus on the question of competition from the angle of Extended Producer Responsibility, which is embodied in France by the particularly strong growth of Producer Compliance Schemes or PCS (called "eco-organisations" in France).

1. PCSs, instruments for the implementation of Extended Producer Responsibility

1.1 Extended Producer Responsibility chains

1.1.1 Principles and objectives of Extended Producer Responsibility

The principle of Extended Producer Responsibility (EPR) is based on a concept formalised by the OECD from 1994 onwards, leading to the publication in 2001 of a document entitled "Extended Producer Responsibility – A Guidance Manual for Governments". This principle consists in transferring financial responsibility for disposal of waste generated by its products to the producer – meaning in this case the entity that put products on the market, including distributors or importers. Extended Producer Responsibility is analysed using an in-depth and structural breakdown of the "polluter-pays" principle, which in France was integrated into the Constitution under the Environment Charter by Law 2005-205 of 1 March 2005, Article 4 of which states that "*everyone shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment*".

The EPR thus contributes to achieving several targets. It is first aimed, from the manufacturing stage, at the internalisation of waste management costs resulting from the consumption or use of the product, encouraging manufacturers to take environmental concerns into account *ab initio* with a view to minimising the costs generated by it on these grounds. In addition, it brings about privatisation, by transferring to manufacturers the financial burden shouldered otherwise by the finances of local authorities, which then pass it on in taxes. Finally, the EPR makes sure that sufficient resources are allocated to the establishment of waste processing and recycling chains, another aim of this mechanism's implementation – an objective which moreover corresponds to a growing concern in French society.

1.1.2 Legal framework

The first text to set out the premise of Extended Producer Responsibility at a European level was Directive 75/442/EEC of 15 July 1975 (modified) on Waste, under which "*in accordance with the 'polluter pays' principle, the cost of disposing of waste shall be borne by the holder who has waste handled by a waste collector or by an undertaking, the previous holders or the producer of the product from which the waste came.*" Law 75-633 of the same day, on the disposal of waste and recovery of materials, transposes that directive into French law, and states in Article 2, "*Anyone that produces or holds waste, under*

conditions that may [...] harm human health and the environment, shall ensure that it is disposed of in accordance with the provision of this law, under conditions that will avoid such effects,”, and Article 6, *“Producers, importers and distributors of these products or components and materials used to manufacture them may be required to take steps for or contribute to the disposal of the waste that comes from these products.”*

The same principle is now set out explicitly in Article 541-10 of the Environment Code, arising from Regulation no. 2010-1579 of 17 December 2010, which states, *“In application of the principle of Extended Producer Responsibility, producers, importers and distributors of these products or components and materials used to manufacture them may be required to take steps for or contribute to the disposal of the waste that comes from these products.”*

Furthermore, Law 2009-967 of 3 August 2009 on implementation of “Grenelle 1” environmental legislation¹ and Law 2010-788 of 12 July 2010 on national commitment to the environment, known as “Grenelle 2”, which mark a significant development in taking into account environmental needs of all types, including reducing waste and increasing recycling, have given new impetus to the realisation of this principle, notably with the introduction of administrative penalties against producers who fail to comply with their obligations.

It is for the purpose of ensuring effective implementation of this Extended Producer Responsibility principle that the PCSs have been established.

1.2 Operation and development of French PCSs

1.2.1 How PCSs operate

EPR is embodied in the establishment of one organisation per category of producers, or chains, under a system that brings together the following: the producer, the holder, the local authorities (in that they are in charge of collecting household waste), the distributor if applicable (when it is their job to sort the used products constituting the waste in question), and the various waste transport, sorting, processing and/or recycling providers.

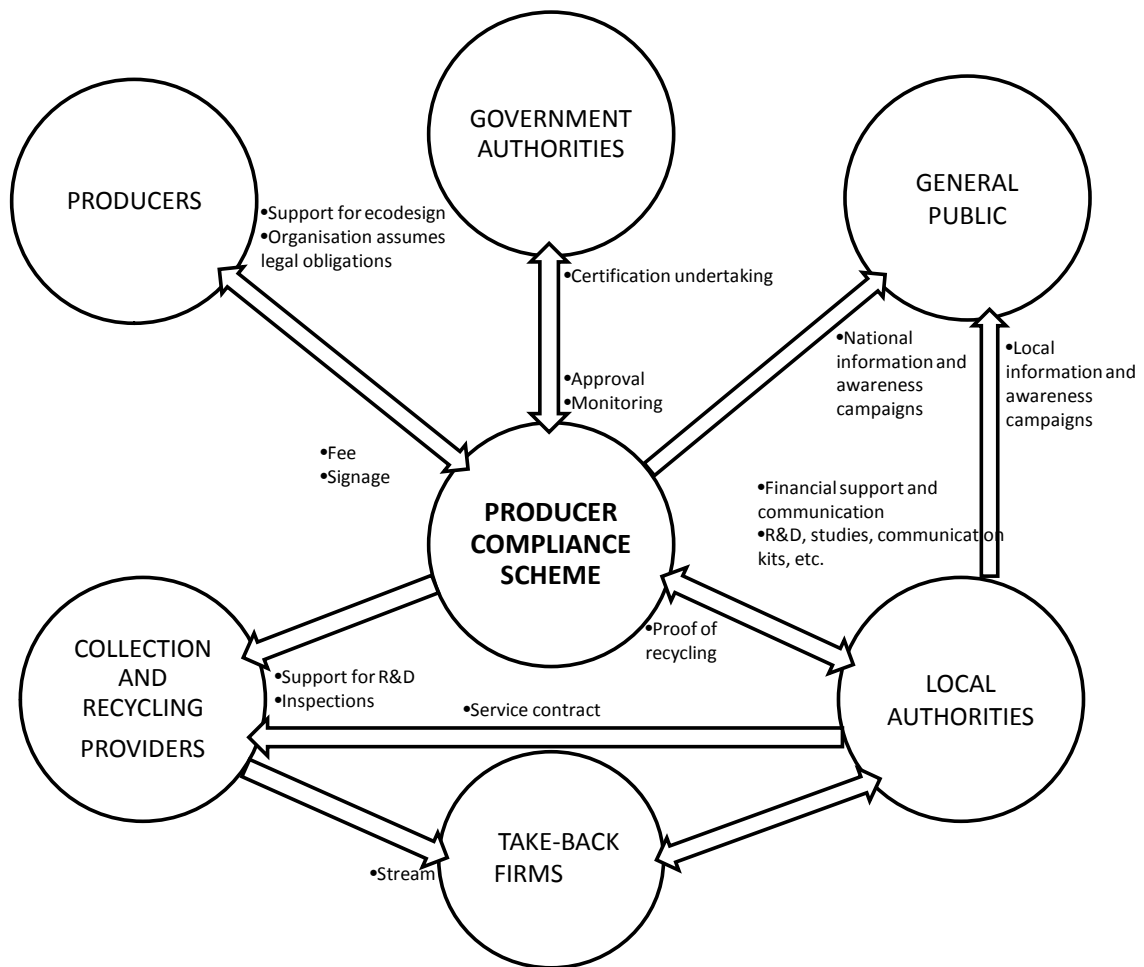
Producers can opt to exercise their responsibility for the waste generated by their products directly by organising its take-back and processing themselves, either individually or for the market share that they represent, or by the pooling of this obligation, by choosing a joint representative, or again by following a “collective” option, namely that of a PCS.

A Producer Compliance Scheme is a structure put into place by producers, of which they are members and for which they provide the governance. The obligation to *“take steps for or contribute to the waste management”* incumbent on producers is passed on to the PCS, in exchange for the payment of an EPR fee (called an “eco-contribution” in French), which is established on the basis of the quantity and nature – in terms of environmental impact – of the products put on the market. In practice, there are two types of PCSs: “financer” and “organiser”.

¹ A series of political meetings organised in France in September and October 2007, bringing together State representatives, local authorities, environmental NGOs and social partners, with the aim of making long-term decisions about the environment and sustainable development.

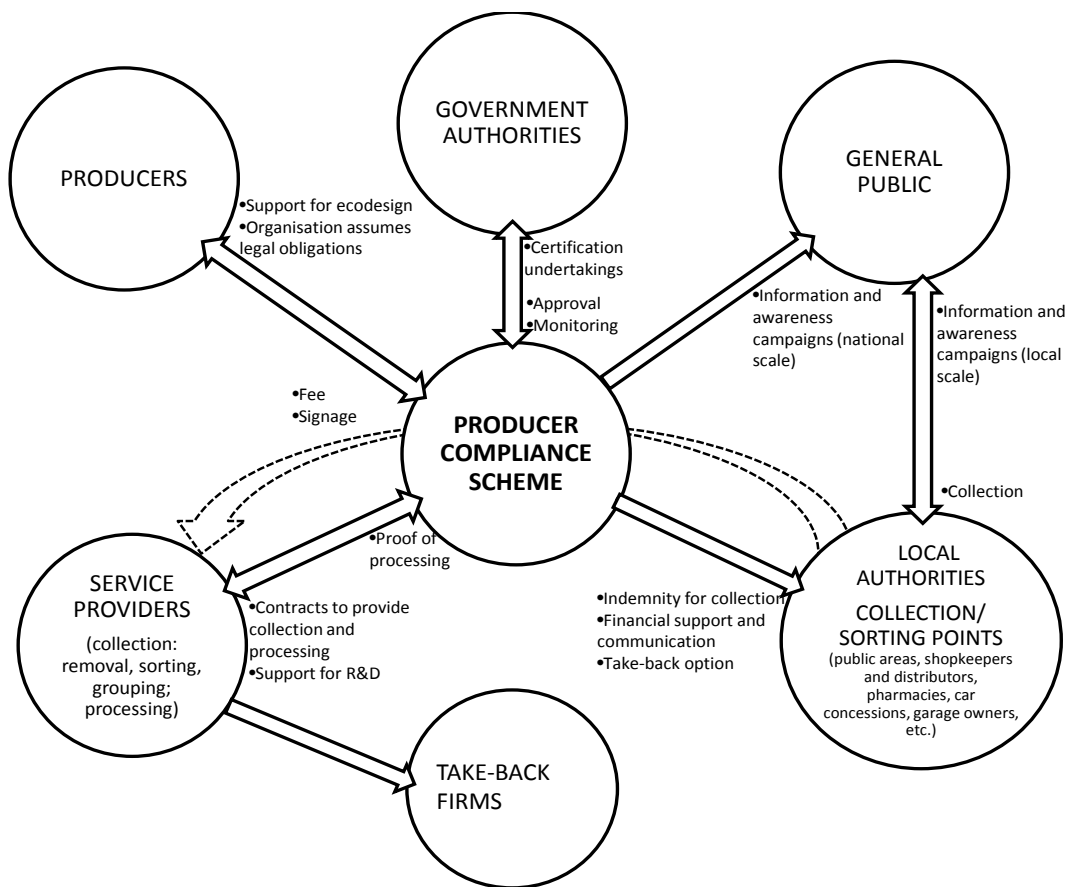
A financier PCS just assumes the producers' financial responsibility for waste management. It thus provides financing to the local authorities, in the case of household waste (or other actors in charge of collecting the products concerned), as well as the provision of expertise and advice, so that they can take on waste collection and disposal. The local authorities contract the necessary providers to ensure the actual waste collection, sorting and processing, and if relevant the sale of any recoverable materials that result.

Flow chart of the operation of a “financier”



The “organiser” PCS is of an operational nature since it takes an active part in waste management, by recovering it from holders, collection points or local authorities (in the case of household waste) and contracting providers directly, via calls to tender, who are in charge of sorting and processing. In this type of arrangement, the role of financier may be added.

Flow chart of the operation of an “organiser”



However, the large household packaging waste sector has a specific and particularly complex organisation, under which the PCS acts further downstream of the waste management, by offering local authorities a take-back service for materials from the selective collection and sorting process. This take-back is offered at a specific guaranteed price, anywhere in the country, by the take-back operator appointed by the PCS. However, this offer cannot be made obligatory and the authorities are free to reach an agreement directly with a take-back operator, or with the professional federations that also offer an integrated take-back system. Whatever the means of take-back chosen, the local authorities benefit from the financial support administered by the PCS, in exchange for the effective recycling of the waste concerned, proven by the production of a recycling certificate.

EPR is a particularly methodical and effective type of organisation in terms of the exploitation of “urban mining”, a term that describes the stream of materials contained in consumption, movable and immovable assets and infrastructures. Indeed, PCSs and the Agency for the Environment and Energy Management (ADEME) are progressively building up the databases necessary for the knowledge of reservoirs of waste in the future – in terms of their quantity, type and material content.

The collective effort of mobilising these reservoirs, pre-financed by the payment of EPR fees, initiates the financing of new collection and recycling systems and, indirectly, operators' industrial investments, with PCSs (or local authorities) offering them a guaranteed supply of their units².

1.2.2 *The development of Producer Compliance Schemes in France*

It is worth highlighting from the outset that of all the European countries, France has brought in the highest number of EPR chains – around twenty to date. It has been observed that the trend is now less towards the creation of new chains than to the enlargement of the perimeter of the chains already covered. More often than not, there is a single PCS per chain, but some chains may have several (for example, the used electrical and electronic equipment or tyre chains). Some EPR chains do not involve any PCS: this is the case for example with end-of-life vehicles, automotive batteries and industrial batteries. The majority of PCSs have been set up in sectors where the products are destined for household consumption, with only a small number concerning intermediary goods destined for industry or agriculture.

In practice, waste management based on Extended Producer Responsibility was for the first time implemented in 1979, with the financing of the management of used lubricants by a tax paid by the entities that marketed them. However, this money went into the general State budget and did not finance the actors in the sector, and the producers had no direct responsibility in waste management, which was devolved to the State, so it was not strictly speaking an EPR chain. It was in the early 1990s that the first genuine EPR chain mechanism was developed, with the establishment of dedicated PCSs.

The constitution of PCSs generally results from the adoption of a piece of legislation. This may be of European origin, either because it has made the establishment of an EPR chain obligatory (Directives 91/157/EEC of 18 March 1991 and 2006/66/EC of 6 September 2006 on batteries and accumulators; Directive 2000/53/EC of 18 September 2000 on end-of-life vehicles), or because such a chain has been established following a directive or regulation with sectoral scope limited to setting out an obligation for selective collection and processing or disposal of waste (Regulation 2037/2000 of 29 June 2000 on unused medicine). It may also be a regulation under national law, for example in the case of the EPR chains for tyres, used textiles, infectious healthcare waste and, very recently, bottled gas canisters. The creation of a competent PCS for the household waste chain – the biggest in France in terms of tonnage and the number of parties involved – was in turn the result of a national regulation (Decree 92-377 of 1 April 1992), which implemented obligations that were established subsequently under a European directive (Directive 94/62 EC of 20 December 1994). However, some PCSs arose from voluntary agreements among producers in the sector (agricultural-supplies waste such as packaging from plant protection products or seeds, print cartridges from office equipment, etc.).

PCSs are most often governed by the constitution of a limited company by the producers concerned – with the exception of some of the healthcare sectors: medicinal and infectious clinical waste, in which the PCS (Cyclamed and DASTRI respectively) are of an associative nature. However, their ambivalent nature, at the crossing point between market logic and the implementation of a general-interest mission, lies in the fact that the PCSs arising from a legal obligation are subject to approval by the French authorities, in the form of specifications establishing their targets, their relationships with other actors in the sector, and the conditions for their inspection. In addition, the presence of a State Comptroller (*“censeur d’Etat”*) is also envisaged, whose main aim is to monitor the financial management of the PCS. To this end, *“the approved PCS shall provide the State Comptroller, on request, with all necessary document and information”*, so

² On the legal framework and functioning of EPR chains, see “Extended Producer Responsibility Chains Panorama 2011”, an ADEME publication (in French and English), Collection *Repères*, October 2012, which can be downloaded free from:

<http://www2.ademe.fr/servlet/getDoc?sort=-1&cid=96&m=3&id=85627&ref=&nocache=yes&p1=111>

that he can “carry out any audits relevant to his job” and draw up “a report for Ministers in charge of ecology, industry and health, whenever deemed necessary.”³

2. PCSs and competition law

2.1 The submission of PCSs to competition rules

French competition laws apply to all economic activities, namely “to all production, distribution and service activities, including those which are carried out by public persons, in particular in the context of public service delegation agreements”.⁴

The Paris Court of Appeal, where appeals against decisions by the Autorité de la concurrence in antitrust matters are heard, has specified on this matter, with regard to an association’s activity, that “it is the economic nature of the activity carried out and not the operator’s capacity or the form in which it acts that establishes the application of competition rules.”⁵ No account is therefore taken of the legal status (public or private, associative or commercial) of the legal entity that is the perpetrator of the practices, its means of financing, or the general-interest objective or non-profit-making nature of the activity.⁶ Thus in its 1999 opinion, the Conseil de la concurrence held that “carrying out a job of general interest such as environmental protection does not exempt financial operators from respecting competition law”.⁷

In terms of the Autorité’s competence in relation to PCSs, the Court emphasised, within the context of an appeal against a decision on the contested practices of two PCSs in the household waste sector, that competition rules “apply to all production, distribution and service activities, in particular in the context of public service delegation agreements and including under administrative contracts”, noting that “the legal form of persons carrying out an activity covered by Article L 410-1 of the Commercial Code, their possible approval by the State, or their participation in a public service mission, will not prevent the Autorité from acting”⁸.

In this context, the Autorité, which has analysed EPR chains as “the introduction, by public decision, of market mechanisms for general interest purposes of an environmental and healthcare nature” and highlighted that “PCSs act in accordance with market mechanisms, while being invested with missions of general interest, without a profit-making aim”⁹, has for a long time subjected their situation to examination with regard to competition rules, mainly in its consultative role with the French authorities and economic actors¹⁰, but also within the context of its decision-making capacity¹¹.

³ Decree no. 2011-429 of 19 April 2011.

⁴ Article L.410-1 of the Commercial Code.

⁵ Paris Court of Appeal, 8 February 2000, “L’Académie d’architecture ” association.

⁶ Opinion 10-A-21 of 19 November 2010, paragraph 47.

⁷ Opinion 99-A-22 of 14 December 1999.

⁸ Paris Court of Appeal, 11 September 2009, *DKT*.

⁹ Opinion 12-A-17 of 13 July 2012, paragraph 28.

¹⁰ Opinion 94-A-31 of 6 December 1994 on a request for an opinion on a draft decree on regulation of used oil disposal.

Opinion 99-A-22 of 14 December 1999 on a request for an opinion from the Minister of Economy, Finance and Industry on the conditions for organisation and financing the used accumulators disposal sector.

In 1994 it was asked to give its opinion on a draft decree on the regulation of used oil disposal, which was creating a real EPR system, under the control of the lubricant manufacturers, in place of the previous publicly administered system. In 1999, it published an opinion on the conditions for organisation and financing the used accumulators disposal sector, then on two occasions, in 2005 and 2010, the Autorité issued opinions on draft decrees on, respectively, waste electrical and electronic materials and infectious healthcare waste (syringes, injection delivery devices) used by patients in self-treatment. Finally, in a 2012 opinion requested by two professional federations active in the household waste sector, it had occasion to carry out a full competition analysis of the waste management sector covered by the Extended Producer Responsibility principle.

The only area in which it has had to issue a decision is the household waste management sector, with a 2009 decision on a request for interim measures in relation to a planned information system on the waste collection and processing by Eco-Emballages, and a 2010 case regarding practices implemented by Éco-Emballages and Valorplast in the take-back and recovery of household plastic packaging waste, which was resolved by the adoption of a series of commitments.

2.2 *The position of PCSs on EPR chain markets*

PCSs are likely to be involved in three markets, as defined in particular by the European Commission in its decision of 15 June 2001 in relation to Éco-Emballages¹²: the service rendered to producers (membership market), selective collection, sorting and processing of waste and the take-back and/or trading of waste materials.

In practice, PCSs' main activity consists in offering a service to producers, under which they assume producers' obligations in terms of waste management. In carrying out this main task, no competition concerns have arisen, and it could actually be held that competition between several PCSs within the same chain would not guarantee effectiveness, since the PCSs' position is on the whole set rigidly as they can only deal with a number of local authorities in proportion to the amount of EPR fees received from the producers, which tend to remain involved in the PCSs that they have created – the case of the electrical and electronic equipment waste chain, known as D3E, provides an illustration, where four PCSs co-exist, three of which are involved in the waste management of the same products.

On the selective collection and sorting market, PCSs offer their services to the local authorities. The financier PCSs have a power of influence over them that *“is apparent from the duality of the role that they exercise with the local authorities: both financiers and experts. The holding of “knowledge” and financial resources from the local authorities, their unity of action across the whole country in relation to 1,500 local authorities, lends their involvement with them considerable weight¹³”*. As for organiser PCSs, they

Opinion 05-A-07 of 31 March 2005 on the draft decree on the prevention and management of electrical and electronic material waste.

Opinion 10-A-21 of 19 November 2010 on the management of potentially infectious healthcare waste used by patients in self-treatment.

Opinion 12-A-17 of 13 July 2012 on the management of waste covered by the principle of extended producer responsibility.

¹¹ Decision 09-D-22 of 1 July 2009 on the drafting of a draft geographical information system for the collection and treatment of waste by the company Eco-Emballages.

Decision 10-D-29 of 27 September 2010 on the practices implemented by the companies Eco-Emballages and Valorplast in the take-back and recovery of household plastic packaging waste sector.

¹² Decision 2001/663 EC, 15 June 2001.

¹³ Opinion 12-A-17, paragraph 45.

have strong power of influence and purchasing power as a result of their position as the principal, since they are replacing local authorities and their groupings, and therefore, *“the creation of an organiser EPR chain has the immediate effect of concentrating the demand of 1,500 clients in the hands of a single organisation”*¹⁴. Furthermore, whether they are financiers or organisers, PCSs submit providers (of sorting, processing, disposal or recycling) to audits and inspections. In neither case, however, do they themselves act as providers in this market.

Finally, on the take-back and recovery market, when a chain has an organiser PCS, characterised by the fact that it has replaced local authorities in contracting with providers, it is this PCS that sells the materials comprised of the waste it has processed, or indeed simply sorted when the waste can be recovered without processing (such as used textiles). However, where there is a financier PCS, it is the local authorities who are the sellers of materials. Whatever the case, the PCSs are not, therefore, directly involved in the take-back and recovery market – although it should be noted that in the particular case of the household packaging sector, the PCS Éco-Emballages acts as an intermediary to the local authorities, offering them take-back at a guaranteed price, in collaboration with its partners.

Thus, although PCSs do not act directly in these markets, their means of action and capacity for influence are likely to affect the balance at different stages of waste management. The establishment and operation of EPR chains, and PCSs in particular, can therefore, in certain circumstances, have a negative effect on competition.

2.3 The risks of distortion of competition identified by the Autorité

The Autorité, in its decision-making role, has had to decide on the sanction for abuse of a dominant position, and on protection of competition as a whole. While its 1999 opinion (the terms of which are cited later in its opinion 10-A-21) stated that the creation of a PCS *“associating producers may not in itself be condemned since, in particular, it may favour the establishment of a disposal sector that would not be profitable under current economic conditions”*, the Autorité did however, in the course of its decision-making practice, specify the risks of distortion of competition that could be occasioned by the establishment or operation of these organisations.

With regard to the first market – services rendered to producers by PCSs, the Conseil de la concurrence emphasised in its opinion 99-A-22 the risk that the creation of a single PCS in charge of managing an EPR chain would hinder the entry onto the market of new producers, holding that *“bearing in mind the size of the joint organisation and the significance of the economies of scale that could be made as a result of its creation, a new entrant, if not enjoying access to this network, would have to bear the cost of establishing a less efficient collection system. The result could be a barrier to entry such that competition on the market would be restricted (...)”*. This reasoning and warning were similarly reiterated in opinion 10-A-21 under which the Autorité noted that, in relation to relationships between the PCS and new entrants onto the manufacturing or exploitation market for the products concerned, it *“would benefit from a strong position on the markets upstream of manufacturing and exploitation of the products,”* while *“the creation of a single organisation could consequently hinder the entrance onto the market of new producers.”*

In addition, the Autorité highlighted that within the framework of the collective assignment of waste management to a PCS, a mechanism to collectively fix the level of the EPR fee was inevitable and that it was important consequently for each operator to ensure that it retained full commercial freedom in relation to any possible passing on of its prices without *“any horizontal agreement, either between producers, or distributors, or any vertical agreement between the different parties involved in the sales chain.”*

¹⁴ Opinion 12-A-17, paragraph 44.

The Autorité likewise shed light on a risk of distortion of competition arising from the power of influence held by the PCSs on the second market identified, namely that of selective collection and sorting. In opinion 94-A-31, the Conseil reported that the PCS scheduled for creation in the used oil EPR chain “*would have the means to limit access of new operators to the lubricants market to the extent that it could exploit the state of dependence on it of the collection firms to dissuade them from collecting used oils*” on behalf of producers who are not members of the single PCS and which would like to assume their obligations with regard to waste management individually.

In its decision of 1st July 2009 on the plan by the company Éco-Emballages to create a geographical information system for waste collection and processing, which would have been built on the basis of the data and information held by this PCS on local authorities and waste processing operators, the Autorité emphasised that “*the position of the sole actor Éco-Emballages on the selective collection and sorting of waste household packaging market by local authorities, its role regarding payment of financial support to local authorities, and the link thus created between them, the length and on-going nature of these relations, its presence across the whole territory, its reputation, could give it a privileged position on the market that could be defined as the waste-collection related software market. Its arrival on this latter market under conditions that would distort competition, for example by the creation or toleration of confusion between its role as distributor to local authorities of assistance in the form of studies related to knowledge of costs and levers for the optimisation of collection on the one hand, and its activities of a commercial nature as a software supplier on the other hand, could potentially constitute abuse of a dominant position.*”¹⁵

Once again in relation to potential distortion on the market for the selective collection, sorting and processing of waste, the Autorité has had occasion in a recent opinion¹⁶ to state that the risks of anti-competitive behaviour was limited, in the absence of direct involvement by PCSs as both providers and competitors on the market (cf. infra, 3.3).

It has however examined certain standard contracts entered into between organiser PCSs and providers and has found that on first analysis, they did not contain any clearly anti-competitive clauses. Any possible risk of allocation of contracts to a single operator would likewise be limited, as PCSs have spontaneously established a transparent, non-discriminatory method of assigning their contracts (even before the negotiation of “*guidelines for relationships between organiser PCSs and waste management operators*” in March 2012).

The Autorité particularly highlighted the potential existence of risks linked to information and inspection obligations, which arise from monitoring the traceability of the waste circuit, the delivery of financial support to local authorities and the achievement of fixed targets by PCSs. The dissemination of information collected by the PCSs on the operation of the processing centres would thus be liable to lead to a violation of industrial confidentiality or exchanges of a collusive nature between undertakings. These risks are however limited by the aforementioned guidelines¹⁷ and by contractual provisions between the organiser PCSs and their providers on the one hand, and between financier PCSs and local authorities on the other hand, since they generally include confidentiality clauses. The numerous inspections and audits of the providers carried out by the PCSs, which sometimes lead to major constraints (likely to hinder the undertaking’s operation), on the grounds of verification of the traceability of waste and achievement by the providers of their contractual obligations, could also lead to the distortion of competition in the market if they were to favour some providers over others for no objective reason. These risks must again be put into

¹⁵ Decision 09-D-22, paragraphs 33 and 34.

¹⁶ Opinion 12-A-17.

¹⁷ Which envisages that “*the PCS undertakes formally not to use the data acquired within the framework of these audits in any way that is unfair, including to develop any competitive activity*”.

perspective on account of changes in the drawing up of specifications set out by the State, which limit the number of audits and imposes the principle of auditor independence. In addition, the guidelines envisage the principle of “*planned or unexpected audits in the presence of both parties*”, a maximum of once a year per PCS, and the coordination of audits carried out by several PCSs at the same provider.

In addition, in its decision of 27 September 2010 on the plastic household packaging take-back market, the Autorité heard a complaint from the company DKT which, wishing to enter into contracts directly with local authorities, felt itself to be the victim of eviction practices on the market for trading plastic packaging waste by Éco-Emballages and Valorplast (the company representing the plastics sector and involved in Eco-Emballages’ circuit). The alleged practices covered the length of the contracts (deemed too long) linking the local authorities to Valorplast in the context of the take-back guarantee, the inability for a local authority to change options mid-contract, the absence of neutrality on Éco-Emballages’s part in offering different options to the local authorities, an attitude which dissuaded local authorities from using the services of Valorplast’s competitor despite more attractive prices, and more requirements incumbent on them than on Valorplast’s recycling partners. Notably contested were the criteria that Éco-Emballages used to accept the validity of DKT’s recycling conditions, as well as the procedure known as “non-objection” – formalising Éco-Emballages’s *a priori* agreement to the final recycler, which was not supported by any text and did not appear “*surrounded by any guarantee of objectivity*”, but did however represent “*a barrier to the entry of new operators*”¹⁸. As the Autorité held that these practices raised competition concerns, Éco-Emballages and Valorplast put forward commitments to remedy them, in particular the removal of the non-objection procedure, the publication of a *vade mecum* of financial assistance to the local authorities in accordance with the principles of neutrality and equality between the take-back methods and options, and the power for local authorities to change take-back options.

3. Autorité de la concurrence’s recommendations

3.1 Recommendations with regard to public authorities

In its opinion 12-A-17, the Autorité recommended that prior to any new EPR chains being created or existing chains extended they should be preceded with an impact assessment including a competition element, that would, more generally, ensure compliance with the rules of necessity and proportionality in relation to general interest objectives.

The Autorité likewise recommended, in the same opinion, that in the future all PCSs be subject to the principle of State approval and control – approval at the time being required for the majority of PCSs, but not yet generalised to everyone. Firstly, “*as the result of a State decision to establish an ex nihilo market, the action of PCSs must naturally be restricted by the State to avoid harmful consequences of competition on the upstream markets*”.¹⁹ Secondly, approval allows the State to exert control over PCS activity, as it constitutes a general interest mission, and over public targets in matters of reducing or disposing of waste. Finally, the procedure for renewal of the approval allows State representatives to encourage PCSs to correct any problematic issues.

In addition the National Committee on Sustainable Development and Planning decided to carry out a fact-finding mission on waste management within the context of EPR chains in February 2013. This mission spoke to the Autorité de la concurrence, as it was related to competition aspects of these problems, and took into account certain recommendations by the Autorité in its final report published on 10 September 2013, suggesting in particular that approval for all PCSs should be made a general

¹⁸ Paragraphs 36-37 of the Decision.

¹⁹ Opinion 12-A-17, paragraph 116.

requirement and the 5-year duration harmonised. The co-authors of the report highlighted that approval constituted “a guarantee for the State that the “product marketers” properly abided by their obligations to take responsibility for the end-of-life of their products”, made it possible “to establish guidelines for PCS relationships with the different actors”, and set out “monitoring and control conditions, particularly of a financial nature, for the approval process”.²⁰ Thus, generalisation of approval for all PCSs would allow the structure of chains and their means of organisation to be made standard, would constitute a measure of equality of treatment for all the organisations concerned, would offer the State new ways of controlling PCSs (particularly their financial policy, involving supervision of placements, management of the level of provisions for charges and means of placement of cash surpluses) and would constitute a guarantee of supervision by the State of all PCS activities. In short, this solution would bring an end to the absence of specific monitoring of unapproved organisations, which do not have the State Comptroller on the board of directors, nor the obligation to release accounts information.²¹

3.2 Recommendations with regard to PCSs

In opinion 10-A-21, the Autorité issued recommendations for PCSs in relation to their involvement in the market of services offered to producers, and the waste collection, sorting and processing market.

In order to avoid the creation of barriers to the entrance onto the market of services offered to the producers, related to the relationships of the PCS with new entrants into the manufacturing or exploitation of products market, the Autorité stressed the recommendations it had made previously in opinion 99-A-22. It is therefore important that, firstly, competitors have access to the services of PCSs at rates and conditions that are non-discriminatory in comparison with producers that are members of the PCS and, secondly, that the PCS is open to everyone under objective, transparent and non-discriminatory conditions – namely that new entrants can enter a PCS’s capital in order to benefit from any future redistribution of profits.

The Autorité also recommended “drawing up a warning with regard to behaviour [by producers] that could tend to use the PCS as a place of commercial coordination during delivery of approval”, and “strengthening the oversight of the State Comptroller whose presence is planned at the heart of the PCS’s decision-making bodies with regard to competition matters and the detection of deviant behaviour”.²²

In the second market, which concerns the PCS relations with providers in charge of collection and processing, the Autorité recommended that supply contracts be assigned by the PCS in application of competition rules, that providers are chosen by means of a tender process, that contracts are entered into for a limited duration and that recourse is made to allotment to allow access for all undertakings to PCS contracts²³.

The Autorité furthermore issued additional recommendations in its opinion 12-A-17, with a view to limiting information and monitoring obligations to those necessary for the exercise of PCS’s statutory missions, guaranteeing the right to confidentiality of information, observing strict equality in the

²⁰ Information report on waste management with the context of EPR chains, by the deputies Jean-Jacques Cottel and Guillaume Chevrollier, pp. 53-54.

²¹ *Ibid.*

²² Opinion 10-A-21, paragraph 100.

²³ Opinion 12-A-17, paragraph 185: “Due to the concentration of demand on the waste processing market, operational PCSs must enter into contracts on the basis of transparency, adopting private tender procedures on the principle of the access of the greatest number of providers to their markets, by allocating their contracts technically and geographically”.

implementation of these obligations between all operators and finally implementing transparent procurement procedures.

3.3 *Prospective analysis of the involvement of PCSs as suppliers*

In its opinion 12-A-17, the Autorité also carried out a prospective analysis in which it identified risks that could potentially distort competition linked to the possible involvement of PCSs as providers – although they are not currently present in this role in waste management chains and indeed state that they have no interest, in current circumstances, in acting as operators.

First, as regards the selective waste collection, sorting and treatment market, the Autorité emphasised that direct involvement by PCSs would lead them in some way to become “judge and party”: in fact, the existence of their right to observe and monitor other operators is only justified by the exercise of statutory missions, which do not include operator activities. PCSs would thus have access to their competitors’ know-how and regular information on their activities to an extent that their involvement in the market as providers would necessarily lead to distortion of competition. The Autorité therefore considers that there would be, *a priori*, “an incompatibility, for a PCS, between the exercise of statutory tasks and the exercise of a commercial waste collection, sorting and processing activity, within the same structure.”²⁴ Consequently, the Autorité specified that in such circumstances, a structural separation would be required: “the conditions for healthy regulated competition require that local-authority financing activities, prescribing activities and activities involving monitoring the provision of selective waste, collection and processing are carried out by entities that are independent of those that would offer goods and services in the selective waste collection, sorting and processing market.”

Secondly, although no competition principle opposes the involvement of PCSs in the materials take-back and trade market, this involvement would add to the power of structuring and monitoring that they actually exercise in the market of selective waste collection, sorting and processing and would risk generating vertical restrictions, should the PCSs in question hold a dominant position therein and they would thus be in a position to lock or partition the materials market in question. PCSs should therefore ensure they do not abuse this dominant position, for example by pledging to deal with all take-back operators equally.

Thirdly, the PCSs could find themselves in a more favourable position in terms of access to the market of advice and consultancy in matters of waste management, due to the mass of data and strategic information they hold as a result of the information and inspection obligation incumbent on the local authorities and waste processing providers. The Autorité considered that although no competition principle opposed the PCSs providing consultancy activities, it is on the condition that a principle of objectivity and neutrality be observed in the provision of “transparent, objective and non-discriminatory information on techniques and technological evolutions”²⁵. In addition, the Autorité noted that if data and information were considered, on a case by case basis, as essential resources, “the PCS could be led, under certain conditions, to grant access to the data and information that it holds”.²⁶ The aforementioned Cottel and Chevrollier report on waste management within the context of EPR chains therefore finds that PCSs that want to diversify their activities into the provision of consultancy and expertise to local authorities should be obliged to do so via separate structures.

²⁴ Opinion 12-A-17, paragraph 141.

²⁵ Opinion 12-A-17, paragraph 121.

²⁶ Opinion 12-A-17, paragraph 160.

GERMANY

1. Introduction

This contribution outlines how competition was introduced into the German waste management sector by means of legislative changes and enforcement actions by the Bundeskartellamt and the European Commission. The paper first explains the legal framework and the characteristics of the market. After setting out the actions taken in this field by the Bundeskartellamt and the results achieved from them, the paper highlights some remaining issues and suggests possible solutions.

2. The legal framework of the German waste market

The German waste market is governed by the German waste management act (Kreislaufwirtschaftsgesetz). A basic distinction made within this framework is between industrial/commercial waste and waste from private households.

The area of industrial/commercial waste has been liberalised for some years and shows that a liberalised and competitive market for waste management services does not lead to a reduced level of environmental protection: there are neither complaints to the Bundeskartellamt nor are there reports about environmental problems, like littering. This paper will therefore focus on waste from private households.

Waste from private households is generally subdivided into general waste and separately collected waste (packaging, electric and electronic equipment, batteries, etc.). General waste is governed by Sec 17 of the German waste management act (version of July 2012). This provision grants municipalities a monopoly on the collection of residual solid waste from consumers. This provision has to be seen against the backdrop of Article 28 of the German Constitution which guarantees the right of municipalities ‘to regulate all local affairs on their own responsibility’ (kommunale Selbstverwaltung). Exceptions from the monopoly exist for extended producer responsibility and charitable/commercial collections. Commercial collections can be banned by the responsible authority, if the collection endangers the economic viability of the waste management facilities of the municipality.

The collection of packaging waste from private households is mainly regulated by the packaging ordinance. The packaging ordinance requires producers and distributors trading packaged goods to organise the take-back and recovery of their packaging. The producers and distributors contract waste management companies for this service. These waste management companies (duale Systeme) organise the collection of such packaging free of charge from private households.

Initially, the entire system for the take-back and recovery of packaging waste from private households was handled by a single undertaking (Duales System Deutschland, DSD also known as “Der Grüne Punkt” - The Green Dot) which was set up by producers and distributors to ensure their take-back and recovery obligations.

Following interventions by the Bundeskartellamt, the European Commission and amendments to the legal framework, several new undertakings entered the market. The amendments of the packing ordinance allowed the organisation of local collections by undertakings other than the former monopolist DSD. To obtain a licence for the market for the take-back and recovery of packaging waste from private households

an undertaking must apply to the Land (State) in which it wishes to provide the service. Such a licence is granted if the undertaking provides a comprehensive system for the collection of such waste for the *entire* Land, has coordinated the collection with the respective municipalities¹ and has organised the recovery of the waste. The collection has to be co-ordinated with the municipalities for practical and legal reasons. As mentioned above, municipalities are self-governed entities enjoying a certain level of constitutionally protected autonomy. Once a licence has been granted the undertaking has to ensure the free collection of the waste from consumers and compliance with the recycling quotas and to report yearly to the waste management authorities.

The requirement that undertakings have to ensure the collection for the *entire* Land in coordination with municipalities (currently there are around 400 different collection areas in Germany) creates specific competition problems as it means that the collection has to be organised jointly by the licensed undertakings.² Sorting and recycling processes are, however, managed individually.

Nowadays collections for the different areas/municipalities are tendered. In cooperation with the Bundeskartellamt it was ensured that competition is not restricted. Since 2011 the collection services for around 1/3 of the approximately 400 different areas are tendered annually. The contracts for the collection of waste have a three-year duration. Which licensed undertaking is in charge of tendering the collection services for a certain area is decided by lot. It is then responsible for organising the collection with the company winning the tender and has to bear the financial responsibility for more than 50% of the local waste collection costs. The collected waste is shared amongst the licensed undertakings according to their individual quota for which they were contracted by the producers and distributors.

3. Actions taken by the Bundeskartellamt

As detailed in the OECD Roundtable on Horizontal Agreements in the Environmental Context,³ the Bundeskartellamt and the European Commission have taken a number of decisions in the area of the take-back and recovery of packaging waste. Four important areas are highlighted in the following.

- The first actions in this area concerned DSD. While the Bundeskartellamt and the Commission initially tolerated that DSD bundled collection and sorting and contracted these services without a tender,⁴ the Bundeskartellamt later prevented DSD from extending its services from private sources' packaging waste to packaging waste from commercial sources.⁵ When the amended legal framework allowed for competitors to DSD, the Bundeskartellamt wanted to ensure that local collectors would not abuse their dominant position. Due to legal and factual reasons the local collectors, after having been contracted by DSD, had the exclusive right to collect packaging waste from private households in one area. This position of dominance should not be abused by refusing to contract with competitors of DSD for collection services (so called co-

¹ E.g. whether and how often the material is collected from the home or from certain collection points and whether and how the waste is to be pre-sorted by the consumers. Packaging waste is typically sorted into three categories: glass, paper/cardboard and lightweight packaging (plastics, composites, aluminium, etc.). Economically lightweight packaging is the most important element accounting for around 80% of the costs/turnover.

² Due to practical, legal and economic reasons it is not feasible that all undertakings collect their respective quantity of waste from all consumers.

³ OECD (2010), "Horizontal Agreements in the Environmental Context," [DAF/COMP\(2010\)39](#).

⁴ See Annual Report 1991/1992, BT-Drs. 12/5200, p. 132.

⁵ Decision B10-82/93 of 24 June 1993, WUW/E BKartA 2561-2573. Further proceedings in this area were halted after DSD changed its policy, see Annual Report 1993/1994, BT-Drs. 13/1660, p. 128.

usage agreements).⁶ The Commission thus issued a decision requiring DSD to end the usage of clauses which ensured that the local collector would exclusively work for DSD.⁷ In 2002 the Bundeskartellamt initiated proceedings to break up the cartel-like structure of DSD by 2006. As a result the structure of DSD changed: the waste management companies providing collection, sorting and recovery services left the DSD in 2003 and in 2004 a financial investor bought DSD.⁸

- As explained in the 2010 OECD Roundtable Contribution⁹ the Bundeskartellamt in 2007 issued a decision in a used glass purchasing cartel case.¹⁰ Waste glass is used in the production of container glass – drink bottles, food jars, etc. There is an economic incentive for using waste glass: waste glass as a secondary raw material creates considerable cost savings for the glass producers, not only because it is cheaper than primary raw material but also because of its lower melting temperature, leading to considerable energy savings.

The German container glass producers set up a glass recycling company “Gesellschaft für Glasrecycling und Abfallvermeidung” (“GGA”) in 1993 to jointly purchase the entire waste glass recovered from household collections. GGA purchased centrally from the waste management companies and organized the delivery of waste glass to special recycling plants. GGA then passed on its purchasing costs for the waste glass and transportation to member companies (all container glass manufacturers with production sites in Germany) in the form of standard tonnage prices.

In an attempt to defend this purchase cartel it was claimed that the joint purchasing was necessary for environmental protection reasons. However, the investigation of the Bundeskartellamt ascertained that the cartel was not necessary for those purposes, in particular to guarantee the recycling quotas for waste glass, which for years had exceeded 80 per cent. The environmental claims were assessed within the traditional framework of Art. 101 (3) TFEU and Section 2 ARC. The purchasing cartel led to the elimination of competition covering a substantial share of the waste glass markets and the environmental recycling goals could be attained without such a far-reaching elimination of competition. For the Bundeskartellamt this case illustrates that there is hardly ever substance to alleged conflicts between competition law and environmental protection. Furthermore, the case showed that the existing legal framework allows for a balance to be struck without the need for a special exemption.

⁶ As the services of the local collectors would not only be used by DSD but co-used by DSD’s competitors.

⁷ Decision 2001/837/EG *DSD* [2001] OJ L 319/1-29. The Commission additionally decided that DSD could not require licence payment for its trademark (Der Grüne Punkt) from producers and distributors of packaging if these had contracted a competitor of DSD to carry out the take-back and recovery. Since 2009 the DSD has unbundled its licence agreement and waste management agreement, so that it is now possible to use the DSD trademark without also contracting DSD for the take-back and recovery of packaging from private households, see Annual Report 2007/2008, p. 155.

⁸ See Annual Report 2003/2004, BT-Drs. 15/5790, p. 178.

⁹ OECD (2010), “Horizontal Agreements in the Environmental Context,” [DAF/COMP\(2010\)39](#).

¹⁰ Decision of 31 May 2007, B 4-1006/06 available at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell07/B4-1006-06.pdf?navid=37>.

- Beyond this GGA case, the Bundeskartellamt has been actively promoting competition in the packaging waste area. It frequently receives enquiries and complaints. In many cases the Bundeskartellamt was able to settle the issues without formally starting proceedings.¹¹
- In December 2012, the Bundeskartellamt published the final report of its sector inquiry into packaging waste from private households.¹² The sector inquiry evaluated the time period from 1993-2011. It established that the system which started as a monopoly held by DSD had been transformed gradually into a competitive system. The main driver spurring competition was the decoupling of the three different steps: collection, sorting and recovery/treatment. Moreover, the new tendering procedure developed in cooperation with the Bundeskartellamt ensures that distortions of competition are kept to the minimum. The tendering system provides financial incentives by means of assigning the main financial responsibility. These incentives in turn ensure competition between the different undertakings tendering the collection services for the different areas.

The inquiry also showed that the market is still not fully liberalised and that certain problematic areas remain. The current system for collection could be made more efficient in economic as well as ecologic terms.

Such improvements are limited by the requirement to arrange the collection in agreement with the local municipality. The mutualisation of costs in certain areas still leads to inefficient structures. One example relates to ancillary charges which are paid by the group of licensed undertakings to the municipality for help desks and the provision and maintenance of areas for the waste collection containers. Another example is the collection of packaging waste together with other solid waste in certain municipalities. In these municipalities the collection has not been tendered and the financial responsibility is shared amongst all the licensed undertakings thereby eliminating the incentive to save costs. Costs in those areas are 40-100% higher than in the other areas. Although one would expect these higher costs to at least translate into a higher rate of recycling per resident, this is not the case. In fact, the rate in some areas is even lower than the average. The Bundeskartellamt continues to advocate and negotiate with municipalities and undertakings to ensure efficient tendering and financial responsibility.

4. Impact of competition law interventions and legal changes

In the area of the take-back and recovery of packaging waste from consumers the different enforcement actions and the changes in the regulatory regime have led to substantial cost savings as well as improvements in environmental performance.

The market for take-back and recovery formerly monopolised by DSD has now 9 further competitors and DSD's market share is down to about 44% (2011). Increased competition has led to substantial cost savings and improvements in terms of recycling quality. Recycling costs have fallen from 2 to 1 billion € per year. For a family of four this means a saving of roughly 50€ per year.¹³ The sector inquiry showed that the introduction of competition has not led to a breakdown of the German waste management system,

¹¹ Some of the statements of objection by the Bundeskartellamt are mentioned in the Sector Inquiry Dual Systems (B4-62/12) Final Report December (2012) page 101ff. available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Publikationen/2012-12-03_Abschlussbericht_Sektoruntersuchung_Duale_Systeme.pdf

¹² Sector Inquiry Dual Systems (B4-62/12) Final Report December (2012).

¹³ See Sector Inquiry Dual Systems (B4-62/12) Final Report December (2012) p 40ff.

which some had feared. The recovery levels for packaging waste are the same and the recycling quota has not fallen. Instead introducing competition has spurred innovation. While the recycling quota declined during the DSD monopoly, it increased once new competitors entered the market. This result also makes sense from an economic point of view. Many components of the packaging waste have market value. Once sorted and separated they can serve as an additional source of revenue. Competition also stimulated innovation in sorting: while new sorting techniques were already available during DSD's monopoly, they became widely established only after competition was introduced. Hence, competition has not led to a race to the bottom in terms of the recycling level but instead to a race for a higher yield in secondary resources from packaging waste.

5. Remaining issues

While the area of the collection of packaging waste from private households has been liberalised, such liberalisation has not taken place with regard to other solid waste from private households. The 2012 changes to the waste management act reaffirmed the position of municipalities in this area. Although options to introduce more competition were discussed in the legislative process, the final version abandoned such liberalisation. Municipalities enjoy a statutory monopoly for the collection of mixed wastes from private households (residual waste). According to Section 17 of the German waste management act the municipalities are also in the position to influence whether and to what extent competition for paper, biodegradable waste and bulky waste is allowed.

While introducing competition into the area of the take-back and recovery of packaging waste from private households has been a success, certain obstacles remain. The obligation to provide coverage for a whole Land means that a certain form of co-operation between licensed undertakings is necessary. The Bundeskartellamt ensures that such agreements restricting competition will not go beyond what is necessary in order to benefit from the exceptions provided under Article 101 (3) TFEU and Section 2 ARC.¹⁴

Moreover, ensuring the separate tendering of collection services is particularly important. This safeguards that competition in sorting and processing is not distorted. The tendering process needs to be designed in a way that any sharing of costs for collection services is kept to a strict minimum.

In the ongoing debate about the future design of waste management and the take-back and recovery of packaging waste from private households, municipalities and certain parts of the waste management industry have recently suggested a system change: A single central organisation, the municipalities for instance, should be in charge of tendering the services (so-called re-municipalisation). However, such a system would effectively turn back the time to the beginnings of DSD: a local monopoly would be created. The reduced competitive pressure would over time lead to a loss of efficiency which had been gained by introducing competition to this area. The change would increase the revenue of the municipality at the expense of competition, consumers and the environment: competing companies would be excluded, consumers would face higher costs, and the lower recycling rate would not be in the interest of the environment.¹⁵

¹⁴ See e.g. Case Report B4-152/07 Bundeskartellamt (18.4.2011) available at www.bundeskartellamt.de.

¹⁵ It seems important to note that the critique is not directed at any economic activity of the municipalities but rather at the problematic competitive structure envisioned. Economic activities by the municipalities can also increase competition, as their recent activity in the energy market shows.

6. Way forward

Taking as a starting point the good experiences in the area of the take-back and recovery of packaging waste, two options for further liberalisation in the waste sector and in particular for the currently municipality-controlled areas of residual waste, paper, biodegradable waste and bulky waste might be put forward: competition for and competition within the market.¹⁶

A “competition for the market” approach could even be adopted where the municipality has a monopoly. The municipalities could be required to tender the different services: collection, sorting and recovery/treatment. This would guarantee that even companies owned by the municipality would face competition, thereby reducing inefficiencies and costs for consumers. For example the introduction of a tendering procedure led to a reduction in costs of around 30% in the time between 2003-2005 when DSD still had the monopoly for organising the collection of packaging waste from private households.

Preferable from a competition policy point of view is competition within the market. The municipalities’ monopoly could be abolished and consumers would buy waste management services. Such a system is already in place for industrial and trade waste and used by consumers in telecommunication and energy. To safeguard against potential problems in terms of security of supply and environmental protection, appropriate regulation could be put in place. The problem of littering, i.e. the disposal of waste without consent at an inappropriate location, could be countered with an obligation to surrender waste to the municipality if proof is not provided that an appropriate waste management company has been contracted.

7. Conclusion

The German experience shows that the area of waste management can be liberalised. While certain areas are not liberalised yet, the market for industrial and trade waste is fully liberalised and the market for the take-back and recovery of packaging waste has been liberalised over the last decade(s). The liberalised markets in Germany deliver good results, both in terms of efficiency and environmental protection. The innovation generated by inducing competition has led to considerable cost savings while and because the recycling quota has increased.

¹⁶

See Andreas Mundt ,Die Liberalisierung der deutschen Entsorgungswirtschaft‘ in Peter Kurth and Anne Baum-Rudischhauser (2011) Ressource Abfall: politische und wirtschaftliche Betrachtungen anlässlich des 50-jährigen Bestehens des BDE p 178-191 available at

http://www.bundeskartellamt.de/wDeutsch/download/pdf/Stellungnahmen/Festschriftbeitrag_Andreas_Mundt_zur_Festschrift_des_BDE.pdf

IRELAND

1. Definition

1.1 Municipal solid waste (MSW) is the waste collected from households, or waste which, because of its nature or composition, is similar to waste generated by households. Do you adopt a definition that is significantly different from the above? How does it differ from the one above and why?

The Competition Authority has not defined municipal solid waste publicly before. However, our preliminary view is in accordance with the above.

In the context of their annual National Waste Report, the Irish Environmental Protection Agency (“EPA”) defines MSW as “household waste as well as commercial and other waste that, because of its nature or composition, is similar to household waste. It excludes municipal sludges and effluents. In the context of the annual National Waste Report, municipal waste consists of three main elements - household, commercial (including non-process industrial waste), and street cleansing waste (street sweepings, street bins and municipal parks and cemeteries maintenance waste, litter campaign material)”.

In the context of the National Waste Report, the EPA defines household waste as waste produced within the curtilage of a building/residence or self-contained part of a building/premises used for the purposes of living accommodation.

In the context of the National Waste Report, ‘commercial waste’ is a term used to describe the non-household fraction of municipal waste, which is produced by commercial premises such as shops, offices and restaurants, as well as municipal premises such as schools, hospitals etc. It also includes non-process industrial waste arising from factory canteens, offices etc. Commercial waste is broadly similar in composition to household waste, consisting of a mixture of paper and cardboard, plastics, organics, metal and glass.

2. Municipal solid waste collection

2.1 Are municipalities responsible for MSW collection within their territories? If not, who is responsible for it? If multiple providers are involved what are approximate their market shares?

No. By the start of 2012, there were only three local authorities collecting household kerbside waste; Galway City Council, Kerry County Council (Killarney Town Council) and Waterford County Council.¹ Of the household waste collected at kerbside, 78% was collected by the private sector in 2011 (65% in 2010) and 22% by local authorities (35% in 2010).²

¹ This does not include collection from apartments which is not considered kerbside collection.

² Environmental Protection Agency National Waste Report 2011. Note that the percentage collected by local authorities includes street sweepings and refuse similar to that collected from households.

The Competition Authority does not have market share information for private waste collectors. In some areas, there is only one waste collector, e.g., some low populated rural areas. In other, more highly populated areas, there are three or four waste collectors such as Dublin. Collectors are mainly regional with two exceptions which operate on a national basis.

2.2 *Are different waste fractions collected separately?*

Yes, the majority of household waste collections are served by more than one bin. A 2-bin or 3-bin system refers to a source segregated collection system where dry recyclables and residual waste are separately collected (2-bin system), or where dry recyclables, organics and residuals are separately collected (3-bin system). Up to 2011, operators from 18 of the 34 local authority functional areas offer a fourth bin for the segregated collection of glass.

2.3 *How are providers of MSW collection services chosen, e.g. are there competitive tenders?*

Waste collection service is an open market in Ireland. Waste collectors only need to apply for and be granted a waste collection permit to be able to provide the services.

Since February 2012, the responsibility for issuing most waste collection permits in the State rests with the National Waste Collection Permit Office (NWPCO).³ Prior to this, there were ten nominated local authorities in the State that had responsibility for issuing waste collection permits.

The household waste collection market is in a period of rapid transition, with many local authorities exiting the household waste collection market. In 2008, 15 local authorities were collecting waste kerbside, in 2010 this dropped to 13 local authorities and by the start of 2012 there were only three local authorities collecting household waste kerbside.

The manner in which the local authorities extracted themselves from the market may have affected the 'selection' of MSW collection services. Most of the local authorities sold off their household waste collection services to private operators via a competitive tendering procedure. Although they did not provide the winner with any form of exclusivity, the tendering process did involve consideration of some important competition factors. For example, some local authorities put greater emphasis on customer service in their competition evaluation than other local authorities. The factors considered varied depending on the local authority involved.

2.4 *If competitive tenders are held what are their main characteristics? Are the awarded contracts: net costs or gross costs? Would the winner enter the market with its equipment, workers, etc or would it take over from those from the incumbent? How long are the contracts? Is the relevant market divided up to be supplied by different suppliers? How is the access to waste transfer stations, incinerators, landfills ensured? How is the quality of services monitored?*

N/A

2.5 *If there has been a change in nature of the providers (e.g. a trend towards municipalities taking over from private companies), please describe the reasons and effects.*

The trend in Ireland has been for private companies to take over from local authorities. The household waste collection market has gone through a period of rapid transition, with many local authorities exiting

³ Some permits, such as for the collection of hazardous and clinical waste must be issued by the Environmental Protection Agency.

the market. In 2008, 15 local authorities were collecting household waste at kerbside, in 2011 there were six (Kerry, Wexford, Dublin City, Dun Laoghaire Rathdown, Waterford County and Galway City). In 2011, the private sector collected 78% of household kerbside waste (up from 65% in 2010), reflecting the fact that many local authorities have moved out of the household waste collection market. In March 2013, only three local authorities were collecting household waste (Galway City Council, Kilkenny Borough Council and Waterford County Council). Most local authorities exited the market by selling off their equipment and customer lists; typically to the highest bidder.

There are many reasons why local authorities stopped providing the services, including financial stress and policy directives.

The main reason why local authorities exited the household collection market is their inability to compete with private collectors - due primarily to high labour cost for local authorities to provide collection services relative to the private sector. Operating costs for the provision of waste collection services by local authorities were generally significant. A number of local authorities also operated household waste collection charge waiver schemes for low income households.⁴ In an effort to cut their costs in light of the significant budget constraints imposed on all public bodies since the recession, some local authorities decided to sell their customers to private waste collectors through competitive tendering. For example, Cork County Council sold its waste collection business to a private operator. As part of this sale, the private operator implemented an immediate reduction of 10% in waste charges to all non-waiver customers.

In addition to the above financial reasons, the Programme for Government 2010 committed the Government to introducing competitive tendering for local household waste collection services. The policy document envisaged that service providers would bid to provide waste collection services in a given area. In this context, in October 2010 the Competition Authority called for rationalising the waste regulatory functions of local authorities. The dual role played by some local authorities - acting as both regulator and competitor in local markets - can create difficulties for their private sector competitors and for local authorities themselves. It was likely that local authorities could be involved in the process of designing the tendering process, therefore, most local authorities ceased their commercial arm in the sector.

However, in 2012, the Irish Government decided to retain the current market structure where waste collectors are competing side-by-side, subject to a strict regulatory regime.⁵

2.6 *If there is competition “in” the market, how many competitors may a given household typically choose among?*

There is competition “in” the market in the household waste collection sector in Ireland. However, the number of waste collectors available to a given household varies across counties. For example, in remote rural areas, there is only one waste collector and in high density urban areas, there are three or four waste collectors.⁶

⁴ The terms of waiver schemes may vary considerably from local authority to local authority. The new National Waste Policy is intended to introduce a household waste collection waiver scheme and other alternative support schemes for low income households that will be standard across local authorities.

⁵ Waste: A resource opportunity”
http://www.epa.ie/pubs/reports/waste/plans/Resource_Opportunity2012.pdf

⁶ Local authority functional area means the geographic area administered by the local authority that had the responsibility for issuing waste collection permits. There are 34 local authorities in the State and ten of which had the responsibility for issuing waste collection permit. Therefore, each local authority functional

2011 Irish census data indicates that 30% of occupied houses in Ireland do not avail of, or are not offered a kerbside collection service.⁷ In 2011, the number of collectors operating in each local authority functional area ranged from 2 to 14, with an average of 8 operators in the market in each functional area, although the geographic spread of the service provided by each operator is not known.

The Competition Authority does not currently have information on the number of operators in different geographic areas. This information would be useful for assessing whether competition is working well in the household waste collection sector. Therefore, we are in the process of working with the relevant government bodies to establish a means of gathering such information in a structured fashion.

2.7 *Is collection organised in a way to facilitate waste recycling? Is the system of incentives designed to achieve a sorting of waste by the disposing households? If so what have been the benefits of sorting to facilitate recycling?*

Yes, the majority of household waste collections are served by more than one bin. Ireland's Central Statistics Office (CSO) census data for 2011 indicates that;

- 26,631 (2%) dwellings have a single bin (black bin) service only;
- 723,374 (61%) dwellings have a 2-bin service (residuals bin and dry recyclables bin; and
- 447,923 (37%) dwellings have a 3-bin service (residuals bin, dry recyclables bin, and organics bin).

Of household waste managed in 2011, 79% was collected at kerbside, 18% was brought from treatment (bring banks, civic amenity sites, directly to landfill, to retailers/collection days in the case of WEEE) and 3% is the estimate of home composting.

The quantity of household waste recovered increased by approximately 30% from 576,864 tonnes to 656,510 tonnes between 2010 and 2011. This represents a 6% increase on that achieved in 2010. Although, the increases in recovery are mainly due to increases in the landfill levy (set by government) the increased collection of source segregated recyclables via increased use of the third bin (organics) and a consistent stream of dry recyclables from kerbside and bring centres also contribute to the increased recovery rate.

In addition, the pricing policy of household waste collection plays an important role in encouraging sorting of waste by the disposing household. For example, some waste collectors charge a fixed annual price for the green and organic bin, but per lift and pay by weight pricing structures for the residual bin encourage households to reduce residual waste.

However, the incentive to use the recycling bin is predicated on its price relative to the residual bin. The cheaper it is to dispose of recyclable material in the green rather than residual bin the more recycling and recovery are encouraged. There is some evidence however that increases in the price of green bin disposal relative to the residual bin have occurred in recent years. The Competition Authority is working

area is likely to be bigger than the geographic area administered by one local authority. We do not have information on the geographic area which is smaller than the local authority functional area yet. An operator can pick and choose the geographic area to operate in under a waste collection permit issued by the local authority. However, it does not have to operate the entire local authority functional area.

⁷ This is considered to be an overestimation for a number of reasons including due to incomplete information on apartment waste and on household waste management practices such as bin-sharing.

with the relevant authorities to establish a good data set which may provide some indications on the relations between household waste collection charges and household waste recycling.

2.8 *How is MSW collection paid for (e.g. through municipal budgets, by households through a flat fee, by households through a variable fee)?*

MSW collection is paid for mainly by households through a variable fee. Some private operators offer a flat fee. However, flat fees may not be allowed in future to encourage adherence with the ‘polluter pays’ principle and incentivise reduction and recycling.

A number of local authorities operate household waste collection charge waiver schemes for low income households. These can vary across local authorities. The new National Waste Policy is intended to introduce a household waste collection waiver scheme and other alternative support schemes for low income households.

2.9 *Are municipalities free to choose the price of collecting waste?*

Waste collection charges are set by operators (including local authorities and private operators).

2.10 *Are there incentives in place to reduce/control the amount of waste each household produces?*

The EPA and different waste stream compliance schemes organise environmental campaigns throughout the year which provide information to the general public and help them to reduce/control the amount of waste they produce. For example, the EPA’s “Stop Food Waste” Programme is encouraging everyone to rethink our food storage habits, sorting the freezer and avoid throwing out up to €700 worth of food every year.⁸

The fact that some waste collectors charge a fixed annual price for the green and organic bin, but per lift and pay by weight pricing structures for the residual bin encourages households to reduce residual waste.

2.11 *Are there specific obstacles to competition in waste collection markets in your jurisdiction?*

To date the Competition Authority has not done a comprehensive study on competition in the household waste collection sector.

In the past, the Authority frequently received complaints in instances where local authorities performed the dual function of waste collector and waste regulator. With local authorities exiting the waste collecting sector, this type of complaint has faded out.

There has been some consolidation of the household waste collection sector in recent years. As a result, the number of private waste collectors has fallen to one in some areas. We receive an increasing number of complaints in which households complain that there is a lack of alternative waste collectors and inadequate quality of services provided by the sole provider. It is not clear that the current licence system put strong emphasis on quality requirement, in any case, those information are not available to the consumer. However, the new waste policy 2012 provides that “*All household waste collection service providers will be required to put in place Customer Charters, clearly setting out information for customers in relation to issues such as charging structure, procedures for dealing with customers who may fall into*

⁸ <http://www.stopfoodwaste.ie/>

arrears, and arrangements for switching from one waste collector to another. These will be audited annually as part of the permitting process.”

3. Waste Transfer stations⁹

3.1 *Are waste transfer stations publicly owned and operated? If not, who owns or operates them? How are those that operate them chosen?*

Although we do not have specific figures, we know that some waste transfer stations in Ireland are publicly owned and operated by local authorities and others are privately owned and operated. We have no publicly owned, privately operated waste transfer stations. The decision by a private operator to establish a waste transfer station is a commercial one.

Waste transfer stations are operated under licence. There are essentially three tiers of waste treatment authorisations applicable to waste transfer stations. The EPA issues waste licences, local authorities issue waste facility permits and the EPA and the local authorities issue Certificates of Registration (the EPA to local authorities, and local authorities to the private sector).

3.2 *How is the price of the use of waste transfer stations determined, that is, by whom and based on what criteria? Is it defined at the national level or locally?*

It is determined independently by the owner/operator of the transfer station. The Authority does not have any information on the criteria used.

3.3 *Is there a requirement for non-discriminatory access by third-party waste collectors?*

It is not clear the current waste management legislation imposes any such requirement. Competition law could apply if appropriate.

3.4 *Do laws or contracts impose geographic limitations or other limitations (other than excluding hazardous waste) on what waste may be disposed of?*

We are not aware of any specific geographic limitations on waste transfer stations (other than in relation to hazardous waste). However, national and regional planning guidelines and area development plans provide limitations on where waste transfer stations can be located. Each local authority has a different planning and development plan which any proposed waste transfer station must fit into. The export of waste is discouraged in keeping with the EU's proximity principle.

The EPA can restrict what materials can go to the waste facilities through the licensing regime. These restrictions are mainly for technical capacity/ technology and hierarchy reasons. For example, the EPA issued a technical guidance document on the standard for minimum acceptable pre-treatment for MSW accepted for landfilling or incineration at EPA licensed waste activities. The guidance requires operators of landfill and incineration facilities to demonstrate via their waste acceptance policy (as established by licence conditions) that waste accepted at these facilities has been subjected to appropriate pre-treatment.¹⁰

3.5 *Is there competition in this sector and of what kind? Are there specified obstacles to competition in access to waste transfer stations? For example do significant scale economies*

⁹ Waste transfer stations are facilities to which MSW is temporarily taken for sorting and onward dispatch.

¹⁰ Municipal Solid Waste-Pre-treatment & residuals Management- An EPA Technical Guidance Document 2011.

lead to high concentration and do high sunk costs typically lead to waste delivery under long-term contracts?

Vertical integration has been the trend in the waste management industry in the past. Many waste collectors own waste transfer stations. This could raise potential competition concerns, if the waste transfer station owner refuses to accept waste from competing collectors. The Competition Authority has not to date received any formal complaints in this area, however, we have been informed by other government agencies that they have received this type of complaint.

4. Landfills

4.1 Are landfills publicly owned and operated? If not, who owns or operates them? How are those who operate them chosen?

Some landfills in Ireland are publicly owned and operated and others are privately owned and operated. In 2011, there was a total of 21 MSW landfills, 5 private and 16 owned by local authorities. Fifteen of these 21 landfills have other non-landfill associated waste infrastructure.

Landfills are operated under a licensing system. As for transfer stations, there are three tiers of waste treatment authorisations. The EPA issues waste licences, local authorities issue waste facility permits and the EPA and the local authorities issue Certificates of Registration (to local authorities and the private sector respectively).

4.2 How are the prices of disposal in a landfill (the “tipping fee”) determined, that is by whom and under what criteria? Is there a requirement for non-discriminatory access to landfills by third-party waste collectors?

The Landfill Directive and Section 53(A) of the Waste Management Act, 1996 requires that the price charged for disposal of waste in a landfill must not be less than the total costs necessary for the three purposes set out in Section 53(A)(4). They are:

- The costs incurred by the operator in the acquisition or development, or both (as the case may be), of the facility;
- The cost of operating the facility during the relevant period (including the costs of making any financial provision under section 53), and
- The estimated costs, during a period of not less than 30 years or such greater period as may be prescribed, of the closure, restoration, remediation or aftercare of the facility.

The EPA has developed a dedicated financial model to facilitate and streamline the reporting to the EPA of compliance with Section 53(A). Details of the model can be found at <http://www.epa.ie/enforcement/landfillgatefees/>.

Furthermore, a landfill levy is imposed by the Government on each tonne of waste presented for disposal at landfill. This has been increasing to discourage the use of landfilling as a first disposal method and to encourage recovery of MSW.

We are not aware of a requirement for non-discriminatory access to landfills by third-party waste collectors. As outlined previously, vertical integration has been the trend in the waste management industry in the past. This could raise potential competition concerns, if the landfill owner refuses to accept waste from competing collectors.

4.3 Do laws or contracts impose geographic limitations or other limitations (other than excluding hazardous waste) on what waste may be disposed of?

We are not aware of any specific geographic limitations (excluding hazardous waste) on landfills which have been publicly identified by the EPA or the Department of Environment, Community and Local Government. However, national and regional planning guidelines and area development plans provide limitations on where landfills can be located.¹¹ Each local authority has a different planning and development plan which any proposed landfill must fit into. The export of waste is discouraged in keeping with the EU's proximity principle.

The EPA could restrict what materials can go to the waste facilities through the licensing regime, these restrictions are mainly for technical capacity/ technology and hierarchy reasons. For example, the EPA issued a technical guidance document on the standard for minimum acceptable pre-treatment for MSW accepted for landfilling or incineration at EPA licensed waste activities. The guidance requires operators of landfill and incineration facilities to demonstrate via their waste acceptance policy (as established by licence conditions) that waste accepted at these facilities has been subjected to appropriate pre-treatment.¹²

Furthermore, Article 5(3) of the Landfill Directive bans the following wastes from landfill:

- Liquid waste;
- Waste which is explosive, corrosive, oxidising, highly flammable or flammable in the conditions of a landfill;
- Hospital and other clinical wastes which are infectious;
- Whole used tyres and shredded tyres (excluding tyres used as engineering material, bicycle tyres and tyres with an outside diameter above 1,400mm).

Article 6(b), (c) & (d) of the Landfill Directive specifies that landfills for non-hazardous waste can only be used for:

- municipal waste;
- non-hazardous waste which fulfils the waste acceptance criteria;
- stable, non-reactive hazardous waste (in separate cells to biodegradable non-hazardous waste);

Landfills for inert waste can only be used for inert waste.

4.4 Is there competition in this sector and of what kind? Are there specific obstacles to competition in access to landfills? Is waste typically delivered under long-term contracts? How large are geographic markets? Is there international trade for disposal of waste in landfills?

It appears there is competition between landfills.

¹¹ Although the EPA issued a Draft Manual on Landfill Site Selection (1995), we are not sure how relevant this document is to the current situation.

¹² Municipal Solid Waste-Pre-treatment & residuals Management- An EPA Technical Guidance Document 2011.

Waste is typically delivered under long-term contracts. A landfill requires considerable investment in its design and engineering, and once used, irrespective of whether a large or small percentage of the landfill is utilised, the property on which it is situated cannot be used for any other purpose for a period of at least 30 years after operation. Therefore, such a facility must have the prospect of generating a revenue stream over a long period of time, usually at least 25 years. Such high capital investment needs can act as a barrier to entry.

The official information indicates that there is no international trade for disposal of Irish waste in landfills. However, it is possible that Irish waste is presented at landfills in Northern Ireland.

There has been excess capacity in some parts of the country for landfill due to the recession reducing the amount of waste (esp. Construction and Demolition) being produced. This had led to significant reduction in the price of disposal at landfill. The landfill levy has in recent times counteracted this.

5. Incineration

5.1 Are incinerators publicly owned and operated? If not, who owns or operates them? How are those who operate them chosen?

There is only one municipal waste incinerator in Ireland, which commenced operations in October 2011 at Indaver Ireland's Carranstown, Co. Meath site. It is privately owned and operated by Indaver Ireland. It operates under a licence granted by the EPA.

Planning permission has been granted for a second municipal waste incinerator in Dublin to serve the Greater Dublin Area, the largest metropolitan area in the State. The proposed incinerator is to have an annual capacity of 600,000 tonnes of waste.

The incinerator is to be constructed and operated under a Public Private Partnership scheme with capital and operation costs being provided by a private company alongside the Dublin municipal authorities. The original tender was awarded in 2005 but had to be revised in 2007 due to the commercial restructuring of the original tender winner. The contract was to build and operate the incinerator for 25 years.

The municipal authorities were to provide a certain amount of waste for the incinerator as part of the contract. However, the original contract has been revised due to the municipal authorities exiting the waste collection market and so not being in a position to provide waste for the incinerator. Furthermore, the municipal authorities cannot legally control the destination of waste collected by private contractors.

Under the revised contract, the municipal authorities will guarantee a certain revenue stream and the contract for the operation of the incinerator has been extended from 25 to 45 years. Construction has not yet begun on the facility.

5.2 How are the prices of disposal in an incinerator (the "tipping fees") determined, that is by whom and under what criteria? Is there a requirement for non-discriminatory access by third-party waste collectors to incinerators?

The price of disposal in Ireland's only incinerator is a commercial decision by the private owner.

There is no specific requirement for non-discriminatory access by third-party waste collectors to incinerators. Competition law could however apply in appropriate circumstances.

5.3 Do laws or contracts impose geographic limitations or other limitations (other than excluding hazardous waste) on what waste may be disposed of?

We are not aware of any specific geographic limitations (excluding hazardous waste) on landfills that have been publicly identified by the EPA or the Department of Environment, Community and Local Government. However, national and regional planning guidelines and area development plans provide limitations on where those incinerators could be located.¹³ Each local authority has a different planning and development plan which any proposed incinerator must fit into.

The EPA could restrict what materials can go to the incinerator through the licence. Any restrictions are mainly for technical capacity/ technology and hierarchy reasons. For example, the EPA issued a technical guidance document on the standard for minimum acceptable pre-treatment for MSW accepted for landfilling or incineration at EPA licensed waste activities. The guidance requires operators of landfill and incineration facilities to demonstrate visa their waste acceptance policy (as established by licence conditions) that waste accepted at these facilities has been subjected to appropriate pre-treatment¹⁴. The EPA does not allow acceptance of recyclables in incinerators.

5.4 Does the legal framework differentiate between incinerators with different energy efficiencies? For example, is there a different treatment as regards ability to import feedstock or to receive fee-in tariffs or renewable energy certificates for the heat or electricity produced?

Yes, the legal framework differentiates between incinerators with different energy efficiencies. For example, Section 41(1) of the Waste Management Act (S.I. No. 126 of 2011) requires that “it shall be a condition of any waste licence covering incineration or co-incineration with energy recovery that the recovery of energy takes place with a high level of energy efficiency”.¹⁵

We are not aware of the legal framework associated with fee-in tariffs or renewable energy certificates for the heat or electricity produced by incinerators.

5.5 Is there competition in this sector and of what kind? Are there specific obstacles to competition in the access to incinerators of waste or amongst holders of waste suitable for incineration? Is there international trade for waste to be incinerated?

There is only one incinerator in operation at the moment; therefore, there is no competition for the provision of incinerator services within Ireland. However, there is some international trade as a number of waste operators are baling municipal waste and exporting it for energy recovery. Furthermore, the incinerator competes with other treatment/disposal facilities such as landfill and MBT facilities for MSW.

5.6 Has state aid or subsidies been given in your jurisdiction to build or operate incinerators?

No

¹³ Although the EPA issued a Draft Manual on Landfill Site Selection (1995), we are not sure how relevant this document is to the current situation.

¹⁴ Municipal Solid Waste-Pre-treatment & residuals Management- An EPA Technical Guidance Document 2011.

¹⁵ For detail information please see D10 and R1 in the Third and Fourth Schedule of the Waste Management Act 1996 http://www.epa.ie/pubs/legislation/waste/licpermit/EPA_waste_management_act_1996.pdf

5.7 *Are there instances of excess entry? If appropriate, answer separately for incinerators that have different characteristics, e.g. energy efficiency.*

No, there is only one incinerator in Ireland. In fact, there is sufficient amount waste generated in Ireland to supply more than one incinerator. With increasing landfill levy and the policy objective of diverting waste from landfill, it is likely that Ireland needs more than one incinerator. The current incinerator has received approval for an expansion in its capacity.

Waste-to-energy incinerators, require large investments in infrastructure. Therefore, such facilities must have the prospect of generating a revenue stream over a long period of time, usually at least 25 years. Such high capital investment needs can act as a barrier to entry.

Another barrier to entry is the uncertainty surrounding, and length of, the planning process¹⁶. This ‘hold-up’ problem can lead to significant underinvestment in the provision of these facilities.

6. Systems to fulfil extended producer responsibility

6.1 *Does your jurisdiction have schemes to facilitate the recycling of packaging waste by providing separate collection and handling at waste transfer/materials handling stations? If so, please describe the competition-salient features, e.g., exclusive territories for collection, exclusive handlers of defined waste streams, the frequency and method for choosing franchises.*

Packaging waste is not collected separately for households, it is collected through the 2 bin or 3 bin system where is available. We do not have detailed information on how packaging waste is handled at waste transfer/materials handling station.

The packaging waste compliance scheme pays subsidies to the waste industry to encourage recycling of packaging waste. Therefore, the packaging waste compliance scheme was designed to encourage recycling of the packaging waste rather than to encourage competition in the area of recycling of packaging waste.

6.2 *Is there competition in this sector and of what kind? Are there specific obstacles to competition among different schemes for recycling of the various recyclable materials? For example, is collection joint but there is competition in sorting? Is there competition in the sale of secondary raw materials?*

The degree of competition between producer responsibility organisations (“PROs”) varies for the five waste streams in Ireland.

Repak is the only packaging waste compliance scheme. Therefore, the question of exclusive territories for collection does not apply in the packaging waste stream. Irish Farm Films Producers Group is the only PRO for Farm plastic. Self-compliance does not seem to offer a real alternative to joining either of these PROs.

For WEEE and batteries the competition situation is different. There are two PROs, WEEE Ireland and ERP Ireland. WEEE Ireland and ERP Ireland operate collection services in mutually exclusive geographic areas, membership fees are based on costs of collection in that area, administration awareness

¹⁶ This is a major problem in Ireland where the period from initiation to start-up can be counted in decades.

etc. Research indicates that WEEE Ireland and ERP do compete with each other, with changes in market share and membership.¹⁷

In the tyres waste stream, Tyre Recovery Activity Compliance Scheme (TRACS) is the main scheme and Tyre Waste Management, has a small market share after entering in 2009.

7. Markets for secondary raw materials

7.1 *Is there competition in these markets and of what kind? Are there specific obstacles to competition in these markets?*

We do not have information on the level of competition in markets for secondary raw materials, although we do know that there are a number of Mechanical-biological treatments (MBTs) facilities who sell their material. We are not aware of any competition concerns in the sale of secondary raw materials.

8. Other Waste

8.1 *What is the role of competition in other markets for waste services, such as the market for the collection and disposal of special waste, like used oil, hospital waste, industrial waste, etc?*

There is an increase in the treatment of hazardous waste off-site at commercial facilities in Ireland in recent years and an increase in the quantity of hazardous waste exported for treatment in 2011 compared to 2010.¹⁸

Disposal of special waste is a relatively niche market in Ireland. For example, in relation to hospital waste, the Irish Health Service Executive (the Government agency that manages the public elements of provision of healthcare within the State) manages the hazardous waste generated by its hospitals through competitive tender for the collection and treatment services.

Over half the medical/clinical waste generated is under the control of the HSE. The HSE has signed a long contract (due to expire in 2014) with a clinical waste disposal company for its waste and that company currently has a monopoly on the disposal of this waste. Although not a problem for the HSE due to countervailing buying power, it has resulted in prices for clinical waste disposal being double that of the UK for small customers such as General Practitioners (doctors), dentists, etc. A potential entrant is considering entering this market but will only do so if it can get access to a portion of the HSE waste. Otherwise, it claims that entry is unviable. Entry would mean that small clinical waste producers could see the benefit of competition at the disposal stage.

Therefore, it is important that the tender process used by Government in securing a new contract in 2014 is designed to encourage both short and long term competition. If the competitive tender were not carefully designed, it could foreclose competition in the hazardous treatment sector in the long run.

¹⁷ According to confidential research conducted for the Department of Environment, Community and Local Government by an expert, which is in the Authority's possession.

¹⁸ Off-site in Ireland refers to waste sent to EPA licensed commercial hazardous waste treatment facilities for treatment.

9. Antitrust investigation and cases

9.1 *Has your office investigated competition law violations in the waste management sector?*

Yes, we have investigated alleged competition law violations in the waste management sector.

During 2010, we assessed a complaint alleging that the contract for the operation of the proposed Poolbeg Waste-to-Energy Incinerator contained breaches of competition law. After a detailed evaluation of the various aspects of the complaint, we found that, while the incinerator and the PPP contract would affect the market for waste collection and disposal, it would not affect these markets in an anti-competitive way.

During 2012, the Authority received a large volume of complaints in relation to the provision of domestic waste collection services. Among the complaints received, a large number related to the sale of Dublin City Council's (DCC) waste collection service to Greyhound Recycling & Recovery Ltd (Greyhound). The Authority found no evidence of anti-competitive agreements or concerted practices (such as market-sharing or customer allocation) that might have breached competition law. Furthermore, no evidence of an abuse of a dominant position in the market for waste collection in the Dublin area was identified.

The Irish National Consumer Agency ("NCA") investigated several waste management companies in 2012, in light of consumer complaints. Consumers experienced difficulties with waste collectors, such as, uncertainty about which service providers were operating in local authority areas, confusion about charges, a lack of information in relation to cancelling services and the procedures for handling billing disputes. Following on its investigation, the NCA received undertakings from the companies involved to amend contract terms and conditions that the NCA considers to be unfair to consumers.

9.2 *Have you had cases involving state aid or subsidies or issues of competitive neutrality, for example between companies run by municipalities and private companies?*

On 21 December 2009 the Irish High Court found that a regulatory proposal by the four Dublin local authorities to move from competition-in-the-market (or side-by-side competition) for household waste collection to a single operator, irrespective of whether selected through competitive tendering (i.e., competition-for-the-market) or by the local authority reserving the collection function to itself, was a breach of national competition law. The case is currently under appeal to the Supreme Court.

10. Market or sectoral studies

10.1 *Have studies of the markets or economics of the activities in the waste management sector been performed in your jurisdiction (by your agency or other government bodies)? What specific issues have they addressed? What methodologies have they used and what have been their findings? Particular markets or activities of interest to the roundtable are waste collection, landfills, incineration, waste destined for incineration, facilities for sorting out different streams of materials, facilities for treating different secondary raw materials, bottle or container deposit systems. But if there have been studies on other waste management services that are not explicitly covered by this roundtable, such as schemes for recycling of electrical and electronic waste from households, please also describe them. Similarly include a discussion on any studies on the relationship between the objectives of the “waste hierarchy” and competition.*

The Economic and Social Research Institute (ESRI) has done a study “*An Economic Approach to Municipal Waste Management Policy in Ireland*” in 2010 (“ESRI report”).¹⁹ This has been circulated by the OECD as part of the discussion.

The Irish Competition Authority has not to date done a study in the waste sector. However, we were asked by the Government to prepare a report in 2016 on competition in the household waste collection market.²⁰ Therefore, we are in the process of establishing a process for gathering data to inform such a study.

¹⁹ The Report can be accessed at

http://www.esri.ie/_uuid/0d17fc57-8726-40ab-b362-d4877cb921a4/index.xml?id=2972

²⁰ ‘A Resource opportunity-Waste Management Policy in Ireland’.

ITALY

1. Introduction

In Italy in recent years the legal and technological changes affecting the waste management sector determined the emergence of new markets in a sector that, traditionally, had witnessed limited competition in the provision of services.

Significant changes took place over the last fifteen years, with new regulation, prompted by the EU directives transposed into national legislation, progressively favouring the use of waste in new productive cycles (either as secondary raw material or for energy production).

In this evolving context the Italian Competition Authority increasingly focused on competition issues that arose in the waste management sector, especially with respect to the way producer responsibility schemes were regulated and organized.

2. Municipal solid waste in Italy – Some data

According to Eurostat Municipal Solid Waste (MSW) generation per capita in Italy slightly increased from 2001 to 2006 (from 516 kg/inhabitant to 552 kg/inhabitant), followed by a slight decrease in the second half of the decade (531 kg/inhabitant in 2010)¹. There seem to be remarkable differences in per capita production across regions; in 2010, e.g., MSW generation ranged from 413 kg/inhabitant per year of Molise to 677 kg/inhabitant per year of Emilia Romagna².

Italy has traditionally landfilled most of its MSW, even if the landfill rates have constantly decreased between 2001 and 2010³, with a reduction from 67 % to 48 % of MSW (and from 19.7 to 15.4 million tonnes in absolute terms). However, also in this regard, there are substantial differences among regions. In 2010, e.g., Lombardy landfilled 8 % of its generated municipal waste and separate collection represented about 48.5 % of the total produced amount, while Sicily landfilled 93 % of its generated municipal waste (ISPRA, 2012). In general, it can be underlined that regions that are able to combine high separate collection rates, adequate capacity for MSW processing under different waste treatment options and a market for recycled materials usually show lower landfill levels.

The level of separate collection is increasing in all the Italian regions, but Italy as a whole, with 35% of MSW separate collection in 2010 (11.4 million tonnes) is still far from achieving the national separate collection targets, introduced by Legislative Decree 152/2006 (the 2008 target was 45 %).

¹ Eurostat, 2012: 'Waste database municipal waste'

<http://epp.eurostat.ec.europa.eu/portal/page/portal/waste/data/database>

² ISPRA, 2012, 'Rapporto Rifiuti Urbani'.

<http://www.isprambiente.gov.it/it/pubblicazioni/rapporti/rapporto-rifiuti-urbani-2012>

³ Eurostat, 2012.

3. The regulatory framework for waste management

In Italy the first national framework law on waste was issued in 1997 (Legislative Decree 22/97 also known as “Decreto Ronchi”), transposing three of the main EU directives on waste: the European Waste Framework Directive (Directive 91/156/CEE), the Directive on Hazardous Waste (Directive 91/689/CEE) and the Directive on Packaging and Packaging Waste (Directive 94/62/CE). The act contains rules applying to all types of waste as well as to all the phases of the waste management cycle (collection, transportation, recycling and disposal). The decree introduced several innovations in the national framework establishing an integrated national waste management system and defining the different level of responsibilities (State, Regions, Municipalities) of the system. In particular, Regions hold the responsibility for drawing up waste management plans to promote waste reduction (with regard both to hazardousness and quantity), and municipalities organise municipal waste collection and management within optimal management areas (so called ATO).

The legislative decree established, as a general rule, a clear distinction between solid urban waste produced by households, on the one hand, and so-called “special” waste resulting from commercial, industrial and artisan activities. The decree set targets for separate collection of municipal waste to be achieved at ATO level (as percentages related to municipal waste generation).

The decree also modified the households’ tax on solid municipal waste generation (based on the floor area of the building), to be gradually replaced by the waste tariff. The structure of the tariff included: a quota to be determined in relation to the essential components of the cost of the service and a quota proportional to the quantity of waste produced by each subject, the standard of the services offered by the municipality and the size of the costs of waste management.

Extended producer responsibility for packaging waste (based on “The Polluter Pays” principle) was introduced in the national system with the 1997 decree. Italian producers of packaging are responsible for recovering and recycling waste. To this end they may either: 1) organize an independent system of collection and recovery of packaging waste; or 2) join a productive chain Consortium (association of undertakings) for each kind of waste (paper, plastic, etc.). The decree established the National Packaging Consortium (CONAI), a cross-sector organisation coordinating the activities of six industry consortia for the recovery of aluminium, glass, paper, plastic, steel and wood. The consortia are participated by producers and recycling companies and are responsible for the collection of packaging waste for the different sectors.

The producers pay a fee to national consortium CONAI and to the respective sector consortium and by this contribution they fulfil their obligation for the treatment or disposal of the packaging waste.

The decree (and its following amendments) provided for more stringent packaging waste targets than the ones fixed at the EU level for plastic (26 % instead of 22.5 % stipulated in the Directive) and for wood (35 % instead of 15 % stipulated in the Directive) to be reached by 2008.

Subsequently, Legislative decree 36/2003 implemented the EU Directive 1999/31/CE (Landfill Directive). It required Regions to elaborate and approve a proper programme for reducing the amount of biodegradable waste going to landfills, integrating the regional waste management plan, in order to achieve specific targets at ATO level (Optimal Management Areas) or provincial level (if the ATO is not yet delimited). The same decree also introduced a landfill ban for waste with a calorific value exceeding 13 mega-joules per tonne with effect from the beginning of 2007. This deadline was then shifted to the end of 2008.

Legislative Decree n. 152/2006 (Environment Framework Act) abrogated Legislative Decree 22/97, including, however, all its main provisions. Legislative Decree n. 152/2006, as subsequently amended⁴ is still the main framework reference for regulation of all phases of waste management (collection, disposal, recycling) addressed in Part IV (Articles 177- 266) of the decree.

The most important innovations shaped by the Decree and its amendments are the following: with regard to the separate collection of municipal waste, the Decree set three new targets to be achieved at ATO level: 35 % by 2006; 45 % 2008, and 65 % by 2012. If an ATO does not achieve the targets, it shall pay a financial penalty consisting in a cumulative addition of 20 % on the special tax on the price paid for the final disposal of waste, to be divided among the municipalities whose bad performances failed to obtain the result. In 2006 the following intermediate targets were also defined: 40 % by 2007, 50 % by 2009, and 60 % by 2011. The waste tariff introduced by legislative Decree 22/97 was substituted by a new one proportional to waste quantity and quality produced per floor area unit, in relation to uses and different typologies of activities. The old tax on solid municipal waste could no longer be applied from 2010. The waste tariff has been subsequently amended and is currently subject to review (it should become part of a wider Service Tax on property collected by municipalities).

4. Competition issues and intervention by the Italian Competition Authority

At the collection stage different competitive conditions apply depending on the way the waste is generated (based on the distinction, outlined in the law, between solid urban waste and special waste). Collection of solid urban waste is dispersed on a large number of households and presents economies of density. It is therefore performed by a monopolist and the only competition that takes place is competition for the market. Special waste which is more concentrated in producers of medium-big size is usually collected by more than one firm. The collected waste is then conferred to the sector consortium. In order to incentivize separate waste collection a national agreement between CONAI and ANCI (the national association of municipalities) has been signed. The agreement establishes the terms and the fees for the attribution of the collected waste to the sector consortia.

The Italian Competition Authority has addressed competition issues in the waste management sector focusing its efforts, in particular, where new markets could develop using waste in a new productive cycle (either for the production of energy or for the production of raw materials). Since competitive restrictions stemmed both from the regulation and the firms' conduct the Authority used various instruments of intervention (market study, advocacy, enforcement).

Most of the ICA's interventions concerned the producer responsibility schemes (in the form of consortia) and the way in which their organization could restrict competition⁵. The consortia were established in view of the idea that market mechanisms would not be sufficient to provide a service that was desirable for environmental protection purposes (a market failure hypothesis).

⁴ Namely Legislative Decree December 3, 2010, n.205 transposing the European Waste Framework Directive (2008/98/EC)

⁵ One exception is the case A433, closed on 14 March 2012, on the assignment of waste collection services in the Municipality of Messina. The ICA found that Messinambiente, the direct contractor for waste collection services for the Municipality of Messina since 1999, had abused its dominant position by denying and postponing the delivery of information that was crucial for proper execution of the competitive tendering process used by the municipality to select a new contractor. According to the Authority, Messinambiente implemented an intentional strategy to delay and block these procedures, obstructing their proper execution, and prejudicing the participation of other competitors. The firm was sanctioned as a result of the investigation.

However, two issues, in particular, raised competition concerns: the monopoly position of the sector consortia and the way in which they assigned the collected waste, which prompted the ICA in intervening.

In July 2008 the Authority concluded an extensive market study on packaging waste⁶. The market study examined the regulation and activity of the packaging waste consortium (CONAI) and those for several recyclable materials (paper, glass etc.).

The main conclusions of the study were:

- regulation should allow the creation of more than a single consortium for the collection of each recyclable material;
- consortia might create unjustified restrictions in the collection activity;
- they harmed competition among recycling companies if the collected materials were assigned to the different companies in a concerted way, usually reflecting historical market shares.

The Italian Competition Authority outlined the competitive restrictions stemming from the regulatory framework both in the conclusions of the market study and through its advocacy power in several reports⁷.

In its reports the Authority advocated: i) that the regulatory framework should allow for the establishment of more than one consortium for the collection of each used material; ii) that the rules on participation to the consortia should be designed in such a way as to promote competition among participants (for example through competitive bids for the assignment of the collected materials).

Some of the Authority's suggestions have been followed in recent regulation allowing for the establishment of more than one consortium for the collection of some materials (for example for plastic), although consortia that are outside the CONAI system still encounter some obstacles in entering the market.

In some instances the conduct of the firms participating in the consortiums restricted competition, in addition to the competitive restrictions stemming from the regulatory framework. In **April 2009** the Italian Competition Authority concluded an investigation into anti-competitive agreements in the lead battery recycling industry (COBAT)⁸.

⁶ IC 26 Packaging waste market, closed on July 3rd 2008.

⁷ Advocacy Report AS 478, October 9, 2008 on implementation of European Directive 2066/66/CE and AS1005, February 2009.

⁸ I697 COBAT Riciclaggio delle batterie esauste closed on April 29, 2009.

CASE I697 COBAT- recycling of used lead batteries

In the case on the lead battery recycling industry the Authority deemed that COBAT⁹, the mandatory consortium for collection of used lead batteries and several lead recycling companies, through the battery lead recyclers industry association, had restricted competition in the national markets for the collection and recycling of used lead batteries. The investigation was launched following complaints from lead battery manufacturers and companies involved in collecting used batteries to export abroad.

COBAT had been established in 1988, with law n. 475/1988 as the exclusive consortium for the collection of used lead batteries. The purpose for its establishment was to face the environmental problems caused by the abandonment of lead batteries and wastes containing lead that are particularly toxic, while they can be recycled and reused. The consortium was established in order to grant the collection of used lead batteries, stocking them and distributing them to the recycling companies, while ensuring elimination of waste material that cannot be reused, in accordance with rules established by environmental laws. In 2002 a change of regulation eliminated exclusivity.

The relevant markets affected by the restrictions were: i) the market for the collection of used lead batteries and ii) the market for the recycling of lead batteries. The geographic scope of both markets is national.

Two anticompetitive agreements were ascertained in the course of the investigation.

The first one concerned COBAT itself and the provisions of the agreements it signed with recycling companies. In particular: a) The quantities of lead batteries assigned each year by COBAT to the recycling companies was established in proportion to the productive capacity of each company – thus in effect maintaining historical shares; b) If a recycling company acquired used batteries directly from a collector, without going through the consortium, COBAT would reduce by the same amount the quantity of lead batteries it assigned to that recycling company.

In the Authority's view, the contractual provisions set by COBAT restricted competition by discouraging both the creation of alternative collection systems and created obstacles to recycling activities independent of those administered by the Consortium, thus maintaining the *status quo* in the national lead batteries recycling market.

Other collusive conducts by the recycling companies were detected through the documentation collected during inspections. The companies exchanged information on their output and on the quantities of lead batteries that they received by COBAT. Through this information exchange the recycling companies came to a concerted repartition of used lead batteries received by COBAT and hindered any attempt to develop recycling activities outside the Consortium, thus preventing manufacturers from taking advantage of a commercial practice for recycling used batteries that would have led to a reduction in the cost of producing new batteries. The industry association of recycling companies, AIRPB, took an active coordinating role and was used by the companies as to reach common decisions.

The decision of the Italian Competition Authority was overturned by the First Instance Administrative Tribunal on March 9, 2010. The main objection to the findings of the Authority by the Tribunal was that the conduct of the consortium and its participants found its base in the regulation. According to the Tribunal, the Consortium has been created in order to serve public interest objectives (health and environment protection) and its conduct should therefore fall into the provisions contained in Article 8, 2 of Law 287/90, stating that the provisions of the Italian competition law “... *do not apply to undertakings which, by law, are entrusted with the operation of services of general economic interest or operate on the market in a monopoly situation, only in so far as this is indispensable to perform the specific tasks assigned to them*”.

The Authority appealed the Tribunal's decision. In the view of the Authority the competitive restrictions in COBAT's conduct were not indispensable to pursue its public policy objective. The Council of State confirmed this position and upheld the decision of the Authority.

⁹ Consorzio obbligatorio batterie al piombo esauste e rifiuti piombosi.

The Authority, following the findings of the market study, also intervened with respect to the conduct of the consortium responsible for the collection of waste packaging containing cellulose, COMIECO¹⁰.

COMIECO is the Consortium that organizes and manages the collection, recovery and recycling of waste paper associating approximately 3,500 firms active in paper manufacturing.

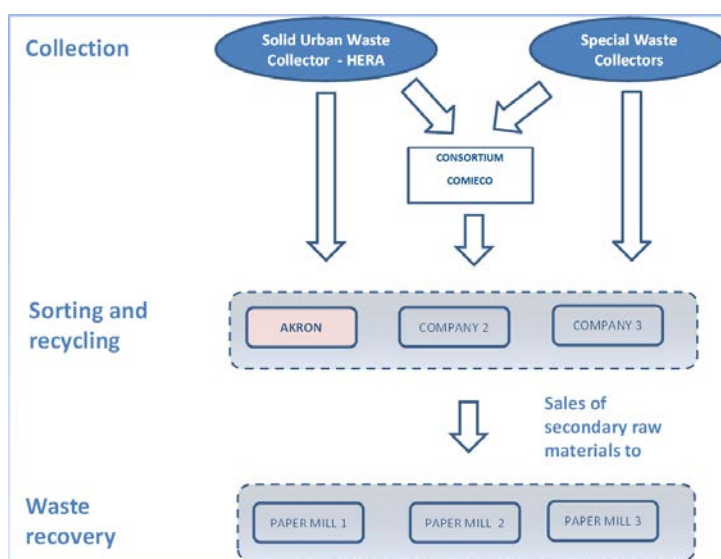
The Authority investigated the system in use to assign paper waste to its members. It found that the amount of waste assigned to each associated paper manufacturer was proportional to the quantity of paper packaging introduced in the consumption phase the year before (so it was based on historical market shares). After the opening of the proceedings COMIECO presented commitments to assign 40% of the packaging waste controlled by the Consortium through competitive auctions. The Authority deemed that these commitments would address the competition restrictions identified in the opening of the investigation. The remaining 60% of paper waste being assigned pro-quota was considered justifiable in order to pursue the environmental objectives fulfilled by the Consortium.

An interesting effect for competition of the COMIECO case was that the outcome of the auctions showed that the waste paper as a secondary raw material had a market value, which prompted many producers to leave the Consortium and sell the waste paper themselves. The participation fee to COMIECO, conversely, dropped from 22 euro/tonne in 2011 to 6 euro/tonne in 2013.

As producers leave the consortia and a market for the production of recycled raw materials develops new competitive concerns might emerge.

In December 2012 the Authority launched an investigation into Hera, Hera Ambiente and Akron, all belonging to the same corporate group, for an alleged abuse of dominant position in the markets related to the collection of waste paper. The HERA group holds a monopoly through the parent company Hera S.p.A. in the collection of municipal solid waste in all the municipalities of the provinces of Forlì-Cesena and Ravenna, in the majority of Municipalities in the provinces of Rimini, Bologna and Modena and in the Municipality of Ferrara by virtue of direct contracts, currently in the stage of extension. Hera Ambiente operates in the business of constructing and operating treatment facilities, materials and energy recovery and waste disposal. Akron operates instead in the field of environmental services, building and managing plants for waste sorting and treatment in order to prepare waste for re-use (see Figure 1).

Figure 1



¹⁰

I730 Gestione dei rifiuti cartacei COMIECO case closed on March 16 2011.

The Authority is trying to ascertain whether Hera, that holds a monopoly in the upstream market of waste collection might have foreclosed access in the downstream market of cellulosic waste recovery by supplying cellulosic waste derived from the collection of municipal solid waste to Akron at more favourable conditions than those offered on the market to its competitors. The distortion of competitive dynamics would be reflected in the downstream market for cellulosic waste recovery and the sale of waste paper to paper mills, whereby the supply could allow Akron an advantage not replicable by its competitors. The conduct of the three companies could also have an indirect effect in effect the level of the tariff paid by the tax-payers for waste collection services: the lower revenues for Hera might in fact be compensated raising the tariff for these services.

Finally the Authority addressed several competition restrictions in relation to the waste management regulation in the Latium Region in a recent advocacy report¹¹. The Authority observed that the regulation adopted at the regional level introduced distortions, favouring waste landfilling disposal with respect to other solutions – such as recycling or use of waste as combustible. In the Authority's view these distortions that raise obstacles to the emergence of new markets in the waste sector are not justified by environmental objectives. On the contrary Law Decree 152/2006, transposing EU Directive in order to reach these objectives introduced a “waste hierarchy” which indicates that landfilling disposal should be the least preferred option.

5. Final remarks

The Italian Competition Authority has been very active with respect to the waste management sector in the last few years. Through its advocacy intervention the ICA has outlined that restrictions introduced in the regulation in order to achieve environmental objectives should not obstacle the emergence of competitive markets. On the enforcement side the Authority investigated firms behaviour in producers responsibility schemes in order to address competitive restrictions, in particular when they hampered the development of new markets using waste in a new productive cycle.

¹¹ AS adopted on 9 September 2013.

JAPAN

1. Outlines of regulations concerning waste management in Japan

In June 2000, the Basic Act on Establishing a Sound Material-Cycle Society was enacted that stipulated a basic framework for the formation of a recycling-based society, including clarification on the responsibilities of the central and local governments, business, and the public, so that a recycling-based society can be implemented through the overall efforts of these entities. Under the framework of this Act, so-called extended producer responsibility (EPR) is established as a general principle, where the producers bear certain responsibility for the products, etc., they produce even after these products have been used and become waste.

Under this basic framework, the Waste Management and Public Cleansing Law (hereinafter referred to as the “Waste Management Law”) and the Law for the Promotion of Effective Utilization of Resources stipulate general rules on waste management to promote its proper disposal and recycling. In addition to these laws, the Law for the Promotion of Sorted Collection and Recycling Containers and Packaging (hereinafter referred to as the “Containers and Packaging Recycling Law”) and other laws have been enacted as regulations suited to characteristics of the individual products.

2. Definition of waste

According to the written request for this contribution, municipal solid waste (MSW) discussed therein is defined as “the waste collected from households, or waste which, because of its nature or composition, is similar to waste generated by households.” In Japan, waste, is largely divided into municipal solid waste and industrial waste. Industrial waste includes waste generated from business activities that falls under one of the 20 types of waste specified in the Waste Management Law¹ and imported waste. Municipal solid waste is defined as “waste other than industrial waste” in Article 2, paragraph (2) of the same act and includes waste generated by household and waste from business activities at certain offices and restaurants. Examples include combustible waste (kitchen waste, paper waste including used tissue paper, clothes, etc.), incombustible waste (glass used for eating utensils, etc., plastic used for beverage bottles, etc.) and bulky refuse (moveable closets and other furniture) from households, combustible waste (kitchen waste, paper waste including used tissue paper, etc.) and bulky refuse (large cupboards, desks, etc.) from certain enterprises, and excreta.

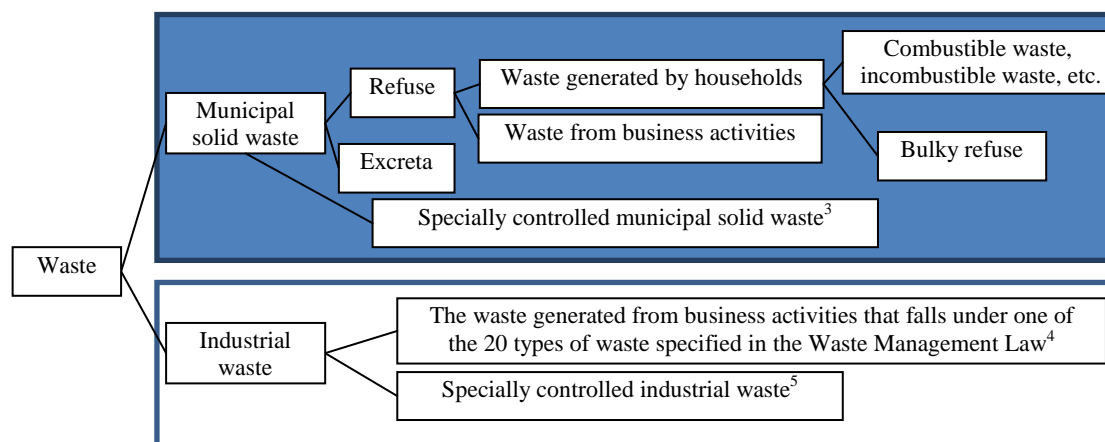
In this way, the definitions of MSW in the written request for this contribution and the municipal solid waste defined in Japan are very similar. Therefore, the following section provides explanations² on matters concerning the municipal solid waste as defined in Japan.

¹ Industrial waste is defined in Article 2, paragraph (4) of the Waste Management Law as follows.

In this law, “industrial waste” refers to the waste categories defined below:

- 1) Ash, sludge, waste oil, waste acid, waste alkali, waste plastic and others specified by a Cabinet Order among the waste generated from business activities.
- 2) Imported waste (excluding ... waste personally carried into Japan by persons entering ...)

² Excreta is excluded from the following explanations of the municipal solid waste management in consideration of the fact that MSW is defined as “the waste collected from households, or waste which is similar to waste generated by households” in this discussion.

Figure 1. Classification of waste

Source: Ministry of the Environment

Source: "Annual Report on the Environment, the Sound Material-Cycle Society and the Biodiversity in Japan 2013"

3. Municipal solid waste collection

3.1. Regulations and current status concerning collection and transportation of municipal solid waste

3.1.1 Outlines of the regulations

It is stipulated that municipalities should collect and transport municipal solid waste (hereinafter referred to as "direct management"). It is also stipulated that municipalities may consign the collection and transportation to other parties (hereinafter referred to as "private consignment"). Regarding consignment to other parties (consignee), the standards for consignment stipulate that the "consignment fee shall be sufficient for conducting the consigned work" in addition to showing requirements for the consignee's ability, etc. It is also provided that "emphasis should be placed on steady implementation of the work rather than requests to ensure economic efficiency, etc., in consideration of the importance of environmental protection and the public nature of municipal solid waste management."⁶

In addition to the above, municipal solid waste may be collected and transported by private entities with fees paid by enterprises that generated it. In this case, a private entity who intends to conduct the service of collecting and transporting municipal solid waste must obtain permission from the mayors of the

³ Refers to those municipal solid waste specified by a Cabinet Order as wastes which are explosive, toxic, infectious or of a nature otherwise harmful to human health or the living environment.

⁴ Refers to ashes, sludge, waste oil, waste acid, waste alkali, waste plastics, paper waste, wood waste, fiber waste, animal and plant residues, solid animal waste, waste rubber, scrap metal, waste glass, concrete and ceramic, slag, debris, animal excrement, carcasses, soot and dust, imported waste, and the above industrial waste that has been treated for disposal.

⁵ Refer to those industrial wastes specified by a Cabinet Order as wastes which are explosive, toxic, infectious or of a nature otherwise harmful to human health and the living environment.

⁶ Notification No. 080619001 from Waste Management Division, Waste Management and Recycling Department, Ministry of Environment, June 19, 2008, "Guidelines for Defining municipal solid waste management plan Based on Provisions of Article 6, Paragraph (1) of the Waste Management and Public Cleansing Law".

municipalities with the jurisdiction over the area (hereinafter referred to as a “permitted operator”)⁷. It is stipulated, however, that a party consigned by a municipality to collect and transport municipal solid waste is not required to obtain the above permission⁸. When a permitted operator directly collects fees from enterprises generating municipal solid waste under a contract between the two parties, the set amount of such fees shall not exceed the amount the municipalities specify.

It is interpreted that municipalities have the overall responsibility concerning collection and transportation of municipal solid waste. A municipality is responsible for the services of collecting and transporting municipal solid waste even when a consignee performs such services, not to mention when the municipality does them itself. In addition, when permitted operators collect and transport municipal solid waste, the collection and transport shall be appropriately performed under the supervision of the municipality in accordance with the principle of the overall responsibility of municipalities.

3.1.2 Status of consignment of collection and transportation of municipal solid waste

According to statistics from the Ministry of the Environment, the amount of waste collected and transported with each of the three methods mentioned above – direct management, private consignment, and collection by a permitted operator – is as shown in the table below.

Amount of collected waste by method (%)

Fiscal year		FY2007	FY2008	FY2009	FY2010	FY2011
Collection by local governments	Direct	28.9	28.0	27.3	26.5	25.9
	Consignment	44.2	45.3	46.2	46.9	47.5
Collection by permitted operator		26.9	26.7	26.5	26.5	26.6

Note: Direct; collection by municipalities or special district authority; consignment: consignee

Source: Waste Management of Japan FY2011

3.2 Measures taken by the Japan Fair Trade Commission

While some municipalities seek competitive bidding to consign collection and transportation of municipal solid waste, there has never been any cases of consultation from businesses or case of the violation in the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter referred to as the “Antimonopoly Act”) where the Japan Fair Trade Commission (hereinafter referred to the “JFTC”) has taken measures regarding such bids. Guidelines to be specifically applied for this field have yet to be established as well. On the other hand, there is a case concerning collection of municipal solid waste by permitted operator, in which the JFTC took a legal measure because the trade association whose membership is made up of the permitted operators had restrained sales activities of members for clients of other members in order to limit competition for clients among its members⁹.

⁷ It is provided that the mayors of the municipalities shall grant the permission only if it is difficult for each municipality to collect or transport municipal solid waste by itself.

⁸ Article 2, item (i) of the Ordinance for Enforcement of the Waste Management and Public Cleansing Law.

⁹ A case involving *Sapporo Kankyo Iji Kanri Kyokai* (Recommendation decision by the JFTC: December 2, 1991).

In addition to the above, there is a recent civil lawsuit case. In this case, local residents filed a lawsuit requesting that the mayor charged successful bidders for the damages resulting from suspected bid rigging involving a consignment contract for collection and transportation of waste generated by households concluded with a local government (comparison of estimates for the contracts). The district court found that there was in fact bid rigging¹⁰.

4. Recycling of waste containers and packaging

4.1 Regulations and current status concerning recycling of waste containers and packaging

4.1.1 Purpose of enactment of the Containers and Packaging Recycling Law

The purpose of the Containers and Packaging Recycling Law is, by reducing waste containers and packaging as municipal solid waste discharged and clarifying the division of roles among consumers (cooperating with sorted collection), municipalities (conducting sorted collection) and enterprises (recycling), to ensure proper management of waste and effective utilization of resources through reduction of municipal solid waste and adequate use of recyclable resources.

4.1.2 Outlines of the regulations

The Containers and Packaging Recycling Law stipulates responsibilities of enterprises, consumers, local governments and the state concerning recycling of waste containers and packaging.

4.1.2.1 Responsibilities of enterprises and consumers

Enterprises and consumers shall endeavor to reduce waste containers and packaging discharge through rationalization of use of containers and packaging. Enterprises and consumers shall also endeavor to promote sorted collection of waste containers and packaging, and their recycling, etc.. In addition, specified container¹¹ users, specified container manufacturers, and specified packaging¹² users are obligated to recycle waste containers and packaging¹³.

4.1.2.2 Responsibility of the state

The state shall endeavor to take measures such as securing of funds necessary to promote reduction of waste containers and packaging discharged and sorted collection thereof, and recycling, etc.

¹⁰ Judgment by Kochi District Court: February 8, 2013.

¹¹ Specified containers include steel cans, aluminum cans, glass bottles, paper beverage containers (paper cartons), cardboard boxes, other paper containers, plastic bottles (for beverages and soy sauce) and other plastic containers.

¹² Specified packaging includes package paper and plastic wrap used with trays for perishable foods, etc.
(Reference [Japanese only]: http://www.hkd.meti.go.jp/hokik/youki/recycle_qa.htm).

¹³ Aluminum cans, steel cans, paper beverage containers (paper cartons) and cardboard boxes are excluded from the subjects of recycling obligation stipulated in the Containers and Packaging Recycling Act because they have already been traded as valuables in the market and therefore have been effectively recycled. (Article 3 of the Ordinance for Enforcement of the Containers and Packaging Recycling Law).
(Reference [Japanese only]: <https://www.jcpra.or.jp/law/what/what02.html>).

4.1.2.3 *Responsibility of local governments*

The municipal governments shall endeavor to take measures necessary to carry out sorted collection of waste containers and packaging in their areas. The prefectural governments shall endeavor to provide the municipal governments with necessary technical assistance to ensure that their responsibility is sufficiently fulfilled.

4.2 *Measures taken by the JFTC*

Concerning recycling of waste containers and packaging, the JFTC published the guidelines related to recycling and has responded to consultations by enterprises concerning recycling.

4.2.1 *Guidelines concerning joint activities for recycling under the Antimonopoly Act*

As measures for establishing a sound material-cycle society mentioned above, promotion of “Reduction” (reduction of waste generation) and “Reuse” (collection and reuse of waste) are to be promoted along with “Recycling”. These three measures are collectively called the “3Rs.” (hereinafter referred to as “recycling, etc.”). To clarify its ideas about joint activities for these 3Rs under the Antimonopoly Act, the JFTC has published “the Guidelines Concerning Joint Activities for Recycling under the Antimonopoly Act” (June 26, 2001, JFTC; revised on January 1, 2010). These guidelines provide basic recognition on recycling, etc. and then explain the approach to joint development of recycling systems and joint activities pertaining to recycling, etc. under the Antimonopoly Act through examples. The following section explains the part of those guidelines concerning joint development of recycling systems.

4.2.1.1 *Joint development of recycling system*

Specific examples of recycling systems that are developed by enterprises in joint operations include cases where machinery manufacturers jointly use collection facilities to split the waste according to the enterprises (manufacturers) and transport them to each enterprise (manufacturer) of waste products, or jointly establish such collection facilities, for example, establishing collection facilities for products that have been used and discarded by users. In determining whether the above-mentioned joint operations become problems under the Antimonopoly Act, examinations are undertaken into what effect the joint operations have on the product and recycling markets. Possible impacts on the product market are as follows.

- **Product market:** In the event that enterprises develop a recycling system in a joint operation to deal with product waste, although the necessary costs for recycling, etc. (usage charges for recycling facilities, usage charges for collection facilities, transportation charges, etc.) are shared, in cases where the proportion of the required costs for recycling, etc., of the product concerned compared to the selling prices are small, the joint operation has an indirect effect on competition in the product market itself, and is therefore considered unlikely to become a problem under the Antimonopoly Act. However, if the recycling system covers a broad scope, for example, by the inclusion of the collection and transportation of waste and the process for recycling, there will be cases where the proportion of the required costs for recycling, etc., of the product concerned through joint operations are large compared to the selling prices. In such cases and when the total share of the participating enterprises in the product market becomes large, it would have an effect on competition in the product market and become problematic under the Antimonopoly Act as an “unreasonable restraint of trade.” Furthermore, in the event that enterprises jointly develop a recycling system because it is difficult to independently develop a recycling system in doing business in the product market, by denying or restricting the use of that recycling system to new

entrants or certain existing enterprises without justifiable grounds, by for example, obstructing new entry of other enterprises into the product market or causing difficulties in the business activities of existing enterprises, in the case that such actions substantially restrain competition in the product market, they shall fall under the provisions prohibiting private monopolization or unreasonable restraint of trade. In addition, even if such actions do not substantially restrain competition in the product market, if there is a possibility that such actions cause difficulties in the normal business activities of enterprises that are denied or restricted participation in the recycling system, they shall be problematic under the provisions prohibiting unfair trade practices as concerted refusal to trade.

4.2.2 *Consultation cases from businesses*

The JFTC provides consultations services to give advice regarding whether a specific action planned by an enterprise or trade association will become a problem under the Antimonopoly Act, etc. The following sections show two such consultations the JFTC provided in FY2007¹⁴. One is “an activity for joint collection of containers by enterprises”, which is related to recycling, and the other is concerning a charge for plastic shopping bags (hereinafter referred to as “plastic bags”) in stores aimed at reducing their use by a city government, resident group and retailers, which is related to reducing.

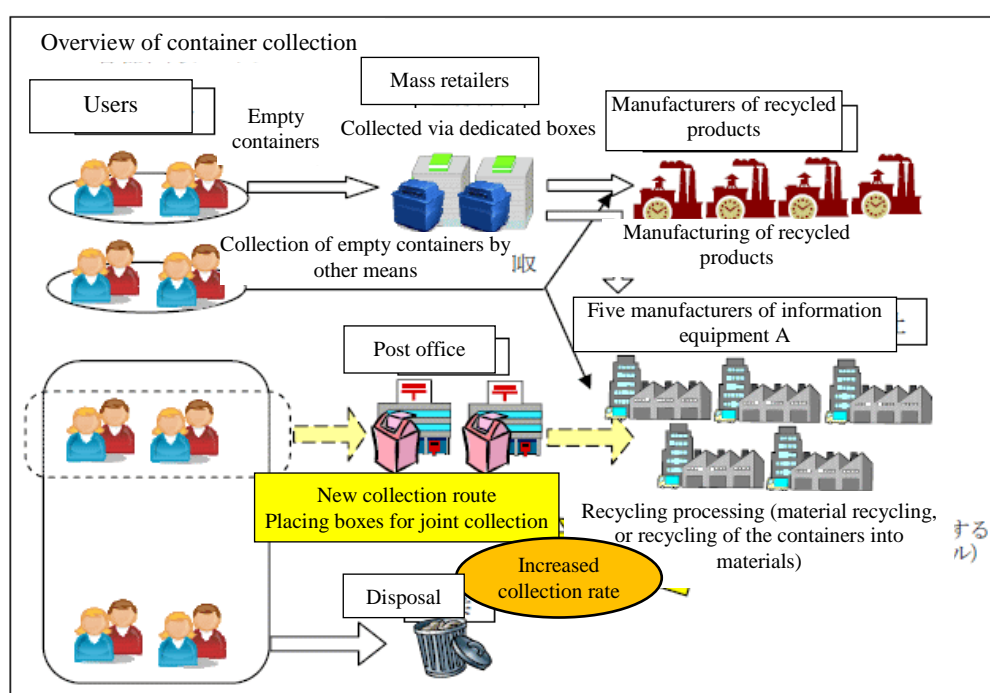
4.2.2.1 *Consultation case concerning an activity for joint collection of containers*

- Contents of the consultation:
 - Five information equipment manufacturers (hereinafter referred to as “five companies”) produce and sell consumable B used for information equipment A (Consumable B manufactured and distributed by the five companies is hereinafter referred to as “genuine products.”). Consumable B is made for equipment A from each company, and there is no compatibility between consumable B from the different manufacturers. Concerning consumable B, there are multiple enterprises who produce and sell what are called “recycled products,” in addition to the five companies that manufacture and sell genuine products.
 - The five companies are planning to jointly collect the containers of consumable B, in addition to continuing to collect them individually. Specifically, the five companies intend to collect the containers by placing joint collection boxes in post offices, sort the collected containers by manufacturers, and bring them back for recycling processing (material recycling, or recycling of the containers into materials) at each of their facilities, in addition to continuing to collect the containers individually from collection boxes placed at mass retailers, etc. The cost of this joint collection is α yen per unit of consumable B on average, which is less than 1% of its sales price. Each company can decide whether or not to increase the sales price by the amount of this cost. The question is whether such an activity by the five companies becomes a problem under the Antimonopoly Act.
- **The JFTC’s answer:** The JFTC responded that the planned joint collection by the information equipment manufacturers would not immediately become a problem under the Antimonopoly Act. Contents of the reviews are as follows:

¹⁴

Contents of the consultations summarized below have been revised in consideration of maintaining the confidentiality of the consulters, such as by leaving them anonymous, while adjustments have been made to make them easy to understand as references. Accordingly, specific details of the consultations are not necessarily consistent with those of the actual details thereof.

- Impact on sales competition among the five companies concerning consumables B. The joint collection may become a problem under the Antimonopoly Act if the five companies arrange that the price of the product be increased by the amount of cost for the collection (α yen per unit). In this case, however, it is left to the discretion of each company whether or not to increase the sales price by the amount of the said cost. Accordingly, the joint collection in question is not deemed to affect price competition among the five companies concerning genuine products of consumable B.
- Impact on competition between genuine products and recycled products. The joint collection is aimed at collecting a large number of empty containers, which used to be disposed of. It is unlikely that this joint collection will hinder the collection of empty containers by third-party manufacturers of recycled products, which have been conducted at mass retailers, etc., and result in a significant reduction in the amount of containers collected by such manufacturers. In consideration of this, it is deemed unlikely that implementation of the joint collection in question will restrain competition between genuine products and recycled products.



Source: Examples of Consultations: in FY2007, JFTC

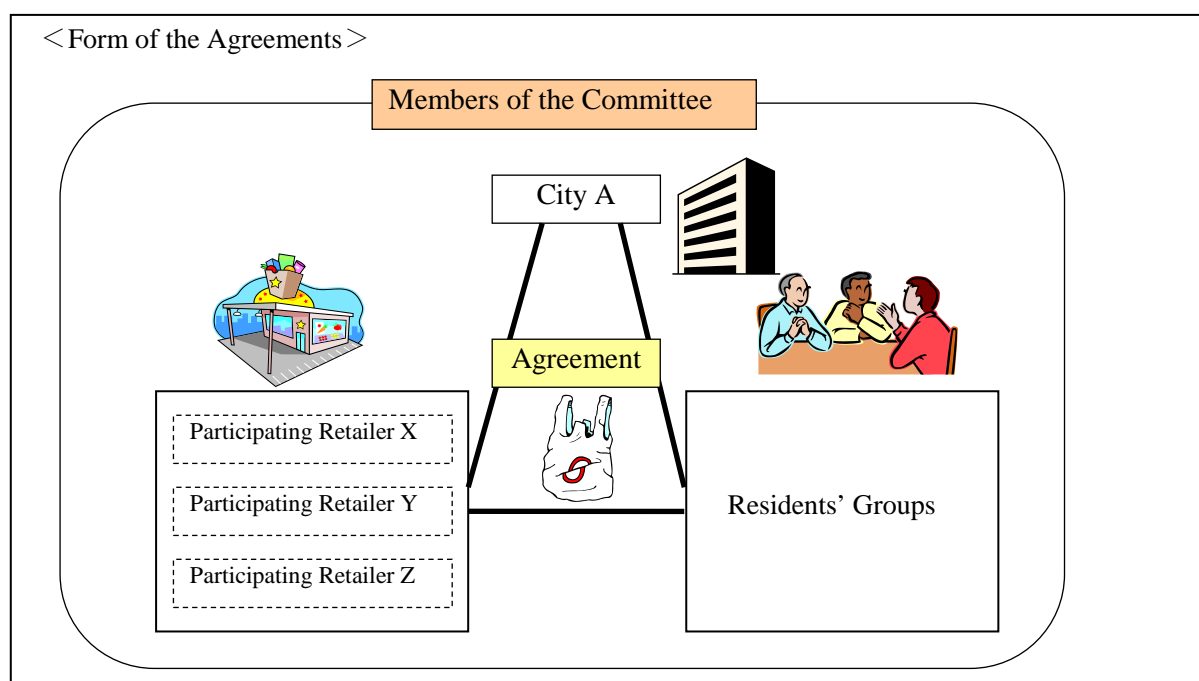
4.2.2.2 Consultation concerning charge for plastic bags in stores aimed at reducing their use

- Contents of the consultations:
 - Each retailer in the city A has so far been providing free plastic bags to its customers for shopping. Under this circumstance, to further promote the reduction of their use, retailers have focused on an initiative to impose a fee for using plastic bags. However, only a fraction of retailers actually introduced a fee on plastic bags due to retailers' concern that their

competitors might deprive them of their customers if they charge for plastic bags ahead of their competitors who provide free plastic bags.

- The city A decided to set up a committee by calling for the participation of resident groups and respective retailers in the city to consider how to reduce the use of plastic bags. Although it was up to each retailer whether to participate in this committee or not, almost all the retailers in the city decided to join the committee.
- After the discussion at the committee mentioned in the above, the city A, the resident groups, and participating retailers in this city (hereinafter referred to as “Three Parties”) concluded an agreement that customers should pay for the plastic bags when they buy things at retailers in the city, and the unit price of five Japanese Yen per bag. The question is whether such an activity for charging fees for plastic bags becomes a problem under the Antimonopoly Act.
- **The JFTC’s answer:** The JFTC responded that it would not immediately become a problem under the Antimonopoly Act for the city government, resident group and retailers to conclude an agreement under which fees will be charged for plastic bags used for goods bought at retailers in the city and the unit price will be five Japanese Yen per bag. Contents of the review are as follows:
 - Generally speaking, it can be said that the customers do not visit the retailer for the purpose of buying its plastic bags and the act of providing plastic bags to the customers is regarded as one of ancillary services. Therefore, the market in which participating retailers compete with each other is considered not the trade of plastic bags but the trade of all the goods sold by the concerned retailers.
 - Since almost all of the retailers in the city A will join this initiative, customers who need plastic bags will have very little room to choose retailers that provide free or cheaper plastic bags. However:
 - The decision in this case does not restrict competition for selling goods by retailers.
 - Plastic bags are not necessarily indispensable for customers when they shop in retailers, and they do not visit retailers to buy plastic bags, etc.
 - Regarding the contents of agreements in this case:
 - For achieving the goal of plastic bag use reduction, introducing fee-based plastic bags can be considered effective.
 - If the unit price of the plastic bags is not fixed, a lower unit price would be implemented, which might result in failing to reach the goal of plastic bag use reduction.
 - The five Japanese Yen unit price as a result of agreements on the unit price cannot be considered as unacceptable level for customers to achieve the objective.

Based on the above mentioned, this initiative does not immediately constitute a problem under the Antimonopoly Act.



Source: Examples of Consultations in FY2007, JFTC

5. Incineration service market

5.1 Regulations and current status concerning incineration service market

5.1.1 Outlines of the regulations

Incineration is one of the methods of disposing of municipal solid waste. The same as collection and transport, disposal of municipal solid waste is performed pursuant to the Waste Management Law, which permits municipalities to consign the disposal of municipal solid waste to other parties, as well as to dispose of the waste on their own. Regarding the consignment to other parties (consignees), the standards for consignment stipulate that the “consignment fee shall be sufficient for conducting the consigned work” in addition to showing requirements on the consignee’s ability, etc. It is also provided that “emphasis should be placed on steady implementation of the work rather than requests to ensure economic efficiency, etc., in consideration of the importance of environmental protection and the public nature of municipal solid waste management.”

In addition to the above, municipal solid waste may be disposed by private entities with fees paid by enterprises that generated it. In this case, a private entity who intends to conduct the service of disposing of municipal solid waste must obtain permission from the mayors of municipalities with jurisdiction over the area (hereinafter referred to as a “permitted operator”)¹⁵. It is stipulated, however, that a party consigned by a municipality to dispose of municipal solid waste is not required to obtain the above permission¹⁶. Permitted operators directly collect fees from enterprises generating municipal solid waste under contracts

¹⁵ It is provided that the municipality mayors shall grant the permission only if it is difficult for the particular municipality to dispose of municipal solid waste by itself.

¹⁶ Article 2-3, item (i) of the Ordinance for Enforcement of the Waste Management and Public Cleansing Law.

concluded with such enterprises. It is provided that a set amount of such fees shall not exceed the amount the municipalities specify.

The same as in the case of collection and transport, it is interpreted that municipalities have overall responsibility concerning disposal of municipal solid waste. A municipality is responsible for the services of disposing of municipal solid waste even when a consignee performs such services, not to mention when the municipality does them itself. In addition, when permitted operators dispose of municipal solid waste, the disposal shall be appropriately performed under the supervision of the municipality in accordance with the principle of the overall responsibility of municipalities.

5.1.2 *Current status of incineration services*

5.1.2.1 *Amount of incinerated waste*

Data on disposal of municipal solid waste in FY2011 shows that the amount of directly incinerated municipal solid waste was approximately 33,990 thousand tons (approximately 79.3% of the total amount of municipal solid waste), constituting the majority. Accordingly, the following sections describe the actual situation of municipal solid waste disposal services in Japan with a focus on incineration.

Amount of directly incinerated municipal solid waste

Fiscal year	FY2007	FY2008	FY2009	FY2010	FY2011
Amount of directly incinerated municipal solid waste (thousand tons/year)	37,011	35,742	34,517	33,799	33,989
Total amount of municipal solid waste that was disposed of (thousand tons/year)	47,725	45,136	43,634	42,791	42,840
Proportion of direct incineration (%)	77.6	79.2	79.1	79.0	79.3

Source: Waste Disposal of Japan FY2011

5.1.2.2 *Status of consignment of disposal of municipal solid waste*

The amount of municipal solid waste that was directly incinerated in FY2011 was 33,990 thousand tons. Among such waste, the amount that was consigned to operators within the same prefectures was approximately 1,780 thousand tons (approximately 5.0% of the total) and one that was consigned to operators in other prefectures was approximately 93 thousand tons (approximately 0.3% of the total). This shows that municipalities on their own incinerate an overwhelming majority of municipal solid waste and the rate of consignment to private enterprises is approximately 2.0% of the total amount consigned within prefectures and approximately 0.2% of the total amount consigned in other prefectures. Thus, the rate of consignment to enterprises is extremely low.

Status of consignment of municipal solid waste incineration (FY2011 results) (Unit: ton)

Segment	Amount consigned to parties within the same prefectures				Amount consigned to parties in other prefectures				Total Amount consigned
	Municipalities	Public corporations, etc.	enterprises	Total	Municipalities	Public corporations, etc.	enterprises	Total	
Incineration	721,046	157,600	905,720	1,784,366	117	314	92,753	93,184	1,877,550
Total	1,646,296	380,273	3,853,084	5,879,653	1,382	483	895,792	897,657	6,777,310

Notes: The figures above show the amount of waste disposed of by municipalities, some special district authorities, and parties other than local municipalities and special district authorities on consignment.

- Waste that was disposed of by special district authorities consisting of municipalities is excluded from the above.
- The amount of waste the Japan Containers and Packaging Recycling Association recycled on consignment is excluded from the above.

Source: Waste Disposal of Japan FY2011

5.2 *Measures taken by the JFTC*

Concerning municipal solid waste incineration services, there has never been any cases of the violation in the Antimonopoly Act where the JFTC has taken measures or cases of consultation from businesses. Accordingly, the JFTC has yet published guidelines to be applied for this field in particular.

On the other hand, there is a case of bid rigging concerning construction of incineration facilities, in which the JFTC took administrative measures. The case concerned construction work of waste disposal facilities ordered by local governments (Decision for a cease and desist order on June 27, 2006; decision for surcharge payment order on November 10, 2010).

LATVIA

Competition Council of Latvia (further – CC) does not adopt a significantly different definition of municipal solid waste (MSW). Municipalities in Latvia are responsible for collection of MSW within their territories. Different waste fractions are collected separately.

Providers of MSW collections are chosen in two ways: there are competitive tenders, if municipality does not have owner of waste management company. If municipality is owner of waste management company, collection of MSW in territory of current municipality is provided by that waste management company without the application of competitive tenders.

The municipality shall include in the work task the requirements in relation to the qualification of the employees of the tenderer, the ability to perform the management of MSW and the technical or financial capacity to perform the management of MSW in a concrete territory, as well as specify a landfill site where the MSW generated in the administrative territory of this municipality shall be disposed in compliance with the regional waste management plan. Within the scope of the public procurement or public-private partnership procedure a tenderer (candidate) shall submit the municipality an extended calculation of the payment regarding MSW management. The municipality (local government) and the waste manager shall enter into the contract for a time period which is not less than three years and not more than five years. The contract in accordance with the procedures specified in the regulatory enactments regarding public-private partnership may be entered into for a time period which does not exceed 20 years. MSW generated in the administrative territories of such municipalities which are located in the relevant waste management region shall be disposed only in the municipal landfill site of the relevant waste management region or transferred to the relevant reloading (transfer) stations. The municipality shall enter into a contract with the manager of such landfill site regarding disposal of MSW collected in the administrative territory thereof. Quality of service is monitored by Ministry of Environment and The State Environmental Service.

Competition in the market of collection of MSW is only in the time of tender. Municipality chooses one waste management company in the process of tender. The initial producer or holder of MSW shall participate in the management of MSW organized by the municipality, observing the regulatory enactments regarding waste management (also the binding regulations issued by the municipality) and entering into a contract regarding collection and transport of MSW with the waste manager who has entered into a relevant contract with the municipality. The municipality shall inform the waste producers regarding the municipal waste manager with which it has entered into a contract regarding the collection, transport, transfer (reloading) and storage of MSW within a month after the day of entering into such contract.

The initial waste producer or holder may collect himself or herself separately the waste generated by himself or herself or waste in his or her possession and deliver separately the collected waste for recycling to the merchant which has received the relevant permit for the performance of Category A or B polluting activities in compliance with the regulatory enactments regarding pollution.

In compliance with the State waste management plan and regional waste management plans, as well as the environmental protection requirements, municipalities shall, in co-operation with the waste managers, organize separate collection of MSW, including, paper, metal, plastic and glass waste, within administrative territories of municipalities in accordance with the categories and periods of time specified by the Cabinet.

The collection of MSW is paid by households through a flat fee or through a variable fee (according to the generated volume of MSW in the concrete period of time).

Municipalities are free to choose the price of collection of waste. The procedures for the determination of payment for MSW management (except for MSW recovery) to be paid by waste producers or waste holders shall be approved by the municipality with binding regulations. On the basis of the procedures provided for in the binding regulations, the municipality shall determine the payment for MSW management (except MSW recovery) with a decision thereof, and such payment shall incorporate the following:

- the payment for the collection, transport, transfer (reloading), storage, maintaining of separate waste collection, sorting and reloading infrastructure objects in compliance with a contract which has been entered into by an between the municipality and the waste manager;
- the tariff for the MSW disposal in landfill sites and waste dumps, which has been approved by the Public Utilities Commission; and
- natural resources tax for disposal of waste in the amount specified in regulatory enactments.

There are incentives to reduce/control the amount of waste each household produces, because amount of payments for collecting depends on generated volume of MSW.

Waste transfer stations mainly owned and operated by landfills owners or management companies. Some MSW management companies are owners and operators of waste transfer stations, too.

The price of the use of waste transfer stations included in the tariff for the MSW disposal in landfill sites, if transfer station is the part of infrastructure of landfill site. The tariff for the MSW disposal in the each landfill site has been approved by the Public Utilities Commission (regulation authority) separately. If transfer station is the part of MSW management company (included in this infrastructure), price of use of transfer station infrastructure included in the price of waste collection. This price is determined by appropriate municipality, and it is defined according to the waste management jurisdiction – each municipality determines the price of waste collection.

According to the National Waste management plan territory of Republic of Latvia is divided into 10 waste management regions. MSW generated in the administrative territories of such municipalities which are located in the relevant waste management region shall be disposed only in the municipal landfill site of the relevant waste management region or transferred to the relevant transfer (reloading) stations. The local municipality shall enter into a contract with the manager of such landfill site regarding disposal of MSW collected in the administrative territory thereof.

According to the information available to CC, competition in the sector (level) of transfer stations does not exist.

Landfills are publicly owned and operated. Each landfill owns and operates by municipalities of appropriate waste management region. According to the Law of waste management municipalities take decisions on placement of new municipal waste recovery or disposal facilities and landfill sites within the administrative territory thereof in compliance with the State waste management plan and regional plans.

The tariff for the disposal of MSW in landfill sites and waste dumps shall be regulated in accordance with the procedures prescribed in the Law on Regulators of Public Utilities.

The tariff for the disposal of MSW shall include:

- expenses related to the construction and operation of a landfill site;
- expenses related to the preparation of waste for disposal, regular covering of waste layer with inert coating;
- expenses for the financing of such educating measures of the public which are aimed at educating of waste producers of the relevant waste management region in the field of waste management;
- expenses related to the financial guarantee or equal guarantee by the landfill site manager;
- landfill site closure and re-cultivation expenses; and
- expenses related to the monitoring of a closed landfill site at least for 30 years subsequent to the closure of the landfill site.

MSW generated in the administrative territories of such municipalities which are located in the relevant waste management region shall be disposed only in the municipal landfill site of the relevant waste management region or transferred to the relevant (transfer) reloading stations. The local government shall enter into a contract with the manager of such landfill site regarding disposal of MSW collected in the administrative territory thereof.

Competition in the sector (level) of landfills does not exist. Waste to landfills typically is delivered according to contracts concluded between operator of landfill and municipality. Geographic market regarding to disposal of collected MSW is appropriate territory of waste management region.

Incineration is carried out in territory of landfill by landfill operator. Incineration is carried out only in some landfill. Essentially all MSW is disposed of in landfills.

Jurisdiction of Latvia has schemes to facilitate the recycling of packaging waste by providing separate collection and handling at waste transfer/materials handling stations. According to jurisdiction packaging waste collection can provide packaging waste manager or company (payer of natural resources tax) itself through established and applied management system by itself. There are 3 packaging waste managers (one of them “Latvijas Zaļais punkts”, like as German “Green Dot”) and some (aprox.10) companies (payers of natural resources tax) provide separate collection of packaging waste through established management systems.

According to jurisdiction that regulates the packaging waste management: within the scope of the management system a manager shall ensure the following: the collection of used packaging and disposable tableware created in households in all regions of the management of household waste (MSW) in at least three collection area of sorted waste, which has been established by the manager (merchant), the local municipality or a waste management operator, in not less than 50 cities or villages where there are more than 2000 inhabitants, if each collection area of sorted waste is located in the different city or village of the respective region. In Latvia there are three independent management companies, which established management systems.

Packaging waste management companies operate in conditions of free competition. Company (payer of natural resources tax) can choose packaging waste manager, which offers the favorable conditions, and contract for an exemption from payment of natural resources tax. Collection of packaging waste can be

joint, can be separately, too. Each management system operator separately sales the collected secondary raw materials (for example, collected used packaging and disposable tableware created in households).

Currently Ministry of Environment starts to prepare regulations of introduction of deposit system in a single-use and reusable packaging (glass and PET bottles) in Latvia.

Before to the performance of the relevant activities the waste manager shall obtain a permit from the State Environmental Service for the collection, transport, (transfer) reloading, sorting and storage of waste (certain types of waste). Waste manager, who has corresponding permit, is the market participant or potential market participant of relevant market according with the conditions to the permit. All waste managers with corresponding permits conditions are competitors and operating in competition environment.

CC has investigated competition law violations in the waste management sector, for example, abuse of dominant position in the relevant market of ship-generated waste oil purification market.

CC has been performed studies of the markets of activities in the waste management sector (collection of MSW, disposal of MSW in the landfills) for analyzing the competition situation in relevant markets. Our findings after studies are market participants activities in different waste management regions and sectors, market shares of waste management companies run by municipalities and private companies etc.

LITHUANIA

1. Definition

Lithuania adopted the following municipal waste definition: municipal waste (MW) is the waste collected from households, or waste which, because of its nature or composition, is similar to waste generated by households.

2. Municipal waste collection

Under the national law, Lithuania is divided into 10 regions. Each of it consists of municipalities which are responsible for MW collection within their territories. These 10 region size varies approximately from 4000 km² to 10000 km² with the number of inhabitants varying from 170.000 to 900.000.

Several or all municipalities belonging to the same region can establish a region waste management center (the region center) which would be responsible for the MW collection within a territory of a corresponding region. MW collection can also be assigned by municipality of the region center to an undertaking which can carry out this activity.

The Competition Council (The Council) does not have any data regarding approximate market shares of providers in each region or municipality.

Under the national law, the providers of MW collection services are chosen by municipality or the region center. A competitive tender or a public procurement procedure can be organized in order to choose a service provider for the whole municipality's or region's territory which can also be divided into smaller parts. It is for the municipalities to decide how many providers there will be in each of these territories. It may decide that the whole territory will be served by one or a couple of service providers. In case there would be a couple of service providers, the municipality can also choose to let the competition "in" the market or to assign a certain part of municipality's territory to each service provider. The established region center can also be entrusted with a right to assign the MW collection service to one or more undertakings. The Council does not possess data regarding a change in nature of the MW collection providers.

The laws also foresee a possibility for an in-house contract which municipalities tend to use often. It can be noted that municipalities tend to assign the execution of MW collection service to their own undertakings (stand-alone municipal enterprises) even though there would be more undertakings willing to provide the same service in the market. However, the Council in its resolutions as of yet has taken the view that the provisions of Article 4 of the Law on Competition of the Republic of Lithuania¹ are to be regarded as a prohibition to grant exclusive rights without a competitive procedure (the relevant matter is now being forwarded to the Constitutional Court of the Republic of Lithuania).

¹ This article forbids the entities of public administration to adopt legal acts or other decisions which grant privileges to or discriminate against any individual undertakings or their groups and which give rise to or may give rise to differences in the conditions of competition for undertakings competing in the relevant market, except where the difference in the conditions of competition cannot be avoided when the requirements of the laws of the Republic of Lithuania are complied with.

Municipalities are responsible for drafting legal acts regulating how MW collection is organized within its territory. These acts should foresee the main characteristics for picking one or more service providers, the length of the contract and any other criteria relevant to this question matter. Also, under the law, the service can be provided only by a waste manager which is registered in a national register of waste managers. The laws do not say anything about whether the winner would enter the market with its equipment, workers, etc. or it would take over those of the incumbent. This issue could be decided in the rules under which the procedure for selecting a service provider is organized.

The quality of service is monitored either by the municipality or the region center. The minimum requirements of the service are foreseen in rules passed by the Ministry of Environment of the Republic of Lithuania.

The procedures for accessing to waste transfer stations, incinerators, landfills are described in the relevant paragraphs: Waste transfer stations, Landfills, Incineration (see below).

All providers of MS collection services have an obligation to collect fractions based on their type and nature separately. The collection of waste has to be organized in a way as to facilitate waste recycling. There are obligations for the waste holders and providers of MW collection to collect and recycle waste in a way as it would be easier to recycle them later on or use them after they are recycled. Under the National plan on waste management, the main incentives for waste sorting are related to legal and financial-tax related tools, for example, a tax for non-hazardous waste disposal at landfills is suggested.

Also, there is an obligation to produce less waste. For example, one of the means in reaching this goal is to impose a fee for disposing a bigger amount of waste than it was calculated or increase the “tipping fees”.

The MW collector for the collection of MW is paid a fee: 1) directly by a waste holder; or 2) through a budget of the municipality or the region center.

In the first case, a municipality sets a maximum fee or tariff. The MW collector sets a certain fee (not exceeding the one set by a municipality) paid to it by the waste holder for the collection of MW. In the second case, the municipality sets a fee which is collected from waste holders to a municipality’s budget from which the collection of MW service is paid.

A municipality is free to choose which criteria to apply when calculating a fee or tariff, for example, the size of household, the number of people living in it, etc. However, under the law, in waste management area the polluter pays principle must be applied meaning that a certain fee or tariff imposed by a municipality must cover all expenses incurred in organizing, developing and operating the waste management system, including expenses for closure and further monitoring of the landfill. Also, the principles of solidarity, proportionality, non-discrimination, and cost recovery must be taken into account.

3. Waste transfer stations²

Matters of ownership, prices or third-party waste collectors accessing to the waste transfer stations are not regulated by the national laws. It is at the municipality’s or region’s level to decide. For example, there are cases when the “tipping fee” covers the expense for using waste transfer stations or it might be included in the tariff or fee set by the municipality. (See more on price determination and limitations on waste disposal in: Landfills).

² Waste transfer stations are facilities to which MSW is temporarily taken for sorting and onward dispatch.

4. Landfills

All regional landfills for the MW disposal are publicly owned. They are operated by the region centers. There is no competition between them because waste collected in a certain municipality has to be transported to the landfill operated by the corresponding region center. All requirements to access the landfill must be applied in a non-discriminatory manner.

The region center is owned by municipalities. Therefore, each municipality based on a size of its territory has a certain amount of shares and corresponding rights, including voting rights. How the decision regarding the “tipping fees” is made may differ depending on the articles of association of a certain region center. For example, a decision regarding the “tipping fee” can be discussed by center’s council whose members represent each municipality and then passed by majority of votes or it might be imposed unilaterally by the region center’s director.

The “tipping fees” are determined by taking into account principles of solidarity (all municipalities pay the same fee) or proportionality (the fee depends on municipality’s number of inhabitants and the size of territory), polluter pays, and cost recovery.

Under the law, there are certain limitations in accessing a landfill. All waste collectors which have contracts with the municipality or the region center may use the landfill for the waste disposal. The laws do not regulate the length of the contract between the municipalities and (or) centers with the MW collection providers. The Council is not responsible for collecting data regarding the length of the contract, therefore, we cannot confirm that waste is typically delivered under long-term contracts. Besides, the following types of waste cannot be disposed in the landfill for MW disposal: inert, liquid, suitable for recycling, medical, infected, exploiting, oxidizing, flammable, acrid, chopped or not chopped tires, etc.

The Council is not in possession of data regarding international trade for disposal of waste in landfills.

5. Incineration

Incineration is used for hazardous and non-hazardous waste disposal. The legal framework does not foresee different requirements between them based on different energy efficiencies. In general, each natural or legal person willing to run this activity must get a permit. There are no rules forbidding privately owned undertakings to carry out this activity. State aid was given for a state owned company to establish an incinerator burning hazardous waste but there are no cases when the incinerator burning non-hazardous MW was given a state aid or subsidy.

The laws do not regulate the prices of disposal in the incinerator (the “tipping fees”) or the requirement for non-discriminatory access by third-party waste collectors to incinerators. These questions are at the municipality’s or region’s level to decide.

There is only one power plant which uses MW in order to make electricity and heating energy. In Klaipėda a contract between the region center and a private undertaking was signed after a competitive procedure was organized. Under the contract, only waste made in Klaipėda region can be brought to this power plant for the purpose of incineration, therefore, only waste collectors from Klaipėda’s region can access it. There is no separate “tipping fee” for accessing incinerator. In this case the “tipping fee” established for accessing Klaipėda’s landfill is used.

As it was mentioned in Klaipėda’s case, there might be geographic limitations (a contract can establish rules that only MW providers from a certain region can bring collected MW) and/or exclusion of certain waste types, for example, hazardous or medical waste.

The Council is not in possession of data regarding international trade for waste to be incinerated.

6. Systems to fulfill extended producer responsibility³

Under the law, the organization of packaging waste must be carried out by producer or importer of these packages individually or collectively. Besides, this waste must be collected separately from other waste and it cannot be mixed.

If the package producer or importer decides to fulfill its obligation individually, a separate but complementary system to municipality's MW collection system for sorting and collecting waste must be organized (sorting and collecting at the place of production) or it can use municipality's MW collection system. If the complementary system is organized, it must be approved by a local government.

If the package producers or importers choose to fulfill their obligation collectively, they must establish an association responsible for the organization of package waste collection. By becoming members of this association, producers and importers can assign all or some of their obligations that they have under law to it. Therefore, the association can create a separate but complementary system to a municipality's MW collection system or use one already created by a municipality as well. In the latter case, the association must sign contracts with the relevant municipality (-ies) and the undertaking responsible for MW collection (the region center or other MW collection provider) in its territory. The contract must regulate how package waste will be sorted, transported, prepared for secondary use etc. From practice, the length of the contract may vary from a couple of months to a couple of years. It is for the parties to decide.

If the producers, or importers or the association established by them decide to use municipality's MW collection system, the level of competition would be the same as it would be in the system of MW collection. For example, if there are a few MW collectors acting in the same municipality's district, this could mean that each of them could compete over sorting and collecting package waste. Also, the producer, or importer or the association can create a complementary system to municipality's MW collection system for sorting and collecting waste and choose any waste collector which has the right to collect waste.

There are no specific legal obstacles to competition among different schemes for recycling, sorting and collecting of various recyclable materials or selling secondary raw material.

7. Markets for secondary raw materials

The same regulation is applied when choosing a waste collector for secondary raw materials as it is done with the MW collection. Usually, it is the same waste collector responsible for the MW collection in a certain municipality's or region's territory.

8. Other waste

The same regulation as it is with package waste is applied for collecting used oil, electricity and electronic, vehicles, batteries and accumulator waste (see: Systems to fulfill extended producer responsibility).

Public (manufacturing) drugstores are responsible for the collection of pharmaceutical waste.

³ A system to fulfill extended producer responsibility is a network of companies and agreements that handle recycled waste from its collection through its sorting and treatment to their transformation in secondary raw materials. They were originally established to perform collectively the tasks required under extended producer responsibility with respect to packaging waste, but their use has since been extended to other types of waste. An example is the German "Green Dot" system, set up in the late 1990s.

9. Antitrust investigations and cases

Decision regarding competition law violation:

The Association of Packaging and Electronic Waste Processors (PEATA) and five its members were fined in total of almost 500 000 Litas (approx. EUR 145 000) for the agreement to fix tariffs for handling taxable products and packaging waste and the issue of certificates on recycling and disposal of taxable products and packaging waste.

PEATA and its members agreed to fix and publish on the website the tariffs for handling waste and issue of appropriate certificates. In its offers to the clients PEATA indicated minimum tariffs for handling of small quantities of waste and the issue of certificates. At its meetings PEATA also fixed a possible 20 percent range for the fluctuation of the established tariffs. Furthermore, PEATA and its members were seeking to ensure that waste of certain types and the issue of appropriate certificates would be organized through PEATA only. Thus, by concluding a prohibited agreement to fix the tariffs for handling taxable products and packaging waste and the issue of certificates for the recycling (disposal) of taxable products and packaging waste PEATA and its members violated Article 5(1)(1) (prohibiting agreement on directly or indirectly fixing prices of certain goods or other conditions of purchase or sale) of the Law on Competition.

However, this decision was abolished by the regional administrative court as according to its ruling The Council incorrectly defined a relevant market.

Decisions regarding competitive neutrality:

- In 2012 the Council acknowledged that the decisions adopted by the municipalities of Pakruojis and Joniškis granting UAB “Pakruojo komunalininkas” and UAB “Joniškio komunalinis ūkis” with the right to exploit the systems of public waste management without a procedure ensuring competition and the agreements concluded on the grounds of these decisions infringed Article 4 of the Law on Competition. These decisions and agreements prevented other undertakings from offering and providing services of public waste collection and transportation in the territories of these municipalities. The Council obligated the municipalities of Pakruojis and Joniškis to repeal relevant points in the agreements and terminate the agreements in order to ensure that UAB “Pakruojo Komunalininkas” and UAB “Joniškio komunalinis ūkis” as well as other undertakings engaged in the provision of public waste management, sorting and transportation services in the territories of Pakruojis and Joniškis would operate under the same conditions and the consumers could enjoy the benefits granted by the competition.
- In 2008 the relevant provisions of the Rules on Waste Management in the city of Kaunas and the resolution of the Council of the Kaunas City Municipality obligating (without a tender procedure) UAB “Kauno švara” to render the municipal waste services in the municipal territory was recognized as contradicting Article 4 of the Law on Competition. By these resolutions the municipality of the City of Kaunas, when developing the municipal waste management system in Kaunas, granted exclusive rights to UAB “Kauno švara” thus depriving other undertakings from a possibility to render the services concerned in the city of Kaunas.
- In 2008 the resolution of the Council of the Vilnius City Municipality approved a condition of the tender for the selection of the public waste management service provider establishing that any waste manager intending to provide waste management services (collection, transporting and transfer for recycling or disposal) in the territory of the Vilnius City Municipality must be a holder of the license for hazardous waste management. This condition of the tender was

recognized as contradicting Article 4 of the Law on Competition. The requirement to hold a license for hazardous waste management established as a condition of the tender for municipal waste management services discriminated the undertakings not holding such license. The management of non-hazardous waste has been groundlessly linked to the management of hazardous waste – there is no statutory requirement for all waste managers to be holders of hazardous waste management license, as the latter activity is subject to specific requirements. The requirement to be a holder of the license concerned prevented other undertakings from entering and operating in the municipal waste management market of the city of Vilnius.

10. Market or sectorial studies

The Council is not in possession of studies of the markets or economics of the activities in the waste management sector therefore it cannot provide any used methodologies or discuss findings of any studies.

NORWAY

1. Foreword

This paper responds to the Competition Committee Chair's letter of July 2013 inviting written contributions for the upcoming Roundtable on competition issues in waste management. The Competition Authority is pleased to pronounce its view on the waste management markets, with reference to Norwegian cases and complaints.

The report is structured as follows. Firstly, the collection of municipal solid waste is discussed. The main competition issue in this market is the possibility of cross-subsidization from waste management companies' legal monopoly business units to its competitive business units. Secondly, there is a short review of the Norwegian extended producer responsibility and compliance systems. In particular compliance systems for packaging waste and the compliance system for electronic equipment is discussed. The report describes the main cases and complaints received by the Competition Authority within these markets. Finally, the markets for the service of incineration are discussed. Significant developments affecting the markets for combustible waste and incineration in Norway are presented.

2. Municipal solid waste

2.1 Introduction

Pursuant to Section 27 of the Pollution Control Act¹ solid waste is defined by source, rather than form. Consequently the solid waste emanating from industries, even if it otherwise is similar to household waste, is not subject to the same regulations as household solid waste.

Any waste from industrial premises is the responsibility of the company producing the waste, and the companies must themselves organize collection. The municipality must ensure that waste emanating from industries which is similar to household waste is properly collected, and that the relevant regulations are adhered to.²

Collection and processing of household solid waste is the responsibility of the municipality. The relevant regulation allows the municipality the discretion to choose appropriate waste management solutions.

A majority of the municipalities handle the collection of household waste themselves, either through an integrated department of the municipality or through an inter-municipal company owned by several municipalities in the region. Some municipalities tender out their responsibilities, resulting in privately owned companies providing household waste collection in certain municipalities.

Most municipalities provide solutions for separate disposal of packaging waste, and in some cases food waste. The categories which are subject to extended producer responsibility schemes are then

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

² <http://www.lovdatab.no/cgi-wift/ldles?ltdoc=/for/ff-20031205-1909.html>

extracted at sorting stations, or collected from separate containers at waste sites. All municipalities must provide waste transfer and sorting facilities. However, they are not obliged to run these themselves.

2.2 *The issue of cross-subsidization*

The main competition concerns in the markets relating to municipal solid waste are related to the possibility for the legal monopolist to cross-subsidize the part of the company subject to competition by allocating costs to the monopoly business. The municipalities' legal monopoly on household waste provides a platform on which the publically owned company may build a strong competitor in neighboring markets such as tenders for household waste collection in near-by municipalities, treatment facilities for industrial waste, incineration facilities and other services.

A central issue in this respect is the calculation of the waste fee levied on the inhabitants of a municipality.

Pursuant to the Pollution Control Act section 34, the waste fee must cover all related costs including capital costs. A more specific guidance for calculating the fee is given in a paper issued from the Norwegian Environment Agency. A new regulation will replace the guidelines in the near future, but this remains a work in progress at the time of writing.

The issue of cross-subsidization is raised by private waste management companies on a regular basis. There have been claims from privately owned companies that more than a fair share of capital costs and other costs has been allocated to the business unit responsible for the legal monopoly of collection and treatment of household waste. The complainants argue that waste fees exceed operating costs, enabling eventual cross subsidizing strategies. The Competition Authority has opened several proceedings against municipally owned waste management companies. The issue has been approached in several different ways, from advocacy and similar forms of soft approach, to abuse of dominance-cases.

In "Reno-Vest" (Case 2004/139) an inter-municipal waste management company, Reno-Vest, won a tender for waste treatment from a nearby municipality. The bid was substantially under that of the privately owned competitor, thus giving rise to allegations of predatory pricing in breach of section 11 of the Norwegian Competition Act. The Competition Authority investigated the claim by analyzing all the relevant costs such as cost of capital, depreciation costs, capacity, any project related investments, potential synergies, cost of personnel, maintenance, machinery, and so on. However, the conclusion was that although the inter-municipal company had underestimated its incremental costs during the tender process, the evidence suggested that incremental revenues would still cover these.

The Competition Authority has also approached the issue of cross-subsidization with advocacy. Pursuant to Section 9(e) of the Norwegian Competition Act the Competition Authority may issue a formal letter of concern directed at any public regulation or activity. The receiving entity must reply addressing the competition concerns raised by the Authority.

In "BIR" (Case 2004/980) an inter-municipal waste management company, BIR, was accused of cross-subsidizing the competitive part of its business by overcharging the monopoly part. The Competition Authority formulated a letter of concern requesting that the owner municipalities undertake measures to ensure a satisfactory structural separation of the monopoly business and the competitive business, and a more clear allocation of costs. Several of the Competition Authority's proposals were adopted, decreasing the risk of cross-subsidization.

The EFTA Surveillance Authority has in a recent case³ addressed the issue of the differing tax regimes the waste collectors were subject to, based on whether they were publically or privately owned. Where a publically owned waste management company provided services in another municipality than that by which it was owned, it was exempt from paying income tax. The Norwegian government accepted the appropriate measures proposed by the EFTA Surveillance Authority, and consequently the case was closed.⁴

3. Extended producer responsibility and compliance schemes

3.1 Collection schemes for packaging waste

Various collection schemes ensure that packaging waste in Norway is collected and sent for recycling and thermal treatment. Most types of schemes for the collection of packaging waste are based on agreements between the Norwegian Government and the packaging industry. Producers have the responsibility to provide the means by which the goods they produce are collected and recycled at the end of their lifecycles.

As a result, recycling companies have been established through cooperation among participants in the industry. One example is Grønt Punkt Norge (the Green Dot Norway) which is responsible for developing, organizing, operating and administrating recycling schemes for packaging waste.⁵ The recycling costs are transferred to the consumers through an "environmental fee" on new products. Pursuant to the agreement with the Government producers are obliged to participate in a recycling scheme. Moreover the recycling companies must report their recycling and how they work to optimize packaging waste handling to the Environment Agency.⁶

Recycling of packaging waste can be divided into product markets for 3.1.1) organization of systems or solutions, 3.1.2) collection and sorting and 3.1.3) recovery service and secondary material. Competition issues related to these markets are listed below.

3.1.1 Organization of systems or solutions

There is limited competition in the market for organization of systems or solutions. There are 14 recycling companies handling packaging waste in Norway, nine of these are involved in recycling refillable packaging for beverages. However the companies are differentiated, in the sense that there is little or no competition between them. As mentioned above, producers are obliged to participate in a recycling scheme. This means that customers have an agreement with the incumbent which represent a barrier to entry in a market characterized by economies of scale.

³ Case no: 69911

⁴ <http://www.eftasurv.int/media/decisions/174-13-COL.pdf>

⁵ Green Dot Norway is developing, organizing and operating the recycling schemes for plastic, EPS (Styrofoam), carton packaging and beverage cartons. The company has also assumed responsibility for the administration of the material companies involved in plastic packaging, carton packaging and beverage cartons.

⁶ Recycling arrangements for packaging for beverages differs from other waste packaging recycling schemes in the sense that a "deposit-refund" system has been implemented in order to optimize the collection. A deposit fee is applied at the point of production of beverages and the refund is given to households when recycling the bottles.

3.1.2 *Collection and sorting*

As described above, collection and sorting of waste is to a large extent done by the municipalities. A majority of the packaging waste gathered by the recycling companies comes from households. As described above the municipalities have a legal monopoly on the collection of household waste. On the other hand collection and sorting of commercial or industrial waste, is open for competition. In order to collect and sort packaging waste, the recycling companies use tenders to hire subcontractors. Although the recycling companies often lack competition "in the market", there is competition "for the market" when it comes to collection and sorting of packaging waste. According to the agreements with the Government, the recycling companies have an obligation to secure downstream competition.

3.1.3 *Recovery service and secondary material*

The normal case is that one has to pay for the recycling of packaging waste. Secondary recycled material will also compete against new material, which often is perceived as of higher quality. In some cases recycling can create a new product with positive value used as input to production of other goods. This will apply to for instance aluminum cans and brown paper. In these cases the recycling company may have market power, if it is a major seller of such material. The Competition Authority has however, never received any complaints regarding the industry of packaging waste that has raised concerns of abusive behavior in the market for recovery service and secondary material.

There have however been other issues of concern in the packaging waste sector over the last decade. The "Rentpack case" (Case 2009/35) is an example. Rentpack AS is owned by the Norwegian Brewers Association (Bryggeri- og drikkevareforeningen). The company controls a range of standard refillable packaging types. Brewers and soft drink producers wishing to use these standard refillable packaging units for the Norwegian market have to pay a rent to Rentpack AS.

In 2005, Rentpack's Board of Directors, regarded as an association of undertakings under Section 10 (Agreements between undertakings that restrict competition) changed the fee structure for new reusable plastic bottles, which implied a differentiated tariff structure in the system for reusable bottles. Following this, the Competition Authority received letters from several producers of mineral water, requesting the Competition Authority to intervene against the fee increase imposed by Rentpack. The pricing structure of the recycling scheme for standard refillable packaging could have a discriminatory effect, for instance between participants within and outside the scheme or between participants within the scheme.

The Competition Authority considered that the changed fee structure in the recycling scheme for recyclable drinking containers would affect the participants in the market for soft drinks and bottled water in a discriminatory way. Small and medium-sized actors would be at a competitive disadvantage compared to bigger actors. Thus, the change would lead to competition-restricting effects in the markets for soft drinks and bottled water. Moreover, in the Competition Authority's view, the fee structure implied a decision by an association of undertakings which restricted or distorted the competition in the market for soft drinks and water in bottles, thus infringing Section 10 of the Norwegian Competition Act, as well as infringing Article 53 of the EEA Agreement.

After assessing the circumstances, where the Competition Authority in particular considered the fact that Rentpack AS subsequently changed their fee structure anticipating the envisaged decision by the Competition Authority, the process was terminated.

3.2 *Electronic equipment*

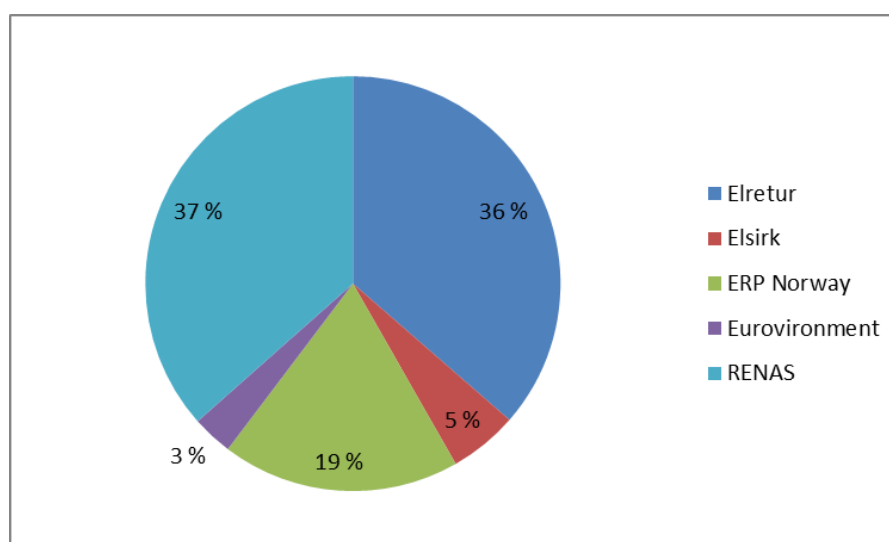
EE equipment is regulated in chapter 1 of the Waste Regulations⁷. According to the regulation distributors shall accept the return of EE equipment from households free of charge at the shop premises.⁸ Moreover, the municipality has an obligation to ensure that sufficient provision exists for the reception of EE waste.⁹ The producers and importers are obliged to ensure that EE waste is sorted, stored and forwarded. Quotas are set by the Environment Agency for the collection of EE equipment.

Analogously to the market for packaging waste, the market for EE equipment can be divided into product markets for 3.2.1) organization of systems or solutions, 3.2.2) collection and sorting and 3.2.3) recovery service and secondary material.

3.2.1 *The market for organization of systems*

In the market for organization schemes for EE-equipment there are currently five different market players competing for members to their schemes, namely Elretur, Elsirk AS, ERP Norway AS, Euroenvironment AS and RENAS AS.^{10, 11} The market share of the participants is shown in figure 1.

Figure 1. The market for organization schemes for EE-equipment



Source: Annual report of "EE-registeret" (2012)

As in the market for packaging waste there are regulatory barriers to entry. The main is the certification as a recycling company from the Norwegian Environment Agency, which is required to operate in the market. A criterion for obtaining such a certification is geographical coverage of all the counties in Norway and at least 70 per cent of the municipalities. Despite the entry barriers there are five actors present in the market. This is possibly due to the fact that the market of electronics consists of larger countrywide companies, some of which have a turnover sufficient to support a recycling organization.

⁷ <http://www.miljodirektoratet.no/no/Regelverk/Forskrifter/Regulations-relating-to-the-recycling-of-waste-Waste-Regulations/>

⁸ Article 1-4 in the Waste Regulations.

⁹ Article 1-7 *ibid.*

¹⁰ Elretur acquired Euroenvironment in 2012, meaning there are only four independent competitors.

¹¹ Miljøstatus.no.

3.2.2 *Sorting and packaging*

Approximately 59 per cent of the EE-equipment comes from the households. The sorting and packaging of EE-equipment from households is done by the municipalities and distributors according to their obligation by the Waste Regulations. At the time being, the EE-equipment delivered at municipal disposal sites is collected by Elretur and ERP. Since both Elretur and ERP also collect EE equipment from their own members, they collect more waste than they are obliged to according to the quotas set by the Environmental Agency. The surplus EE equipment is bought/cleared by other recycling companies, in order to fulfill quotas. When it comes to sorting and packaging of commercial or industrial EE equipment there is competition.

3.2.3 *Recovery service and secondary material*

The Competition Authority has never received any complaints regarding EE equipment and the market for recovery service and secondary material that has raised competition concerns. However, in the market for EE-waste schemes there have been several issues of concern over the last decade. Two of these cases are described briefly below.

Case 2005/1678 dealt with EE-schemes "overcharging" their members, in order to build a legally mandated security fund covering 6 months running costs. The fund eventually became far bigger than the necessary 6 months. This led to a situation where large members would have significant funds locked up in the scheme. This naturally led to higher switching costs, and thus decreased mobility amongst the customers.¹² When the scheme sought to return to the obligatory 6 months security fund, it reduced the environmental fee to such a degree that competitors complained about predatory pricing.¹³

In 2010 the Competition Authority received a complaint from Ragn-Sells Elektronikkretur AS concerning an exclusive agreement between Elretur and Avfall Norge.¹⁴ At the time Elretur was the largest recycler of EE equipment in Norway. Avfall Norge is an organization for companies in the waste industry including most of the municipal companies collecting household waste. The complainant was a competitor to Elretur in the market for organization of systems.

The complainant argued that the exclusive agreement foreclosed them from collecting EE-equipment at disposal sites controlled by members of Avfall Norge. The agreement would give Elretur an exclusive right to more than 50 % of the EE-equipment in Norway. In addition Elretur collected EE-equipment from its own members. The exclusive agreement could therefore limit the competitors of Elreturs access to EE-equipment, and make it impossible for them to meet the criterion of geographical coverage stipulated in the Waste Regulations.¹⁵ During the case process the complainant gained access to disposal sites controlled by members of Avfall Norge, and the Competition Authority terminated the process.¹⁶

3.3 *Sector inquiry*

The Competition Authority published a report on "Competition Concerns Related to Recycling in Norway" in 2004.¹⁷ The report addressed competition issues related to several specific categories of waste recycling and the schemes introduced to manage these categories and concluded that there was room for

¹² Case 2009/568.

¹³ Case 2005/1678.

¹⁴ Case 2010/0176.

¹⁵ Section 1-14 in the Waste Regulations.

¹⁶ [http://www.konkurransetilsynet.no/ImageVaultFiles/id_5710/cf_5/A2012-10 - Elretur AS - konkuranseloven - 12 tred.PDF](http://www.konkurransetilsynet.no/ImageVaultFiles/id_5710/cf_5/A2012-10_-_Elretur_AS_-_konkurranseloven_-_12_tred.PDF)

¹⁷ http://www.konkurransetilsynet.no/iKnowBase/Content/395622/04_01_RETUR.PDF, an unofficial English language summary of the report is available at request.

improvements. The report focused on the problem that several of the recycling systems encouraged or required competing firms to cooperate, that several of the recycling systems were *de jure* or *de facto* monopolies, and that these caused inefficiencies on the market.

In the report, the Competition Authority proposed the introduction of deposit schemes in order to provide better and cheaper collection and recycling of waste. Furthermore the report recommended a move away from extended producer responsibility systems negotiated between regulator and industry, and towards a system based on taxation. Subsequent exchanges with the relevant regulating authorities resulted in the application of some of the alterations proposed in the report. Some of the issues addressed, however, remain problematic.

4. Incineration

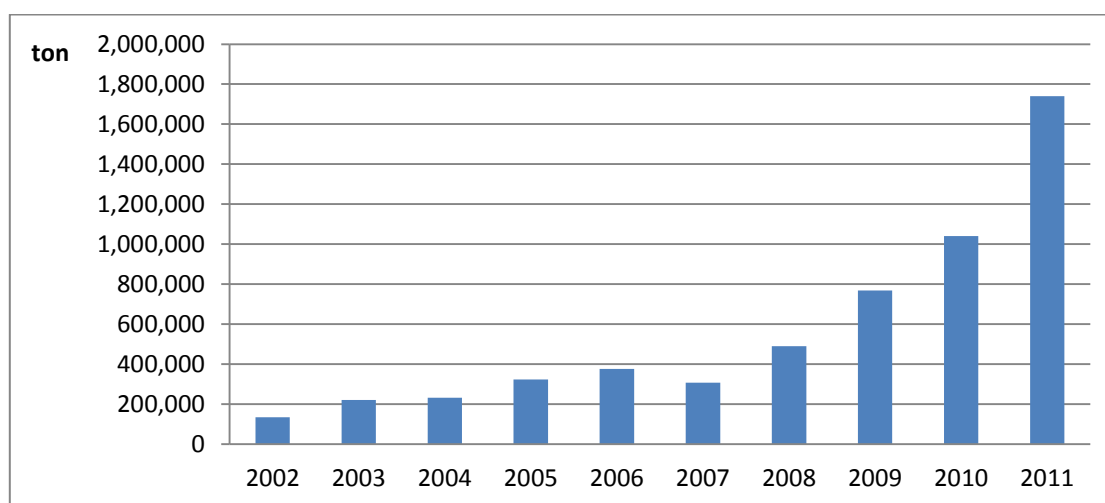
4.1 Market dynamics

One of the main trends of recent years is the commodification of waste. Waste is now increasingly viewed as a valuable resource, either for recycling or incineration. The increased value of waste has resulted in lower tipping fees as incinerators and material recovery facilities compete for waste supply contracts. Another manifestation of this is the sharp increase in waste exports (see figure 2).

The volume of waste being exported has increased significantly in recent years. In 2007 Norway exported 307 000 tons of waste, whilst in 2011 that number had risen to over 1.7 million tons.¹⁸ The substantial change has mainly been attributed to an increase in demand from incinerators, particularly in Sweden¹⁹, and a response to the 2009 ban on landfill disposal of degradable waste²⁰, which will be presented further in paragraph 4.2.

To export waste the waste holder must apply for a license, and report the destination and the treatment method. These licenses are not considered a major barrier to trade, but there have been examples of illegal exports of waste, particularly destined for less developed countries.

Figure 2. Exported waste



Source: www.environment.no / Ministry of Environment

¹⁸ http://www.regjeringen.no/pages/38416619/T-1531_web.pdf

¹⁹ More than 80 per cent of the exported waste in 2010 was sent to Sweden.

²⁰ <http://www.miljostatus.no/miljodata/Miljodata/?spraak=NO&dsID=AVIE&rID=BME>

In the last few years there have been several significant developments affecting the markets for combustible waste and incineration in Norway. These include:

- A steady increase in total waste generation;
- Increased focus and incentivizing of district heating;
- The introduction of a ban on depositing degradable waste at landfills;
- The removal of the disposal tax on incineration;
- Increased demand from Swedish incinerators.

4.1.1 *Total waste generation*

Overall waste generation has increased by almost 40 per cent since 1995. In the same time landfilling has decreased by over 60 per cent. Some of the waste is incinerated without energy recovery, but most of what used to be landfilled is now recycled or incinerated with energy recovery.

4.1.2 *District heating*

Regulations allowing municipalities to require new building projects, to connect to district heating infrastructure is providing the market with the necessary increase in demand to induce investment. The current production is equivalent of 5 TWh annually²¹, and it is expected that this number will increase significantly over the coming years.²² As demand for combustible waste for energy recovery increases, and prices incinerators offer consequently become more attractive, the flow of combustible waste might increasingly turn away from other forms of treatment such as material recovery.

4.1.3 *Landfills*

With the introduction of the landfill ban on degradable waste in 2009, a significant alternative disposal for combustible waste was removed from the market. This led to increased incineration both by Norwegian facilities and by export, mainly to Sweden.

In Norway there are currently 62 ordinary landfills, a handful for inert waste, and one for hazardous waste.²³ Most of the ordinary landfills are owned by inter-municipal companies, whilst the specialized landfills are mostly privately owned.

The volume of waste ending up in landfills has decreased significantly in the last few years due to regulatory changes aimed at increasing recycling or energy recovery by incineration of waste. Since July 2009 landfilling degradable waste is prohibited. In addition a disposal tax was removed on waste destined for incineration for energy recovery, incentivizing increasing volumes of waste to incinerators in Norway.

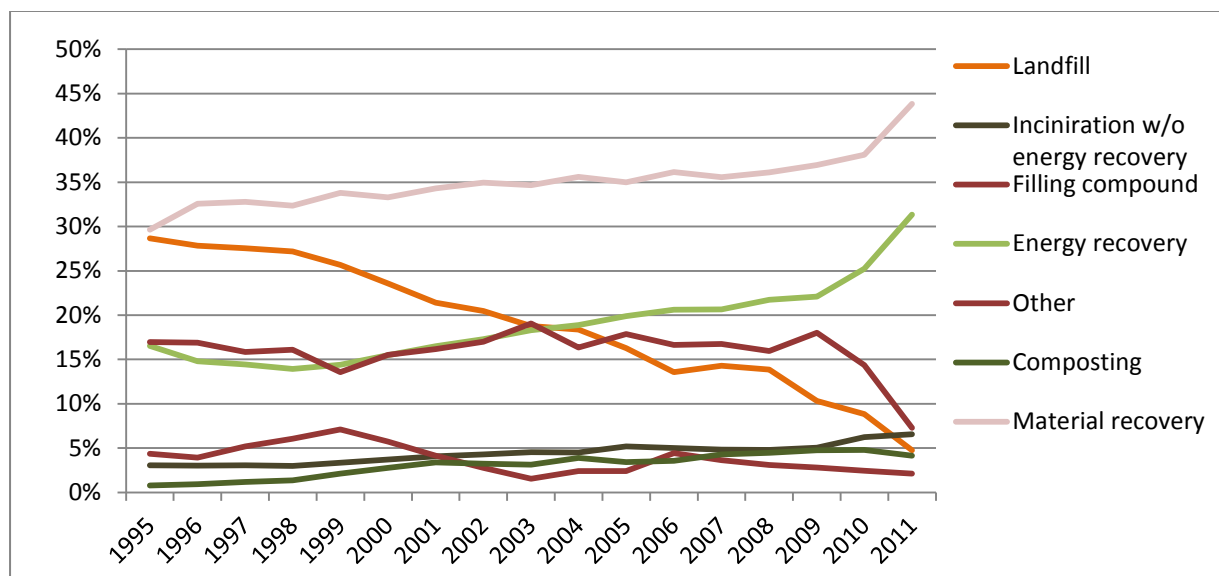
As a result of these changes the volume of waste deposited at landfills have fallen from 1 902 000 tons in 2009 to 820 000 tons in 2011. The volume is expected to continue to fall as special dispensations from the landfill ban end.

²¹ <http://www.ssb.no/a/kortnavn/fjernvarme/tab-2012-11-27-01.html>

²² <http://www.regjeringen.no/nb/dep/md/dok/regpubl/stmeld/2011-2012/meld-st-21-2011-2012/7/3.html?id=682968>

²³ <http://www.avfallnorge.no/deponering1.cfm>

Figure 3. Non-hazardous waste by treatment

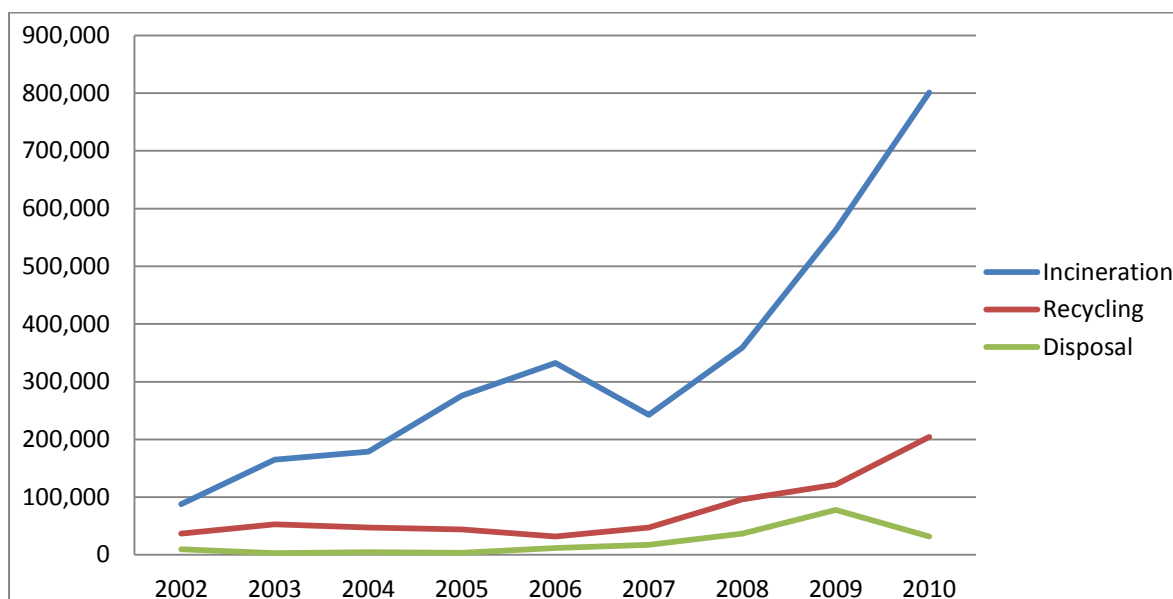


Source: www.environment.no

4.1.4 Taxation on incineration

A disposal tax on landfilling and incineration was introduced in 1999 in order to incentivize recycling. The disposal fee on incineration was altered in 2004 to reflect a more emissions oriented approach, and in 2010 the tax on incineration was removed entirely. The tax remains on non-degradable waste destined for landfills. The tax on incineration was removed partly as a response to a similar policy in Sweden in order to maintain a level playing field. The removal of the disposal tax on incineration in 2010 may have contributed to the increasing shift from material recovery to incineration. Some have expressed concerns over the environmental effect of increased incineration, at the expense of material recovery.

Figure 4. Exported waste by treatment (tons)



Source: www.environment.no

4.1.5 *Increased demand from Sweden*

Sweden has significantly higher incineration capacity, and consequently higher demand, for combustible waste. District heating in Sweden totals over 50 TWh²⁴ per year, in comparison with Norway's annual 5 TWh. Additionally, as a result of the ban on landfilling degradable waste, steady increase of total waste produced, and a lack of incineration capacity, Norway has recently experienced a surplus of combustible waste. A dip in overall waste generation due to the financial crisis led to a shortage of supply for Swedish incineration plants. This, in turn, led to increased demand for combustible waste from the Norwegian market, raising export volumes.

In general the Swedish incineration plants have a higher willingness to pay for combustible waste than their Norwegian counterparts. Consequently Swedish incinerators are able to offer lower tipping fees. Nevertheless, due to the significant transportation costs the Norwegian incinerators are still able to compete for combustible waste, even with higher tipping fees.²⁵

At the same time, while the Swedish incinerators win contracts for Norwegian combustible waste, their Norwegian counterparts look abroad to fill spare capacities. Imports have increased over the last few years, and particularly British waste is increasingly finding its way to Norwegian incinerators. Landfill tax in the UK is currently £ 72 per ton²⁶, making Norwegian incinerators offering tipping fees ranging from around NOK 400 (approx. £ 43) to around 700 (approx. £ 75) per ton a realistic alternative. However, the total volume of waste imported for energy recovery remains fairly low, and is only a minor share of total waste imports.

Material recovery and incineration remain alternatives in the waste treatment market. The cost of material recovery depends on prices for secondary raw materials. Material recovery's competitiveness is thus connected to fluctuating international raw materials prices.

4.2 *Cross-subsidization*

A recent report²⁷ produced for business associations representing private waste management companies indicates that tipping fees for waste originating from the legal monopolies on household waste are significantly higher than tipping fees for non-monopolized waste. In other words the fees monopoly waste collectors pay the incinerator plants far exceed the current market price on combustible waste. The report suggests three possible contributing factors:

- The allocation of costs of capital to the monopolized business;
- The value of combustible waste is a result of international demand, rather than based on costs of collecting locally. Particularly the demand from Swedish incinerators plays a significant part in pricing;
- Spare capacity after handling household waste allows incinerators to price at incremental cost.

²⁴ <http://www.svenskfjarrvarme.se/Statistik--Pris/Fjarrvarme/Leveranser/>

²⁵ <http://www.miljodirektoratet.no/old/klif/publikasjoner/2983/ta2983.pdf>

²⁶ http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageExcise_ShowContent&propertyType=document&id=HMCE_CL_000509#P3_54

²⁷ <http://www.mef.no/ikbViewer/Content/109636/Rapport%20Avfallsh%C3%A5ndtering%20og%20kryssubsidiering.pdf>

Some private waste management companies claim that publicly owned incinerators, granted exclusive rights to household waste within the municipality owners area, are being constructed with excessive capacities. Thus, there is spare capacity beyond the monopolized waste. It is argued that the publicly owned incinerators, seeks to fill this capacity , by offering prices to the market, which only take incremental costs into account. The municipalities which have invested in incineration plants have to cover their costs of capital through waste fees levied on their inhabitants, in accordance with the Waste Regulations.

The claim is that the municipalities tendering their combustible waste management contracts, instead of investing in an incineration plant, are currently being offered prices at incremental costs. The implication is that waste fees in municipalities which chose to invest in incineration plants will be higher than those in municipalities which chose not to invest in incineration plants.

The result, the argument goes, is that the inhabitants of municipalities that have built incinerator plants are subsidizing the other municipalities through higher waste fees. In addition the added spare capacity, and the possibility of pricing at incremental cost, contributes to lowering the price of combustible waste, making material recovery increasingly unattractive as an alternative.

PERU¹

1. Definition

In Peru, the collection service of solid waste is about collecting common solid waste and debris from homes, shops, supermarkets, restaurants, hotels, banks, etc.,² as well as its transportation and disposal,³ i.e., there are three stages: collection, transport and disposal.

- The collection of residential solid waste is done manually or mechanically and this is placed in a collecting vehicle and/or compactor. Also the streets are cleaned and solid waste dumped in the street is collected.⁴
- In the transportation step, the rubbish truck and/or compactor is brought to the point of waste concentration (called transfer plant) where the load weight is checked, the waste is unload and the vehicle is cleaned. The use of the transfer plant is intended to receive the vehicles that carry out the residential collection and transfer the solid waste that they bring into larger big capacity vehicles called "transport truck" in order to transfer this solid waste to a landfill.⁵
- The final disposal relates to the destination of municipal solid waste that could be recycled, burnt or sent to landfills installed at sites licensed for such purposes, or other final destinations as open dumps, rivers, lakes or sea; recycling or waste.⁶

2. Collection and transportation of Municipal solid waste

The municipalities are the entities responsible for the collection service provision of solid waste within their jurisdictions, being that the provincial municipalities are responsible for service provision in the capital of the province and the district municipalities in the jurisdiction of their district⁷ (Law 27314 of July 20, 2000).

¹ Elaborated by Santiago Dávila (CEO of Indecopi), Javier Coronado (Economic Research Manager) and Roberto Daga (Executive 2).

² In the case of uncommon solid waste as those from hospital (syringes, gauze, serums, etc.) it is the entities themselves generating such waste which must hire a private company to be in charge of the respective collection, transportation and disposal.

³ The description is taken from Metropolitan Municipality of Lima - MML (2007) and District Municipality of Miraflores – MDM (2009).

⁴ This service is known as street sweeping and refers to manual and/or mechanical sweeping of sidewalks, driveways and central berms for collecting solid waste in small amounts, and picking up solid waste that have been dumped on roads, sidewalks, parks and squares. Solid waste services and street sweeping make a single service known as public cleaning service.

⁵ Recyclable solid waste is taken through a space called segregation plant which separates each of the different types of materials (paper, plastic, cardboard, cans, etc.) for its subsequent marketing. Organic waste that comes along with recyclable waste is taken to the landfill for disposal.

⁶ These final destinations of Municipal solid waste are mentioned by the municipalities themselves in a survey (called National Register of Municipalities - Renamu) that the National Institute of Statistics and Informatics (INEI) performs annually (Inei, 2013).

⁷ A province is composed of several districts.

Users of such services are required to make periodic payments - known as municipal taxes – to the municipality of its jurisdiction to finance their provision.

According to current legislation (Law 27444 April 10, 2001), the amount of municipal taxes must not exceed the cost of the service supply, and must also be established through municipal ordinances, legal devices that are issued by agreement of the city Council.

In the case of district municipalities, these Bylaws (including the amounts for municipal taxes) must be ratified by the provincial municipality of their respective jurisdiction and be published in the year prior to their application. For example, in December of each year the municipalities of Lima Metropolitana and Callao publish the amounts by municipal taxes to be charged next year.

Despite the above, according to information from the Ministry of Environment (Minam), the resources effectively collected through municipal taxes are not enough to finance the collection service of solid waste. In particular, the high rate of late payment of these excise taxes (estimated at 64,5% at national level in 2011 by the Minam, 2012) appears to be the main cause of the budget deficit.

Also, some municipalities hire private companies (called Companies Providing Solid Waste Services, EPS-RS) to be in charge of providing the collection service, transportation and disposal of solid waste in all or part of their jurisdiction.

In 2011, 83% of municipalities provided the service through the municipality itself, 13% organized the service by mixed operations, and 4% outsourced the service completely (Minam, 2012). In Box 1 a case of mixed operation in collecting solid waste is described.

Box 1. Mixed Operation in Collecting Solid Waste

An example of mixed operation in collecting solid waste is the District Municipality of San Juan de Lurigancho, within the jurisdiction of the Municipality of Lima, where 75% of the area of the district (which is basically a flat surface with a relatively easy access) is served by an EPS-RS called Petramas SAC, while the remaining 25% (consisting of homes located in the skirts of the mountains) is covered directly by the municipality having to hire (for that 25%) only the service of some landfill for the respective disposal.

The private operation is justified because the cost of the service (which includes three stages: collection, transportation and disposal) reaches S/. 89 per ton of solid waste⁸ (USD 32,41), while if the operation was direct (by mayor authority itself) cost could increase up to 70%.

In this case the trend for the private operator is to have greater coverage within the district because some years ago it only covered 50% and now has a range of 75%.

Source: Interview with Geraldine Quispe, Supervisor of Solid Waste in the Municipality of San Juan de Lurigancho.

For municipalities that outsource (all or part) of the service of solid waste collection, selection of suppliers (that is, the choice of the EPS-RS) is done by public tender organized by each municipality every two or three years, although there are also cases where the service is not hired (as in the previous case) but is leased for a longer period, between ten and fifteen years (see Box 2).

⁸ The amount is cited in the Public Bid N° 0002-2011-CE/MDSJL (Minam, 2012).

Box 2. An Experience of Public Cleaning Service Concession

In 1995 the Metropolitan Municipality of Lima (MML) gave the concession of cleaning service (solid waste and street sweeping)⁹ of *Cercado de Lima* to the company Environmental Relima SA, then called Vega Upaca Consortium, besides granting the management and operation of the Zapallal landfill and Portillo Grande landfill, located in the northern cone (Carabaylo) and south cone (Lurín) of the city of Lima. The initial period of the concession was for ten years and was renewed until October 25, 2015.¹⁰

The cost of collection, transportation and disposal of solid waste in *Cercado de Lima* amounts to S/. 100 (USD 36,42) on average depending on whether the collection is from houses, businesses or market. The solid waste generation is about 400 tons per day.

In the MML there is an administrative area only intended to make sure the service concessionaire meets the established route for solid waste collection using GPS technology for this purpose and verifying that the collecting vehicles are not delayed longer than allowed in a given point of the course, this in order to verify the quality of service and ensure that only solid waste is collected in Cercado de Lima.

Despite the above, being that the concession agreement is close to expire and that current contractual requirement meets an outdated technology (basically collection and burial of solid waste in landfills), an international tender is underway to find a dealership with a full public cleaning service that also includes the construction of segregation plants for recyclable and treatment materials to develop solid waste products like bags, blankets, polar, fertilizer, etc.

Source: Interview with Eduardo Flores, Manager City Services in the Metropolitan Municipality of Lima.

Municipalities that want to hire an EPS-RS publicly announce the reference price (in Nuevos Soles per ton of solid waste) to be paid for the collection, transportation and disposal of solid waste within their jurisdiction, and also announces the number of solid waste (tons per day) to be collected within their jurisdictions, being that this volume can vary from 25% up or down.

Once announced the reference price, quantity and other technical aspects, private companies (EPS-RS) make their decision as to whether or not they are willing to participate in the selection process being to choose the company that offers the lowest price and meets the relevant technical requirements.

The winning bidder enters the market with their own equipment (compactor trucks, public janitors, etc.) to provide service both during the collection stage as the transportation of solid waste, being that for the final disposal stage of solid waste it can use its own landfill or that of a third company.

For example, there is a landfill known as Huaycoloro (operated by Petramas SAC company which also operates in the stages of collection and transportation of solid waste) where another company (Relima Ambiental SA, which also operates in the stages of collection and transport) may leave (prepaid service) solid waste collected in the districts that have leased or hired the service.

In the case of San Juan de Lurigancho it has been observed that a single company (Petramas SAC) is the one that has won the bidding, and is also the only one that has been presented in at least four of the latest tenders.

⁹ International Public Bid N° 001-95.

¹⁰ See: http://www.invermet.gob.pe/phocadownload/invermet/supervision/contratos/vigentes/adenda_relima_0706_2010.pdf, Retrieved on October 3, 2013.

3. Final disposal of Municipal solid waste

In Lima Metropolitana y Callao almost all solid waste is taken to a landfill. According to the Minam, 96% of solid waste is destined for a landfill (Minam, 2012).

However, national statistics indicate that 71% of municipalities reported that at least a significant part of their solid waste goes to open dumps. On the other hand, 21% of municipalities said at least a portion of their solid waste is recycled (Inei, 2013).

Among the municipalities with recycling programs the case of Santiago de Surco stands out. It has implemented its program since 2001 and is the most advanced in the field (Durand and Metzger, 2009) (see Box 3)¹¹.

Box 3. An Experience of Solid Waste Recycling

In some district municipalities as Santiago de Surco, located in the Lima Metropolitan area, residents voluntarily participate in the separation of the waste produced in their homes, which are collected once a week using orange bags provided by the municipality. The recyclable waste are taken to a physical space called segregation plant where they are separated into paper, plastic, cardboard, cans, etc. for subsequent commercialization.¹²

The homes participants involved in the recycling program do not receive any financial incentive in return, but do receive some recognition through the distribution of articles coming from the reuse of recycled waste.

In the opinion of the municipality itself, the benefits of this recycling program is summarized as follows: i) Improving the quality of life for residents of Santiago de Surco; ii) improving the environment; and, iii) International recognition; and an increase in the value of land (estimated around 15% excluding the associated increase in real estate boom experienced by the country) and a resource-saving as recyclables are sold to traders of solid waste. However, the amount of waste that is collected through this recycling program, at around 12 to 15 tons per day, is still below the target set in the program at 30 tons per day.

Source: Interview with Mr. William Chata, recycling program manager of the Municipality of Santiago de Surco.

4. Sectorial studies

In Indecopi no complaints of violations of the rules of free competition in the solid waste sector and EPS-RS have been received or complaints about unfair competition of municipal solid waste collection have been filed either.

However, a sectorial study where it is estimated that the technical efficiency in the provision of waste collection service varies between 37,69% and 60,16% has been carried out, implying a potential resource savings of up to S/. 141,30 million of the S/. 241,23 million budgeted by municipalities of Lima Metropolitana and Callao for the year 2009, or alternatively implying almost triple the provision of waste collection services (in number of tons) using the same amount of resources of the municipal budget (Davila *et al.* 2009).

¹¹ Moreover, since 2010 this participates in the Segregation at Source and Selective Solid Waste Collection by which, prior to meeting targets, the Ministry of Economy and Finance (MEF) allocates resources to municipalities as incentives for the compliance with them (Minam, 2012).

¹² The other waste (non-recyclable) are collected daily using black coloured bags that are also provided by the municipality. The provision of the service (both recyclable and non-recyclable waste) is run by the municipality through the Municipal Company Santiago de Surco SA - Emussa, i.e., there is no private operator that has had the service concession.

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POLAND

1. Introduction

1.1 “Waste revolution”

In 2011 the Polish Parliament enacted amendments to the *Act on maintaining cleanliness and order in communes* (hereinafter also “*the Act*”), which caused fundamental changes in the system of dealing with municipal waste. The scale and scope of introduced modifications soon started to be described as the “waste revolution”. The reform aimed at increasing the level and quality of natural environment protection. However, means selected to achieve this goal strongly influenced competition on the markets of waste collection and management.

This submission provides information on the system of municipal waste management in Poland, competition problems connected with the above mentioned legal changes, as well as the activities of the Office of Competition and Consumer Protection (UOKiK) undertaken in order to prevent and remedy negative effects of the “waste revolution”.

2. Waste management system in Poland

2.1 *Environmental problem – EU regulations*

The direct inspiration to introduce changes derived from obligations of the Republic of Poland arising from its membership in the European Union. In particular, from the necessity to fulfill the obligations prescribed in the EU waste directives.

The requirement to comply with the EU regulations means that Member States shall reduce the biodegradable municipal waste (BMW) stored in landfills to amounts and according to schedule set forth in the Directive 99/31/EC (Landfill Directive). Moreover, they must take measures to ensure that only waste which has been previously processed is landfilled. Directive 2008/98/EC on waste (Waste Framework Directive) determines targets that Member States are obliged to achieve as regards re-use, recycling, recovery and disposal.

At the same time it was beyond doubt that waste sector in Poland needed considerable improvements. One of the major problems involved the high level of waste deposited in landfills - in 2010 this level amounted to 73%¹ of all collected waste (which already exceeded the limits established by the EU²), as well as the widespread phenomenon of fly-tipping and in-home burning. Only 18% of the collected waste was recycled. Furthermore, the Supreme Audit Office informed about a number of irregularities in the

¹ *Competition in the Polish market of collection and treatment of municipal waste. Report by UOKiK, February 2012, p. 51. http://uokik.gov.pl/analizy_rynku2.php#faq1614*

² C. Fisher, *Municipal waste management in Poland*, February 2013, p. 10. Available at: <http://www.eea.europa.eu/publications/managing-municipal-solid-waste/poland-municipal-waste-management>.

municipal waste management³. In this situation the necessity to introduce reforms was unquestionable. The shape of the changed law emerged from a long-lasting legislative process, which ended with adoption of the amendments by the Parliament⁴.

2.2 *The reformed system of municipal waste management*

The main elements of the “waste revolution” were:

- granting municipalities responsibilities over the waste produced on their territory;
- imposing on municipalities obligation to select providers of waste collection services in the tender procedure;
- imposing on municipalities obligation to build, maintain and operate regional facilities of municipal waste processing.

Before the reform the property owners and administrators were free to choose an entrepreneur who, based on an individual agreement, would collect their waste. In many municipalities this system became an environment conducive to creation and development of numerous public and private companies providing services of waste collection or management. These entities were competing with each other on their local markets.

In 2012 UOKiK published a report titled *Competition in the Polish market of collection and treatment of municipal waste*, which demonstrated that within the previous legal frames, in these communes where multiple companies were operating, prices were rising more slowly than in communes with only one service provider. Due to variety of reasons it was not possible for all municipalities to create suitable conditions for competition to emerge but wherever such an opportunity existed market participants were exploiting it.

Under the new system communes became responsible for collection of waste on their area. Municipal authorities are obliged to organize public tenders in order to select one company which would perform that duty on behalf of the municipality. Communes inhabited by more than 10 000 people can be divided into sectors; in this case a separate tender is organized for each sector. Municipal enterprises may provide collection services only if they win a public tender. Financial means necessary to fulfill the new task come from the special waste fee paid monthly by the inhabitants.

The modified law indicates various ways in which local authorities may calculate the fee. The size of the payment might depend on i) the number of residents of a given real estate or ii) on the amount of water used in a given real estate or iii) on the surface of the real estate. The final amount of the fee is calculated by multiplication of one of the above described factors by the rate adopted by the commune’s council. In order to facilitate recycling, communes’ councils are obliged to set lower rates for selective gathering and collection of waste. It is obligatory for all communes to introduce selective collection of waste including at least such fractions as: paper, metal, plastic, glass and composite packaging, as well as BMW together with packaging waste undergoing biodegradation.

When a commune chooses to base the fee on the number of persons in the household, it must collect declarations on the number of inhabitants from all real estate owners.

³ <http://www.nik.gov.pl/aktualnosci/nik-o-odpadach.html>

⁴ *The Act of 01 July 2011 on changing the Act on maintaining cleanliness and order in communes and some other acts*, Journal of laws of 2011, No.152, item 897.

The reformed *Act* contains provisions which expand the tasks of municipalities as regards building, maintaining and operating regional facilities of municipal waste processing. The new *Act on waste*⁵ defines region as an area inhabited by minimum 150 000 people. Single municipality may constitute a region on condition that its populations exceeds 500 000. Regions are established by the sejmik of voivodeship⁶ (regional-level assembly) by an act of local law, which communes are obliged to respect.

Communes should select an entity which would build, maintain or operate regional facilities. Performance of the task must take place in one of three legal forms indicated by the law-maker:

- public procurement;
- public-private partnership;
- concession for construction works and services.

Municipalities can perform duties concerning regional facilities by themselves only if selection of an independent enterprise proves to be impossible. These duties can also be carried out in cooperation with other municipalities.

Regional facilities have to meet the requirements described in the *Act on waste*, i.e. sufficient capacity to process waste from an area inhabited by at least 120 000 inhabitants using the best available techniques. Regional facilities should allow for i) thermal treatment of waste (incineration) or ii) mechanical-biological processing of mixed municipal waste in order to isolate fractions suitable for recovery, or for iii) processing of biowaste collected in a selective way in order to produce fertilizers and compost, or for iv) landfilling waste produced in the course of mechanical-biological processing of mixed municipal waste and remains of communal waste sorting for at least 15 years. Operator of a regional facility is obliged to conclude agreements with all waste collection operators within a given region. In general it is forbidden to accept waste from outside the region as the proximity principle applies.

Communes should be motivated to fulfill the obligations determined in the *Act on maintaining cleanliness and order in communes* since financial responsibility is foreseen for failure to comply. The act contains provisions on the levels of recycling and re-use of waste as well as on the amounts of landfilled biodegradable municipal waste, which reflect the levels described in the previously mentioned EU regulations. Communes are forced to pay fines if they do not achieve prescribed standards within the time given. Municipalities and waste management companies have to submit periodical reports to the respective authorities under the threat of pecuniary punishment.

3. Competition issues

3.1 Threats

The preparation of the new *Act* took several years. UOKiK was taking active part in inter-ministerial consultations and it communicated reservations regarding the main assumptions of the amendment, i.e. transferring responsibility for waste collection from property owners to communes and creating regions of waste management. UOKiK was standing on position that replacing the model of competition *in the market* with the model of competition *for the market* would negatively influence many entrepreneurs who had so far successfully carried out their economic activity. Competitive environment would be seriously undermined by introduction of the tender procedure which brings danger of bid-rigging. Moreover, based

⁵ *The Act of 14 December 2012 on waste*, Journal of laws of 2013, item 21.

⁶ Voivodeships – administrative regions in Poland

on the previous experience, UOKiK claimed that due to general prohibition to transport waste outside the region, regional facilities would abuse their dominant position.

The President of UOKiK is also responsible for the protection of general consumer interests. The Office maintains a record of enforcement decisions as well as educational initiatives undertaken with the aim to raise consumers' awareness as regards municipal services. Within the new system the President is no longer entitled to react on irregularities concerning waste collection which affect inhabitants, since the producers of household waste lost their legal status of consumers.

3.2 *Sector inquiry*

The reservations stated by the competition agency were rejected in course of the legislative process and the Parliament accepted the project, which incorporated the vision of the Ministry of Environment. However, before the final decision was made, UOKiK launched a wide sector inquiry, with primary goal of providing evidentiary support for the Office's arguments. This was the first comprehensive household waste collection market study ever conducted in Poland. The market analysis allowed to collect data on the business and market aspects of waste management in Poland and obtain a wide perspective of the sector. Unfortunately it was completed only after the shape of the new system had been adopted by the Parliament. Therefore, the report on findings could not be used for advocacy purposes and the results of the inquiry were described as a "closing report".

The inquiry involved gathering information from all urban and urban-rural communes, as well as from 10% of rural communes in Poland. Furthermore, UOKiK examined these communes which had previously, on the basis of a public referendum, taken over responsibilities over the waste. The Office also analyzed data obtained from 283 local and 8 supra-regional entrepreneurs and from professional organizations.

Results of the analysis were published in the previously mentioned report *Competition in the Polish market of collection and management of communal waste*. The main conclusion of the document was that communal waste sector in Poland had fulfilled technical and economical conditions of competitive market. The average number of entrepreneurs collecting waste in the examined communes reached 4,52. Over 85% of the municipalities had more than one service provider. In case of communes with only one provider it was observed that commune-owned or commune-controlled companies prevailed.

Before the legal reform was introduced, few Polish municipalities had taken over responsibility for waste collection at their territory as such an opportunity existed on the basis of other regulations. This required holding a local referendum on that matter. UOKiK checked the situation in all communes where this model had been adopted. It occurred that in the majority of cases income from the waste fee did not cover the expenses for the waste collection and they had to be subsidized from other communal sources.

Another important finding of the inquiry was related to supra-regional companies. The report identified as such 8 undertakings which led their economic activity within a network and on a large scale in at least three voivodeships. All of these companies were capital groups, moreover majority of them were owned by foreign consortiums and that strengthened their market force. Analysis conducted in the communes which had previously taken over responsibilities over the waste and had organized tenders for its collection demonstrated that supra-regional undertakings were winning contracts in more than 50% of cases.

3.3 *Debate*

In March 2012 UOKiK organized a debate devoted to the problems of waste management in Poland. The debate served as an occasion to present the report and as an opportunity to discuss the new legal regulations which back then had already entered into force but were not yet fully effective for its all

stakeholders. The debate was attended by representatives of the competition agency, the Ministry of Environment and, first and foremost, by entrepreneurs and lawyers.

Many participants who were directly affected by the new provisions of law expressed their reservations, doubts and general dissatisfaction with the reform. Interestingly, as the following months showed some of their fears were justified.

For example the tender procedure for waste collection in Warsaw had to be annulled. Entrepreneurs who failed to win in the tender appealed to the National Board of Appeal (NBA). The NBA agreed that the conditions of the procurement were formulated in a way which obviously promoted the communal undertaking. As a consequence full implementation of the new system in Warsaw was delayed by at least few months.

3.4 Enforcement

The amendments to the *Act* went into force on 1 January 2012. By the end of June 2012 the *Voivodeship Plans of Waste Management* should have been updated with the purpose to introduce regions and indicate regional facilities. By the end of 2012 communal authorities were obliged to adopt all necessary by-laws in order to organize tenders. The system should have become finally effective by 1 July 2013. On 4 July 2013 the competition authority reported that it was already conducting 27 proceedings in cases involving the waste management sector.

The first decision was issued by the President of UOKiK at the end of June 2013. The company from the city of Wrocław (the 4th largest city in Poland) abused dominant position by introducing excessive prices. The undertaking was fined with nearly 100 thousand EURO. Moreover, the President issued a cease-and-desist order and imposed an injunction to enforce the decision immediately.

The firm operated the only available regional facility in the north-central part of the Dolnośląskie voivodeship (a region that includes the city of Wrocław). In November 2012 the company significantly increased the price for reception of municipal waste. According to the firm the raise was caused by the fact that it had expanded the scope of the provided service by implementing biological processing technology. However, the company did not produce any calculation of costs which would explain why introduction of biological processing had to impact the overall price to such a considerable extent.

As a result the undertakings collecting waste from 29 communes of the north-central region were forced to pay over 100% more for its storing and processing. That in turn led to raising prices for their clients – real estate owners, by 30% to 70%. In the course of the investigation the competition authority compared prices offered by 14 similar facilities from the entire territory of Poland. It was shown that the company's offer exceeded the average price in that group of facilities by more than 40%.

Aside from imposing a fine, the President of the Office ordered to cease the practice immediately. Two more regional facilities were planned to be opened shortly after the decision had been issued. However, the fined company would continue to hold a dominant position, as some time is needed until a new facility will reach its full productivity and because one of them will not constitute a good substitute for the company's facility.

Another case is currently investigated by the Branch Office of UOKiK from Katowice. The authority is looking into tender procedure for communal waste collection in the city of Częstochowa as it has received signals of possible bid-rigging. The company which won the tender by offering the lowest price did not sign the contract with the communal authorities. The second company also did not sign the contract despite the fact that it had been protesting against the results of the tender procedure. Ultimately the

procurement was granted to the company which offered the highest price. Moreover, the company employed the firm which was the second best in the tender procedure as its subcontractor.

3.5 *Advocacy*

The new legal environment in the waste management system creates risks of antitrust infringements and demands a very active stance regarding competition advocacy on the part of UOKiK. Some examples of advocacy initiatives have already been mentioned throughout this paper – inter-ministerial consultations, significant contribution to the public discussion in the form of the exhaustive report, debate hosted by the authority. Currently the Office focuses on publicizing the examples of breaches of the antitrust law found in the municipal waste management sector. In this way the President of the Office consequently promotes its position towards the changes taking place in the sector.

4. *Conclusion*

“Waste revolution” resulted in major changes for the whole Polish society. The goals of the reform are undoubtedly justified. If they are indeed achieved, people in Poland would be able to enjoy cleaner and healthier natural environment. It seems however, that authors of the amendments did not consider sufficiently the opinions of the main stakeholders and that the means adopted were not completely adequate. Law-makers enforced their vision despite numerous reservations of the citizens and other authorities. This contribution covers only selected problems connected with the reform. Municipalities alarm that the application of the new provisions cause a lot of risks and that further amendments to *the Act* would be desired.

ROMANIA

1. General rules

According to the national legislation, namely the *Law no.101/2006 concerning public sanitation services of localities* (with subsequent modifications and completions), municipal waste services are within the scope of public utilities and the specific activities are conducted under the control, management and coordination of the local public administration (municipalities).

There is no regulatory distinction between the market for household waste collection and commercial or business waste collection, as long as non-household waste can be handled together with communal waste.

According to the normative act mentioned above, collection, removal and disposal of municipal waste is a public service that is mandatory for municipalities and that consumers are obliged to make use of. The sanitation service includes the following activities:

- collection and transportation of municipal waste, including hazardous waste from household waste, except those with special regime;
- sorting of municipal waste;
- processing, neutralizing and recovery material and energy of waste;
- controlled landfilling of municipal waste;
- establishment of landfills and their administration;
- sweeping, washing, spraying and maintenance of public roads;
- cleaning and transportation of snow from public ways and maintaining roads in service during the frost;
- removal of dead animals from public places and transfer to specialized units;
- collection, transport, storage and recovery of bulky waste from the population, public institutions and economic agents, i.e. furniture, waste electrical and electronic equipment, etc.;
- collection, transportation and neutralization of animal waste from households;
- collection, transport and storage of waste from construction activities and demolition.

Local public authorities are in charge of drawing up and regulating the sanitation service, taking into account the local particularities, as well as the current and perspective interests of the respective community. They have exclusive authority regarding the approval of the fees for the activities included in the sanitation service.

The municipalities may manage municipal waste directly, in-house, or they may delegate this service to a company following a public tender procedure. In such a case, the competition between operators interested in providing this service takes place during the selection procedure.

2. Competition for the market

Since in this case the competition is *for the market*, it is essential that the tender procedures are open and based on transparent and non-discriminatory criteria.

Also, the contracts resulting from a tender procedure must be of limited duration. The duration depends on the contract in question and it has to be objectively justified and established taking into account the need to ensure the economic and financial stability of the project, so as not to limit free competition beyond what is necessary to ensure recoupment of the investments required for the provision of the public service in question.

For the purposes of the competition rules, on the markets where competition takes place during the tenders, the interventions of the local government usually distort the competitive environment by setting unreasonably high durations for the contract awarded. Such a long-term contract creates a competitive advantage for the service provider selected and establishes unjustified barriers to entry for other operators that could provide the same service more efficiently.

2.1 Case study

In 2009, following an investigation procedure, the Romanian Competition Council (hereinafter RCC) decided that the interventions of all public local authorities from Bucharest on the local municipal waste collection markets infringed art. 9(1) of Romanian Competition Law.

Bucharest has six administrative districts, each of which with their own mayor and local council. The geographical market in question is represented by each of the 6 administrative districts of Bucharest, which were responsible for municipal waste collection within their territories.

Romanian Competition Law (Article 9) prohibits any actions by the central or local public administrative body which have as an object or may have as an effect the restriction, prevention or distortion of competition, especially:

- making decisions which limit the freedom of trade or the undertakings' autonomy which are being exercised under the law;
- setting discriminatory business conditions to undertakings.

Compliance with the specific rules of a market economy based on free initiative and free trade is an obligation incumbent on both operators and public authorities, which in exercising their competences cannot intervene in economic activity by setting discriminatory market access conditions.

In case central or local public administration authorities do not abide by RCC's decision, the latter may challenge the action before the Bucharest Court of Appeal.

As a result of the investigation, RCC concluded the following:

- The principle of equal access to the market must be applied in regards to municipal contracts; in accordance with the principle of proportionality, the duration of contracts may not impede effective competition beyond what is necessary in order to enable the operators to achieve an economically satisfactory return on their investment.

- After the expiration of the initial duration of the public contracts awarding the collection and transport of municipal waste collection (5 years), public local authorities from Bucharest did not organize competitive tenders in order to select the best offer for providing the service in question (for district 2, 3, 4 and 6). The public local authorities extended, for the period 2004-2007, the duration of the initial contracts by addenda, thus creating a competitive advantage for the initial contractors;
- One of the districts (District 1 municipality) awarded, in 2008, the collection of municipal waste to a private operator for a period of 25 years, without clear identification of the specific investments that had to be made by the respective private operator for the activities entrusted. This created an undue advantage for the private operator part of the public contract.

These interventions of local government had the effect of restricting and distorting competition in the market of municipal waste management on the territory of Bucharest. These actions represent an infringement of art. 9 (1) Competition Law.

To restore the competitive environment in these local markets, RCC imposed the following actions:

- the respective municipalities should end the extension of the public contracts in question and, if they still intended to delegate the waste collection services, they should organize transparent tenders for the selection of operators;
- the local public authority in question (District 1 municipality), which delegated the collection of waste through a 25 years' service contract, should reanalyse the duration of the contract based on clear and objective grounds. Thus, the duration of the contract should be correlated with the payback period, i.e. the length of time required for the private operator to recoup the investments made.

Within 90 days after the communication of RCC's Decision, the public local authorities were required to inform the competition authority on the measures taken in order to comply with the provisions of the above-mentioned decision.

For failure to comply with these measures, RCC filed an action to the Bucharest Court of Appeal against the local authorities concerned, requesting the court to pronounce the termination of the above mentioned contracts and to require the authorities to organize public auctions. The action was admitted by the Court. The authorities have contested the sentence pronounced by the Bucharest Court of Appeal. Currently, the case is examined by the Supreme Court (ultimate jurisdiction).

RUSSIAN FEDERATION

1. Legal frameworks

In the Russian Federation the Federal Service for Supervision of Nature Resources is the Federal Executive Authority which exercises functions of control and supervision in sphere of environmental management, as well as within its competence in the field of environmental protection, including restriction of negative technogenic impact, in the field of waste management (excluding radioactive waste) and state ecological expertise.

The market of waste management is regulated by the Federal law of 24.06.1998 No. 89-FZ “On Production and Consumption Waste”, which establishes the basic principles of the state policy in the field of waste management (except radioactive), the procedure for determining the property rights for them, as well as the basic of ecological control. Besides, according to this law the organization of activity in the field of waste management is placed under the jurisdiction of the local government authority. This is also indicated by the Federal law № 131-FZ of 06.10.2003 “On General Principles of Establishment of Local Self-government in the Russian Federation”. Thus, the order of collection of solid domestic waste (hereinafter - SDW), the place of their sorting and utilisation, sanitary standards and rules of accomplishment are determined by local self-government authorities.

Activities related to SDW, always in contact with the environment, therefore considerable part of the normative basis regulating this sphere is composed of the following regulatory legal acts:

- Federal Law of 10.01.2002 No 7-FZ «On protection of environment»- defines the powers of local authorities in the sphere of relations connected with environmental protection. This Federal Law determines that:
 - organization of actions of intersettlement nature on environmental protection and organization of utilization and processing of household and industrial waste are referred to issues of local significance of the municipal district;
 - organization of environmental protection actions within the boundaries of the urban district and the organization of collection, removal, disposal and utilizing of domestic and industrial waste are referred to issues of local importance of the urban district.

This Federal law also obliges to observe the requirements for the neutralization and safe disposal of waste, to normalize formation and to limit waste disposal, licensing some activity category in the field of environmental protection.

- Federal Law No 96-Φ3 of 04.05.1999 «On Protection of Atmospheric Air» sets the requirements for prevention of adverse impact on atmospheric air by production and consumption waste during storage, disposal and deactivation. This means that all objects connected with the processing, disposal, deactivation of solid household waste are obliged to prevent and reduce emissions of harmful substances. Particularly it concerns combustion plants and firing ground that are the major sources of harmful emissions.

- "Land Code of the Russian Federation" obligates the land users to protect acres from littering with production and consumption wastes, pollution.
- Federal Law No 52-FZ of 30.03.1999 "On Sanitary and Epidemiological Welfare of Population" - regulates the sanitary requirements to the procedure, conditions and methods of collecting, using, neutralization, transportation, storage and disposal of production and consumption waste, which also should be established by local authorities and have Sanitary-Epidemiological Certificate.
- Federal law of 04.05.2011 No 99-FZ "On Licensing of Certain Activities" regulates relations connected with licensing of the certain types of activity with regard to waste management.

2. Definition

Solid domestic waste (SDW) production and consumption waste (hereinafter - wastes) - the residue of raw products, materials, half-finished products, other goods or products which are formed in the process of production or consumption, as well as goods (products) that have lost their consumer properties. Such waste includes household waste, waste of light industry and construction waste.

SDW is characterized as composition with many components and heterogenous structure, low thickness and instability (ability to decay).

3. Collection of solid domestic waste by municipal enterprises.

Waste is a subject of property rights. Property right¹ for waste which are formed in the process of consumption of raw products, materials, half-finished products, other goods or products, as well as goods (products) is belong to the owner.

The owner bears the burden of maintaining his property, unless otherwise is stipulated by the law or agreement².

Individual entrepreneurs or legal entities executing its activities in the sphere of waste circulation are obliged³ to maintain according to the specified procedure a register of the composed, utilized, decontaminated, handed over to other entities or excepted from other entities as well as disposed waste.

Wasted is considered to be disposed by its owner even if for purpose of waste relocation other parties are involved. Thus the owner of the disposed waste is considered to be the payer of the fee for negative impact on the environment.

The right of waste ownership can be acquired by other entity on the basis of buy and sell agreement, exchange, by way of gift or other transaction on alienation of waste⁴. Moreover, the owner can hand his property to other entity/person, remaining the owner of the property⁵.

¹ Art. 4 of the Federal Law of 24.06.1998 № 89-FZ "On production waste and wastes of consumption".

² Art. 201 of the Civil Code of the Russian Federation.

³ Art. 19 of the Federal Law of 24.06.1998 № 89-FZ "On production waste and wastes of consumption".

⁴ Clause 2 of Art. 4 № 89-FZ Federal Law of 24.06.1998 № 89-FZ "On production waste and wastes of consumption".

⁵ Clause 2 of Art. 209 of the Civil Code of the Russian Federation.

Owner of dangerous waste has the right:

- alienate dangerous waste for ownership by other person/entity;
- while remaining the owner hand over to other person/entity the right of ownership, use or disposal of dangerous waste if this person/entity has a license to execute activities in the sphere of dangerous waste.

Federal Law № 131-FZ of 06.10 2003 “On general principles of establishment of local self-government in the Russian Federation”⁶ attributes issues of collection, transportation, utilization and recycling of production and domestic waste to the questions of local self-governance.

For collection and transportation of domestic waste the authorities of local self-governance can establish specialized municipal enterprises or conclude agreements with enterprises of other forms of ownership. The activities of such enterprises are regulated by the Rules on provision of transportation service of solid and liquid domestic waste⁷.

Local self-governance authorities are obliged to conduct tenders for election of managing companies for multi-storey apartment buildings as tendering allows to attract new companies into the relative market and to develop demand for services in regards to maintenance and repairs of apartment buildings, and as well for services of transportation, utilization and burial of solid domestic waste.

Time limits, conditions and quality of services are prescribed in the agreement.

Access to waste sorting stations, waste burning plants, landfill is granted on the basis of concluded agreement.

The market of the solid domestic waste is characterized by distinguishingly low competitiveness, especially in regional levels. Specifics of the market are its localized character. As a rule there is a certain number of players that control the market of turnover of solid domestic waste. Any number of participants can compete for one household.

Separation of waste collection is a process of gathering different types of waste separately. All types of waste are subdivided into 5 hazard grades:

- Hazard grade 1: the most hazardous waste e.g. used mercury lamps;
- Hazard grade 2: hazardous waste e.g. used sulphuric acid, used automobile batteries filled with sulphuric acid;
- Hazard grade 3: hazardous waste e.g. used automobile and industrial oils, oil rags;
- Hazard grade 4: low hazardous waste e.g. solid domestic waste, iron scrap;
- Hazard grade 5: practically non- hazardous waste.

For collection of solid domestic waste there should be specialized allocated places for containers (bins) with convenient approaches for automobile vehicles⁸. The site should be open with waterproof

⁶ Art 14 Clause 18.

⁷ Adopted by the Resolution of the Government of the Russian Federation of 10.02.1997 № 155 (revised as of 13.10. 1997).

⁸ Sanitary Codes and Rules 42-128-4690-88.

shelter and preferably fenced with hedges or green planting. A number of installed waste containers can be calculated on the basis of quantity of citizens using these containers, rate of waste accumulation, storage time for waste. Design volume of waste containers should meet actual formation of waste during periods of its maximum formation. Solid domestic waste should be removed by waste trucks⁹.

Major difficulty on the way to solid domestic waste recycling is lack of developed system of separated waste collection in Russia which is the necessary condition for profound waste recycling.

Sorting of waste by the population is not performed and all the waste is dumped in containers of general use. Separated waste collection by Russian population distinguishes between large scale items and all other types of solid domestic waste.

Solid domestic waste collection service is financed from fees collected from households.

In accordance to sub-clause "д" of clause 11 of Rules of maintenance of jointly owned property in the multi apartment buildings¹⁰ the structure of works and services includes collection and removal of solid and liquid domestic waste, inclusive of waste from individual entrepreneurs and organizations, that are using uninhabited premises in the in the multi apartment buildings.

The Federal Law of 31 December 2004 № 210-FZ "On the bases of tariff regulation of organization of communal complex" does not include solid domestic waste collection and removal services to the number of services in the sphere of communal complex that are liable to state regulation. This service is competitive and its price is set by the organization providing the service on the basis of agreement with the consumer, i.e. the so-called "Management Company of the union of property owners". The price for solid domestic waste collection is developed in accordance with the methodology of calculation of fee.

4. Waste Sorting station

The subsisting system of management of municipal solid waste in the Russian Federation is economically and technologically ineffective.

The main reasons this state of affairs are the insecurity of urban districts and municipal areas sufficient amount of accommodation facilities, as well as technical means of collection and transportation of waste. Tens of villages not covered services for the collection, transportation and disposal of waste.

Planning and deployment of temporary waste storage facilities, the standard number of vehicles for their exportation, waste disposal activities of the private sector, recreational areas are defined on the basis of general purification schemes of municipalities, which are approved by local authorities at least once every five years.¹¹

It's worth noting that, that no law obliges municipalities to build facilities for waste management, the law requires "to organize the process." Moreover, according to the Federal Law № 115-FZ "On the budget classification of the Russian Federation" does not provide for expenditure on the construction of facilities for decontamination and disposal or recycling of waste.

⁹ [State Standard 27415-87 "Waste trucks. General Technical requirements"](#).

¹⁰ Adopted by the Resolution of the Government of the Russian Federation of 13.08.2006 № 491.

¹¹ Under Article 13 of the Federal Law " *On production waste and wastes of consumption* ", Sanitary Codes and Rules 42-128-4690-88 "Sanitary rules for maintenance of population settlement," Methodical recommendations "On procedure of development of general plans of treatment of settlements of the Russian Federation", approved by the Decree of the State Committee on Construction and Housing and Communal Services of the Federation Russian of 21.08.2003 № 152.

Solid waste processing stations can be both in public and private ownership.

Stations are managed by municipalities or the organizations that have been concluded contracts by results of auction procedures.

According to the analysis of technologies of waste processing in the world, the most problematic and cost process that is prior to any processing of secondary raw materials is waste sorting.

The main cause of lack of development in this sector of the market is non-usage of separate collection of waste in Russia.

Therefore, we can conclude that the separate collection, sorting and recycling of secondary raw materials extracted from waste, requires considerable time and considerable financial resources, while the demand for many secondary products is not high. The consequence of these factors is the very low levels of development of the sector and the competition in this area.

5. Landfills

Nowadays, disposal of waste in landfills is the main method of waste disposal, due to the high volume and rate of accumulation of waste consumption at the weak development of the industry of recycling.

If the land is in private ownership, in private ownership, in ownership of subjects of the Russian Federation or in other proprietary interest, the responsibility for littering the site and its pollution due to placing the illegal landfills should be borne by the owner, leaseholder, land user, land owner.

A solid waste landfill is a special facility intended for the isolation and disposal of solid waste.

Landfills should guarantee sanitary and epidemiological safety of the population. On polygons provided by the static stability of solid waste, taking into account the dynamics of compaction, salinity, gas emission, the maximum load per unit area, the possibility of subsequent rational use of the site after the closure of landfills (reclamation).

Landfills can be organized for communities of any size. It is recommended that centralized landfills for groups of settlements are created.

Landfills are located outside the cities and communities¹². The size of the sanitary protection zone from the residential area to the boundaries of the landfill is 500 meters. In addition, the size of the sanitary protection zone is specified in calculating of gas release.

Nowadays, the majority of facilities used for the disposal (disposal) of solid waste are located on land owned by the subjects of the Russian Federation or municipal property.

As previously noted, the organization of recycling and processing waste refers to the local issues of municipal and urban districts.

The following barriers to market entry can be identified in this sphere:

1. One of the main barriers in this sphere is an ecological barrier. Ecological barrier is difficult to surmountable, and its presence causes the monopolistic structure of the market, since ensuring the protection of the environment does not allow you to create multiple test landfills in the

¹² Instruction on design, operation and reclamation of landfills for solid domestic waste” adopted by the Ministry of Construction of the Russian Federation of 02.11.1996

vicinity of human settlements. Replacing the waste disposal services for waste incineration and recycling are extremely costly and uneconomical. Moreover, the burning of waste has a significant negative impact on the environment.

2. Administrative barriers to entry in this sector is the procedure for obtaining land for the organization of the landfill, as the number of such land is limited, in view of the limited areas, and based on the requirements of environmental, health safety. Landfills require significant upfront financial costs as well as costs in the period of time of their operation, including for ensuring the maintenance of the corresponding state of communications.
3. In addition, these activities are inherent costs to exit from the market. So that the polygon (landfill) at the end of its use is subject to recultivation, which also requires significant capital expenditures.

Therefore, taking into account the requirements for an economic entities, engaged in services in a given market, the number of participants of this process is limited.

6. Incineration

The most widespread method of utilization of solid domestic waste is incineration with the subsequent burial in the special landfill.

Burning plants are managed publicly as they are constructed at the expense of state budget. Even if the plants are joint-stock companies, they have some state shares.

The recycling price at burning plants is established by the owner.

Competition is at a low level in this sector because of a small amount of such plants in Russia.

There is no state support or state subsidies for construction or management of incineration in Russia. However the state or municipal preferences can be provided¹³ on the basis of legal acts of federal executive authority, public authority of the Russian Federation subject, local self-governance authorities, other bodies carrying out the same functions of the specified body or organizations for the purpose of environment protection.

There aren't so many enterprises which are engaged in waste recycling, thus in the majority they are concentrated in the large cities or in their suburbs (generally in Moscow).

There are some reasons of lack of development of this market:

- construction of waste burning plants demands considerable financial expenditure;
- strict requirements are introduced for reduction of environment emissions owing to branch specificity. It causes constantly a need to improve technologies and equipment increasing costs and additional financing.

7. System of expanded liability performance of the producer

Packing (transport, service or commodity, including container) - the product of industrial production intended for protection against different external influences, storages, transportations, loadings, unloadings, deliveries and realization of various goods, including raw materials and finished goods, in all spheres of activity of the person.

¹³ Clause 1 of Art. 19 of the Federal Law “ of 26.07.2006 No. 135-FZ “On protection of competition”.

Packing waste is packing that lost fully or partly its consumer properties in the course of circulation;

The technology of container processing and packing materials is one of the priority directions of development of science and technology for the next decade. Nowadays packing is not only the most important component production and realization of goods but also an indicator of society development. A good packing not only protects goods during transportation and storage but also plays an important role in promotion of goods in the market.

The special legislation is developed now regulating the sphere on recycling of packing waste, including questions of collecting, transportation, recycling, utilization and elimination of packing waste for ensuring ecological safety and health of the person, resource-saving and environmental pollution prevention. Before adoption of the relevant acts the issues will continue to be regulated according to legislative and regulations in the sphere of ecological safety and other adjacent spheres.

8. Recyclable materials markets

Using of recyclable materials as a new resource base is one of most dynamically developing trends of waste recycling in the world. It is rather new trend for Russia.

The Russian Federation possesses considerable resources of recyclable materials which can be characterized as renewable raw material, physical and energy resources.

The recyclable materials¹⁴ are understood as secondary physical resources which can be reused in a national economy. Thus secondary physical resources are understood as production wastes and consumption which are formed in a national economy.

According to statistics, only 3% of domestic raw materials are recycled in the Russian Federation.

Fundamental feature of the recyclable materials market as a whole (on the average by all its types) is considerable imbalance between developing demand and the potential supply. In particular, the supply (which it must be kept in mind resources of all annually being formed and already saved up before waste) considerably surpasses the demand for them as on recyclable materials. On the one hand it is caused by the fact that formation of waste, unlike production of goods in market conditions, isn't the purpose of production, but only a consequence of imperfection of the modern technological base that can't function waste-freely.

Competition is at a low level in this sector because of dependence of the solid domestic waste collection and preparation market. The effectively technologies of solid domestic waste separate collection will take root the percent of received recyclable materials will be higher owing to what there are preconditions for competition development between participants of the market.

9. Other waste products

Other waste products generated by some of production activities are not always secure and cannot be recycled. Many of the waste products are extremely toxic, highly explosive, radioactive, chemically reactive and inflammable; they are bearers of different diseases and inimical bacteria. Ecologists rank such wastes as dangerous or extra hazardous. Hazardous waste collection and transportation including their utilization and storage, burial and treatment should be managed in a special way to exclude or minimize harm caused to environment.

¹⁴ Definition "secondary raw materials" are regulated by the State Standard 25916-83 "Secondary material resources". Terms and Definitions".

There are number of economical and administrative barriers for setting up new market players providing hazardous waste management services. Primarily it depends on considerable initial expenses and extremely complicated procedures for obtaining a license.

Administrative barriers: Federal Law “On consumption and production wastes” states requirements for business entities providing waste management services, including:

- requirements for hazardous waste management;
- requirements for professional training of persons admitted to hazardous waste management;
- requirements for hazardous waste transportation.

In accordance with Federal Law “On licensing separate types of activity” of 08.08.2001 N 128-FZ the hazardous waste management activity is required to be licensed.

At the same time, the development of competition occurs in this sector due to majority of private companies operating at the waste material collection and utilization market.

10. Anticompetitive cases and investigations

The FAS Russia has conducted a number of investigations upon violations of the Federal Law on Protection of Competition in the sector of waste management. Some of the cases are given below:

Case No. 1

In the frameworks of compliance with competition legislation, the FAS Russia’s Moscow regional unit initiated the case N 1-15-994/77-12, having discovered evidences of violation by Moscow City Government part 1 Article 15 the Federal Law on Protection of Competition expressed in issuing Direction N 1395-PII of 28.07.2005, provided transfer of rights and obligations in accordance with agreement on implementation of project on management of financing, constructing and exploiting of waste processing plant N1 without carrying out competitive procedures.

The FAS Russia’s Moscow regional unit issued the injunction to Moscow City Government to withdraw violation of antimonopoly legislation.

Case No. 2

Presidium of the Supreme Arbitration Court of the Russian Federation upheld the Decision of the FAS Russia’s Primorskiy regional unit. (Resolution N 14746|12 of 23.04.2013.) In accordance with the Decision of the FAS Russia’s Primorskiy regional unit, actions of OOO “VOSTOKSTOISERVICE” expressed in imposing of unfavorable conditions of hard wastes utilization agreement to its contractors (in part of establishing limits to admission of hard domestic wastes and payment for over limits), were found violating the order of pricing on hard waste utilizations services and setting up discriminating conditions on hard wastes utilizations agreements (in part of establishing different limits of admission and different value of hard wastes over limits admission), and were qualified as abusing of dominant position on providing hard wastes utilization services at commodity market. (parts 3, 8, 10 Article 10 Federal Law on Protection of Competition).

On the basis of the conducted research it is possible to identify the following barriers for the entry into the market of waste circulation.

The major obstacle is the undeveloped market infrastructure which is linked with the necessity of buying special equipment and hiring of specialized staff.

In the opinion of many economic entities their activities are impeded by high tear and wear of the special equipment, huge costs for petrol and oil products and technical servicing of equipment.

Moreover some economic factors complicate and restrict activities in the market: long return of capital investment, lack of efficient support for small enterprises, low rates of return, unduly paying off of fees by clients.

Among administrative barriers economic entities point out the necessity of applying for licenses for execution of activities in regards to neutralization and disposal of hazardous waste of grades 1-4.

It is worth mentioning that according to the FAS Russia's Plan of activities in analyzing the state of competition on the product markets for years 2013-2014¹⁵ the analysis of the market of solid domestic waste is carried out.

Presently regional offices of the FAS Russia conduct regional market analysis which will be submitted to the Central Office of the FAS Russia for assessment and conclusion.

Bearing in mind the regional character of the waste circulation market the results of this assessment will have great significance for revelation of barriers for market entry as well as analysis of the state of competition.

Moreover, aiming at stimulating of economic activities in the sphere of waste circulation the work on amendments to the Federal Law "On industrial and domestic waste", other legislative acts of the Russian Federation is presently carried out with active participation of FAS Russia's representatives.

¹⁵ Approved by the FAS Russia's Bylaw of 19.12.2012 No. 773/12.

SLOVAK REPUBLIC

The Antimonopoly Office has received several complaints indicating potential infringements of competition rules in provision of municipal waste services, but also other categories of waste, e. g. electronic waste, packaging waste and accumulators and batteries. The Office has issued two decisions in this sector and conducted several investigations leading to competition advocacy in order to eliminate potential barriers to effective competition on this market. Based on the information from the market and data obtained during the investigations the Office provides summary of its findings.

1. **Municipal waste collection**

Pursuant to the Act on Waste, municipal waste is household waste generated on the territory of a municipality produced by natural persons or similar waste generated by legal entities or entrepreneurs, except for the waste generated in the direct exercise of their business activity. Household municipal waste covers also waste from properties used by individuals for their recreation such as gardens, cottages or parking places and garages. Municipal waste is also waste generated in a municipality during cleaning of public roads and areas that are property of a municipality and also during the maintenance of public green grounds including parks and cemeteries.

Under the Act on Municipal Establishment municipalities are independent to decide and perform activities related to provision of public services, in particular municipal waste management and management of minor construction waste, but also municipality cleaning, administration and maintenance of green areas, public lighting, water supply, etc.

The Act on Waste describes further responsibilities of municipalities stating that a municipality is responsible for the treatment of municipal waste generated within its territory. Each municipality determines itself the way of municipal waste management in a “generally binding regulation” (“GBR”). A municipality in the GBR sets down the details on the method of collection and transportation of municipal waste, separate waste collection, method of handling minor construction waste, as well as storage of the waste.

A municipality usually provides municipal waste services via:

- its own public utility or technical services;
- private enterprise (choosing one or more enterprises as a contractual supplier/suppliers);
- private – public partnership (connection of municipality property and property of a private enterprise).

In case a municipality opts for an external supplier to provide municipal waste services, the supplier has to have a signed contract for a provision of these services with a municipality. Duration of a contract is not regulated and usually varies between 1 and 20 years.

1.1. *Separate waste collection*

As for the separate waste collection, pursuant to the Act on Waste a municipality is obliged to establish and ensure implementation of separate waste collection of following fractions:

- paper, plastic, metal, glass;
- municipal bio-waste, other than that generated by a kitchen operator. (Kitchen operators are responsible for separate collection of their biodegradable kitchen and canteen waste).

1.2. Choice of providers of municipal waste collection

In case a municipality decides for an external provider of municipal waste collection services it must act in accordance with the Act on Public Procurement setting out a procedure to be followed in a public procurement. In this area thus applies “competition for the market”. Entrepreneurs compete for the market in tenders organized by relevant local authorities. There is no difference, set out by the Act on Public Procurement regarding participation of domestic and foreign undertakings. Any company fulfilling the selection criteria can submit a bid.

It is also up to a municipality whether it will ensure municipal waste services such as collection, separate waste collection, operation of a collection yard, transportation, recovery, disposal as a “complex package” it means via one contractual company or it will divide the services among more contractors. Collection of municipal waste is mostly performed by one company. Tender is of a great importance. It determines the company and duration of its market performance, its position on the market, possibility to strengthen the position, possibilities of competitor’s market entry and based on the criteria of the tender or contractual terms it can also contribute to restriction of competition on the market.

1.3. Nature of providers of municipal waste services

The Office has not investigated the nature of providers of municipal waste services, but based on the publicly available information certain trends may be identified.

In the time of the entry of the Slovak Republic to the European Union also the area of municipal waste management started to develop. New Act on Waste came into force setting many entities (including municipalities) new obligations such as the obligation to separate municipal waste, fulfill limits of collection and recycling and recommended ways of waste treatment. Before, municipalities had neither obligation to separate and recycle municipal waste nor other related administrative responsibilities. Municipal waste was treated by local companies owned by municipalities and was to a large extent transported to waste disposal sites. Exceptions were only scrap, paper, glass which were already in that time bought out and further processed. Since local companies did not have required experience and know-how and lacked financial resources a room for entry of foreign companies with needed experience, resources, technology and personnel was created. They have strengthened their market position on the Slovak market through mergers with local private or municipal companies. Besides waste management they also extend their services to municipal services such as maintenance of local infrastructure, public green places or public lightening.

1.4. Payment system

Costs related to municipal waste management are borne by a municipality. They are covered from a local fee for municipal waste and minor construction waste paid by all residents and businesses located on the territory of a municipality and generating waste on this area. The revenues from the local fee may be used to finance solely cost applied to municipal waste management, in particular, collection, transportation, recovery and disposal. The fee amount is regulated by the Act No. 582/2004 Coll. on local taxes and local fees for municipal waste and minor construction waste.

1.5. *The fee is set as follows:*

- no less than 0,0033 EUR and no more than 0,0531 EUR for a liter or dm³ of municipal waste or minor construction waste or no less than 0,0066 EUR and no more than 0,1659 EUR for a kilogram of municipal waste and minor construction waste.
- no less than 0,0066 EUR and no more than 0,1095 EUR per person per calendar day, in case a municipality does not introduce quantitative waste collection.

The amount of the fee is set by a municipality depending on the costs associated with waste management within the regulated minimum and maximum rate in the generally binding regulation.

In case the collected fee is not sufficient municipalities covers all the costs, a municipality has to cover the remaining costs through its budget.

2. **Landfills**

A municipality can establish its own legal entity to provide waste management services including operation of a landfill. A municipality can also choose a contract partner for disposal of solid waste pursuant to the Act on Public Procurement as described above.

Most of municipal waste (around 80 %) is disposed on a landfill. Currently there are around 90 municipal landfills on the territory of the Slovak Republic.

The operator of a landfill may be:

- a municipality/association of municipalities;
- private enterprise (domestic or an international company);
- private – public partnership (connection of municipality property and property of a private enterprise).

2.1. *The price of disposal in a landfill*

An operator of landfills determines independently the price of disposal in a landfill. The price consists of two major parts:

- “Tipping fee” – price for disposal, reflecting costs of a landfill operator. The fee is influenced by the territory, transportation costs, size of the company, the amount of disposed waste, lifetime of a landfill, competitions, etc. The tipping fee is the income of a landfill operator.
- Legally determined fee for disposal of municipal waste (so called “landfill tax”). The fee is to be paid by a waste producer or a waste holder and it is an income of a municipality on territory of which the landfill is situated. It is some kind of compensation for negative effects of waste disposal and at the same an economic tool aimed at prevention of municipal waste disposal making other ways of waste treatment (recovery and recycling) more favourable. Revenues from this fee can be used solely for the purpose of waste management. The fee was introduced in 2004 setting a progressive growth of the fee. The amount depends on the number of separated fractions. The more fractions are sorted out the lower the fee per 1 ton is. For one ton of mixed municipal waste the fee of 10 EUR applies in comparison to 5 EUR/ton in case of five separated fractions.

3. Systems to fulfill extended producer responsibility in packaging waste

The Act on Packaging stipulates requirement for the composition, properties and marking of packaging, as well as the rights and obligations of legal entities and natural persons in the handling of packaging and in the collection and recovery of packaging waste. Pursuant to this Act, an obliged person¹ is obliged to provide for the collection of packaging waste, including waste from reusable packaging (“collection of packaging waste”) placed on the market or put into circulation, as well as for its recovery and recycling at least to the extent of the obligatory limits for packaging waste recovery and recycling (set out in the implementing regulation). The obligatory limits may be fulfilled both in and outside the territory of the EU Member States, provided it is proved that the waste recovery and recycling have been performed under conditions equivalent to those set out in the legally binding acts of the European Union.

An obliged person provides for the collection of packaging waste either:

- Himself, at his own expenses, namely based on the volume of packaging he has placed on the market or put into the circulation. He can also ensure the collection and recycling via a contractual partner which has required permits and authorization to provide these services. This is called an individual system.
- Through an authorized organization or several authorized organizations, with which he has entered into agreement in this matter. In the event that the obliged person becomes a member or a client of an authorized organization, this will for a certain fee take over a responsibility for the fulfillment of binding limits. It means that an authorized organization ensures for an obliged person collection of packaging waste, and its recovery and recycling at least up to the mandatory limits. This is called a collective system.

An authorized organization is a business company established by obliged persons and entered in the Register of Obligated Persons and Authorized Organizations. Obligated persons report to authorized organizations total amount of produced and imported goods, respectively total amount of packaging placed on the market. The authorized organization does not own the infrastructure for separate collection of packaging waste. They act as intermediary. They sign contracts with municipalities and industries as a source of the waste and collection, recovery and recycling of packaging waste are provided on the contract basis by qualified business entities having required permissions that physically carry out these services. Under the contracts, an authorized organization order collection of certain amount of waste and its transfer to recovery or recycling facilities and pay for these services.

As of 2013 there were 12 registered collective organizations. The Office has not conducted further investigation in this matter and does not have information on current market shares and competition between these collective organizations.

4. Activities of the Antimonopoly Office of the Slovak Republic in waste sector other than municipal waste

The Antimonopoly Office of the Slovak Republic has issued two decisions in the area of waste management.

¹ Obligated person mean natural person – entrepreneur or legal entity that:

- a) uses packaging to package products or puts products into packaging;
- b) places packaged products on the market;
- c) places packaging on the market, except for packaging manufacturers and importer supplying unused empty packaging to the obliged persons referred to in item 1.

4.1. Case ENVI-PAK

In the first case the Division of Abuse of Dominant Position imposed a fine of 18 394 EUR on ENVI-PAK, a. s. (ENVI-PAK) for having abused its dominant position on the market of granting permission to use the trademark 'Green Dot' in the territory of the Slovak Republic. The conduct was found to be an infringement of Article 8 of the Slovak Act on Protection of Competition as well as Article 82 of the EC Treaty (now Article 102 TFEU). ENVI-PAK was the sole undertaking entitled to provide 'Green Dot' trade mark sub-licences in Slovakia and at the same time it acted on the market for the provision of packaging waste collection, recovery and waste recycling through authorized organizations. According to the Office's decision of 28 August 2009 and 8 June 2010, the abuse of its dominance consisted of setting the sub-licence fee for the use of the 'Green Dot' trade mark in such way that companies using the packaging waste collection, recovery and recycling services of ENVI-PAK did not have to pay a licence fee, while companies using the services of its competitors, which were interested only in the 'Green Dot' sub-licence, had to pay a separate licence fee, even for packages without the 'Green Dot'. ENVI-PAK's pricing policy was set in such a way that the final price paid by an undertaking applying only for the 'Green Dot' sub-licence was almost always higher than the price the undertaking would have paid if it had been a service client of ENVI-PAK. By this conduct ENVI-PAK indirectly forced undertakings using the 'Green Dot' trade mark to use also its packaging waste collection-, recovery and recycling services and thus created barriers to growth and entry for competitors on this market.

4.2. Case NATUR-PACK

In the second case, the Division of Agreements Restricting Competition concluded proceedings in the matter of a possible agreement restricting competition between the authorized organization NATUR-PACK, a.s. (NATUR-PACK) and 14 waste collection companies by accepting commitments offered by participants to the proceedings. During the investigation the Office found out that in the period of 2006 – 2008 the authorized organization NATUR-PACK concluded contracts with 14 waste collection companies. The contracts included the obligation of exclusivity, which bound the wasting companies to provide their services exclusively to NATUR-PACK. This could restrict competition. Pursuant to the Act on Protection of Competition the Office may conclude proceedings by decision imposing on an undertaking the requirement to fulfill commitments offered by undertakings for eliminating possible restriction of competition. The Office accepted commitments offered by the participants of proceedings consisting in removing the provision obliging the waste companies to provide waste exclusively to NATUR-PACK that according to the Office was satisfactory for eliminating possible restriction of competition.

4.3. Competition advocacy

In some cases violation of the Act on Protection of Competition was not proved, but during the investigation the Office identified problem market areas. In these cases the Office informed the respective authorities of these restrictions within the framework of the competition advocacy and commented on draft law and other materials within the interministry comment procedure. Examples include letter to the Ministry of Environment of the Slovak Republic promoting new methods of collection of small electrical waste in school premises, hospitals and municipal authorities and a draft Decree on Treatment of Electronic Waste, introducing the obligation for the electronic waste treatment plant to be equipped with technologies for processing of all categories of electronic waste, to which the Office was fundamentally opposed for the reason of potential deformation of the competitive environment. The Office also several times officially approached the Ministry of Environment regarding restriction on export of hazardous waste for recovery and recycling purpose. The existing legislation unreasonably created a strong, even monopoly position of certain undertakings engaged in the recovery of hazardous waste, limited choice and decreased effectiveness of the whole sector and created barriers to entry the foreign markets of recovery and management of hazardous waste. Also thanks to the activity of the Antimonopoly Office, the provision restricting export of hazardous waste was omitted from the Act on Waste which came into force on 1 Jan. 2013.

5. Possible competition issues in provision of municipal waste services

Based on the conducted investigations and gathered information in the field of provision of municipal waste services the Office has identified two sorts of possible obstacles to competition.

First possible competition concerns are related to duration and exclusivity of waste service contracts. Since there is no limit of duration of a contract, long-term exclusive contracts, even if they are result of a tender, may prevent market entry of new rivals and lead to foreclosure of the market. In case a tender is called for provision of complex waste services or municipal services the foreclosed market is even broader.

Secondly, competition concerns are connected to activities of vertically integrated companies providing complex waste management services. Competition issues may arise when an owner of a waste disposal facility gives more favourable conditions to certain waste collection companies (e.g. those belonging to the same economic group or being vertically integrated subsidiaries). The issue has to be treated individually depending on the alternative ways of waste treatment, concentration of the landfills, competitive pressure, capacity of landfills, etc.

SOUTH AFRICA

1. Introduction

South Africa's legislation places an emphasis on environmentally sustainable waste management practices, including waste reduction, recovery, re-use and recycling. Waste is classified according to the risks it poses to public health and the environment. Waste that does not pose any significant threat to public health or the environment is known as general waste. This includes domestic and business waste. Waste that has the potential, even in low concentrations, to have a significant adverse effect on public health and the environment because of its inherent toxicological, chemical and physical characteristics is known as hazardous waste.

The waste management industry deals with various waste types, including general and hazardous waste. Efforts to manage waste streams, including the collection, transportation and disposal are known as waste management. According to the South African Waste Act of 2009, the management of waste generated by the domestic households is the primary responsibility of the municipality servicing the area in which waste is generated. The functions of collection, removal and disposal of domestic waste streams are either carried out by the relevant municipality or outsourced to service providers. Municipalities form the largest component of the waste management industry in South Africa.

The responsibility of managing hazardous waste lies with the firm that generates the hazardous waste stream. Such firms usually contract private service providers to assist them in waste management, but the responsibility for the proper disposal of the waste stream remains with the firm. Privately-run service providers collect waste from waste generators, recover recyclable waste material and dispose the rest at a designated landfill site. A landfill site is a piece of land used primarily to bury waste materials in order to avoid environmental pollution.

It is important to note that competition issues in waste management have not yet been the subject of Competition Tribunal decisions. This submission therefore focuses on how the Competition Commission ("Commission"), which investigates and prosecutes cases of anti-competitive conduct, is approaching the issues. In this regard, our comments are focused on the issues facing the Commission in its on-going investigations in the hazardous waste market.

2. General waste

General waste includes, foodstuff, garden waste, old clothing, packaging materials. This is waste that unlikely to have a harmful effect on the environment or public health.¹

¹ Some low hazardous waste may be disposed of through the general waste disposal services. This practice is referred to as co-disposal. Waste material qualifying for co-disposal includes batteries, expired medication, detergents and CFL lamps. Low hazardous waste material may be delisted and then disposed of in a general landfill site. For the delisting process to be approved the waste generator has to make a request for the delisting of the waste stream. The request provides information about the waste, including its chemical composition and characteristics, for demonstrating that this particular waste is not hazardous. The request

2.1 *Landfill site services*

Municipalities bear the responsibility for the disposal of general waste. There are approximately 1400 landfill sites located across the nine provinces in South Africa, 1200 of which are owned by municipalities and the rest by privately owned firms. Municipal owned sites are also available to commercial and industrial general waste generators. Municipalities operate these sites in-house and in some instances outsource these operations to third parties, such as privately owned firms. Municipal landfill sites charge a fixed rate for the disposal of general waste.

2.2 *Collection and transportation services*

A waste collector picks up waste from the customer's site and then transports the waste to a landfill site. General waste does not require strict requirements for collection and transportation nor does it require special treatment. A collector must have, at a minimum, a truck and a skip to collect the waste from the premises of the generator. Waste collectors in this market include, Enviroserv, Interwaste, Waste Group, Wasteman, Skip Waste and Multi Waste. Entry barriers into this market are low.

The pricing for waste collection services varies, but it would typically include a service charge per collection device with an additional charge for weight or volume and distance travelled by the waste collector. Waste collectors in this market compete on price and service. The market for the collection and disposal of general waste is generally competitive because there are many service providers. The market for the collection of general waste is local.

3. *Hazardous waste*

Examples of hazardous waste include waste streams that contain acids and alkalis, toxic substances, oils and paint. Hazardous waste requires a more burdensome regulatory framework than general waste. Due to the complexity of hazardous waste, the costs of collection, disposal and treatment are significantly higher.

3.1 *Hazardous landfill services*

The market for hazardous landfill services is a highly concentrated market with one player, Enviroserv, having a monopoly in South Africa. Hazardous landfill sites are classified into the following two sub-categories; H: H landfill sites (meaning high hazardous sites) and H: h landfill sites (meaning low hazardous sites). These landfill sites are designed to dispose hazardous waste streams that are considered to contain extremely harmful substances. There are four of these landfill sites in South Africa and each is designed, constructed, managed and monitored according to stringent requirements stipulated by the National Department of Environmental Affairs and Tourism. In addition, there are several privately-owned hazardous landfill sites for the exclusive disposal of the waste streams generated by the firms or their subsidiaries.

A new entrant needs to meet regulatory requirements before the government can issue them a site specific permit to operate the landfill. Furthermore, capital requirements for the construction and maintenance of hazardous landfill sites are significantly high. These include sunk costs in the form of Environmental Impact Assessment studies, which besides their significant monetary cost also involve a high degree of uncertainty, given the average time period of 3 to 5 years to complete. These assessments are also done for potential sites before ownership of the land occurs. There are also additional costs in the form of infrastructure, cell construction and the post closure costs.

is reviewed by the Department of Environmental Affairs and Tourism to determine whether the waste is eligible for a delisting. Delisted low hazardous waste streams may be disposed of at a general landfill site.

3.2 *Collection and transportation of hazardous waste*

The market for the collection and transportation of hazardous waste requires specialised equipment needed to transport hazardous waste. Although waste collectors of hazardous waste can also collect general waste, the opposite is not true. Collectors of hazardous waste have to comply with the relevant by-laws, are required to use specialised equipment and their vehicles must be registered for the transportation of dangerous goods. The largest players in the market for hazardous waste collection are Enviroserv, Wasteman, Interwaste and Waste Group. Competitors in this market compete on service, environmental standards and price.

For collectors of hazardous waste, transport costs and disposal rates are the biggest consideration in this market. Risk is also a factor in this market as collectors are mindful of transporting highly hazardous waste over extremely long distances. The market for the collection of hazardous waste is regional.

4. **The Commission's investigations**

Competition dynamics in the market for general waste management stand in stark contrast to those in the market for hazardous waste. In hazardous waste, entry barriers are higher due to substantial capital requirements and stringent regulatory requirements. Enviroserv is dominant in the upstream market of the provision of hazardous landfill sites. It is vertically integrated into the downstream market of the collection and transportation of hazardous waste.

The Commission is currently investigating complaints alleging restrictive horizontal practices as well as allegations of abuse of dominance involving:

- excessive pricing for the disposal of hazardous waste;
- price discrimination with respect to disposal rates charged to third party waste collectors; and
- general exclusionary behaviour (margin squeeze).

The specific abuse of dominance provisions in sections 8 and 9 of the Competition Act 89 of 1998, as amended, (“the Competition Act”) stipulate effects-based economic tests (with some exceptions, such as for excessive pricing). There are also explicit pro-competitive, efficiency and technology defences for most of the abuse prohibitions. Section 8(a) prohibits a dominant firm to charge an excessive price to the detriment of consumers. An excessive price is defined under the Competition Act as a price which bears no reasonable relation to the economic value of the good or service, and is higher than such value. Economic value is not defined in the Act.

Exclusionary conduct is covered under section 8(c) of the Competition Act. Section 8(c) prohibits a dominant firm from engaging in exclusionary conduct defined in general terms, with no penalty for a first contravention and with the onus on the complainant to demonstrate that the anti-competitive effect outweighs its technological, efficiency or other pro-competitive benefits. An exclusionary act is defined as that which impedes or prevents a firm entering into, or expanding within, a market price discrimination with the effect of substantially preventing or lessening competition is prohibited under section 9, and has no penalty for first offence. A finding depends on the pricing being for equivalent transactions of products of like grade and quality. The dominant firm may establish that the differences are justified on various grounds, including reasonable allowances for cost differences and meeting competition. The Commission is currently investigating these allegations.

SWEDEN

1. Introduction

The Swedish Competition Authority (“SCA”) has during the past few years investigated a number of cases concerning public undertakings in the waste management sector. These investigations have shown a number of ways as to how publicly owned enterprises can give rise to potential competition issues. In this paper we discuss three cases which illustrate three different kinds of competition issues that the SCA has investigated in the waste management sector.

In order to give a background to the cases discussed we also provide an overview of the Swedish waste regulation and a brief presentation of the national competition legislation which is relevant for the SCA’s investigations in the waste management sector.

2. The waste management sector in Sweden

The Waste Framework Directive¹ has been incorporated into Swedish law by the Swedish Environmental Code and the Swedish Waste Ordinance.² The Environmental Code has been applied in Sweden since 1999 and aims to promote a sustainable development which ensures present and future generations a healthy and sound environment.³

Many of the regulations in the Environmental Code are defined further in the Waste Ordinance. Principally, the Ordinance contains provisions regarding the duties of the municipalities with regard to waste disposal. Municipalities also have an obligation to develop a municipal waste management plan, local waste management regulations and a municipal waste management system. The Ordinance also provides general rules regarding management of waste and rules regarding responsibilities between different actors in the waste management sector.

2.1 *The responsibility for waste disposal is divided*

The responsibility for waste disposal in Sweden is divided among different stakeholders depending on the source and nature of the waste in question. Household waste is under the responsibility of municipalities, save for producer waste, which fall under the responsibility of the producers. When it comes to commercial waste, the enterprise where the waste is created has the responsibility for its disposal.

In the next section these divided responsibilities will be presented in some further detail.

¹ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.

² The Swedish Waste Ordinance (SFS 2011:927).

³ The Swedish Environmental Code (SFS 1998:808), Ch. 1:§1.

2.2 *The responsibility of municipalities*

Municipalities are responsible for the disposal of household waste and “waste similar to household waste”, that is waste from, for example, office canteens.⁴

In Sweden the right of municipal self-determination is laid down in the Swedish Constitution and therefore municipalities may themselves decide how to organize their waste management activities. There are several organizational forms available. Cooperation between municipalities is, for example, possible within a joint committee or local government federation. There are also local authorities which collaborate on specific matters such as joint procurements. Approximately 70 percent of the collection of household waste is outsourced by way of public procurement to private undertakings in accordance with the Swedish Public Procurement Act⁵, while other municipalities provide it as a public service. Municipalities are contracting authorities and are therefore obliged to apply the public procurement rules when they purchase goods and services and when they allow an external party to perform a part of their operational responsibility. Services that are commonly procured are collection and waste treatment.

Municipalities may also offer other services to households and enterprises which they are not obliged to provide by law and which are also provided by the private waste management sector. Many municipalities provide curbside collection of packaging and newspapers to apartment buildings as an extra service and at an extra cost. About 30 municipalities also provide the same service to single-family houses.

2.3 *The responsibility of producers*

Producers are responsible for waste that falls within the producer responsibility such as paper, packaging and electrical and electronic products. The responsibility covers the whole production chain. The responsibility lies in ensuring that the disposal of waste is done properly according to laws and regulations, and that national recycling targets are met.

The producers have met their responsibilities in this regard by creating so-called producer responsibility organizations (“PROs”). The PROs cover different types of waste fractions and take care of the practical responsibility of individual member companies' producer responsibility. The collection of packaging waste is funded by packaging charges while the collection of recycled paper is jointly funded by paper producers. The PROs mainly organize the collection of producer waste from households through their nearly 6000 recycling stations where households can dispose of newspapers, packaging, glass etc. These stations are placed within communities and provide a reasonable ease of access for households. There are also larger recycling facilities placed further away from city centers where households can drop off bulky waste, electronic waste and hazardous waste etc. There are around 630 recycling facilities throughout the country.⁶

Through cooperation between PROs, local authorities and/or private contractors, curbside collection of one or more packaging fractions and/or recycled paper is more and more often offered to households as an additional service. The curbside collection of packaging waste may be directly linked to the local government collection of food waste and/or combustible waste in combined collection systems which use bins with multiple compartments. Collected paper and packaging is thereafter transported for sorting and recycling.

⁴ The Environmental Code (SFS 1998:808), Ch. 27 §5.

⁵ The Swedish Public Procurement Act (SFS 2007:1091).

⁶ Swedish Waste Management 2012, Avfall Sverige, page 9.

About one third of the packaging waste is today collected through curbside collection. Property owners sign agreements for collection services with private contractors or the municipality. Currently, private entrepreneurs account for 75 % of the curbside collection. The expenses of the curbside collection operators are to some extent reimbursed by the producers, but also covered by fees paid by households. Curbside collection has primarily been expanded in apartment buildings where about 50 % of all households use this service. The private collection contractors have a market share of 80 % on the market for apartment buildings. Municipalities on the other hand dominate collection from single-family houses.⁷

Small businesses often use the same collection infrastructure as households for packaging waste. Larger businesses can often produce such large amounts and pure fractions that collection contractors pay them in order to collect packaging waste.

2.4 The responsibility of enterprises

Enterprises are responsible for disposal of the waste they produce. In practice, services for this purpose are purchased from the private waste management sector. A portion of the enterprises' waste which is "similar to household waste" is, however, under the responsibility of municipalities.

3. Some competition concerns regarding public undertakings vis-à-vis private undertakings

When public and private undertakings compete there is a risk that competitive conditions are distorted due to the differences between these two kinds of enterprises.

One key difference between private and public undertakings is that the latter cannot be declared bankrupt and that public undertakings also benefit from being financed through tax funding. Public undertakings commonly serve other purposes than maximizing profits for their owners and might therefore have differentiating incentives from private undertakings. Consequently, the public undertakings operate on the market under different conditions and their mere presence on the market may give rise to market distortions and act as a disincentive to private undertakings to expand or establish themselves.

It is common in Sweden for municipalities and county councils to engage in commercial activity in competition with the private sector. The municipalities and county councils, as well as companies they operate, are regulated by the Local Government Act ("LGA")⁸ and the Act on Certain Municipal Powers⁹, which sets out the conditions for municipalities to engage in commercial activities within certain sectors, e.g. employment of disabled people and tourism.

Municipalities and county councils may themselves attend to matters of general concern which are connected with the geographic area of the municipality or county council or with their citizens and which are not to be attended to solely by the state, another municipality, another county council or some other body (*The location principle (LGA §2:1) and municipalities' powers*). What constitutes matters of general concern has never been further defined in law and the municipalities' powers have thus been widened through case law.

Municipalities may not impose a fee or pricing which leaves the municipality in profit. The fee may not exceed the necessary costs for the operation (*The Prime Cost principle (LGA §8:3c)*). The purpose of the law is to prevent the emergence of monopoly profits in a market that does not have competition. The

⁷ SOU 2012:56, page 145.

⁸ The Local Government Act (SFS 1991:900).

⁹ The Act on Certain Municipal Powers (SFS 2009:47).

principle does not prevent the municipality from setting prices below the actual cost of the operation and the operation being subsidized by the taxpayer. The Prime Cost principle is not, however, considered applicable when the municipality operates in a sector which is generally reserved for the private sector.

Adhering to the Prime Cost principle in competitive markets can result in prices being charged at such a low level that private undertakings will find it difficult to compete. Although the prices may not necessarily be below cost and the intention of the public undertaking may not be to eliminate competition, the anticompetitive effect may in some cases be similar to predatory pricing by a dominant undertaking.

4. Sales activities carried out by public entities

In order to create similar conditions between public and private entities acting on the same competitive market a new provision was incorporated in the Swedish Competition Act as of 1 January 2010.¹⁰ The new provision may be applied to sales activities carried out by public entities and enables the SCA to request the Stockholm City Court to prohibit anticompetitive sales activities by public entities that are considered to distort or impede competition. A prohibition may be imposed under penalty of fine for default.

Conduct that is found to be justifiable on public interest grounds and activities carried out by county councils or municipalities which are compatible with applicable law may however not be prohibited.

This prohibition serves as a complement to the two general antitrust prohibitions, i.e. on anti-competitive agreements and abuse of a dominant position, which both remain applicable to public undertakings.

There are currently five cases regarding this provision pending in the Stockholm City Court and one in the Swedish Market Court which is the highest instance in competition law cases. So far only one case has been fully processed by the courts. None of the court cases involve the waste management sector.

5. Competition issues between public and private undertakings in the waste management sector

The SCA has for many years received complaints regarding activities carried out by public waste management undertakings. The complaints often concern cases where a public entity's pricing practice is questioned, either for being allegedly below cost or for being considered excessive.

Another typical case that gives rise to competition issues is where the public undertaking carries out activities under a legal state monopoly as well as activities that are subject to competition.

One problem that has been pointed out in the waste management sector is that municipalities have the possibility to use the local waste regulation and the waste tariff as an instrument for increased recycling of different categories of waste, some of which are collected competitively. A reduction in waste collection fees is quite often offered to those residents who choose to make use of municipal curbside collection services for the disposal of producer fractions. This puts at a disadvantage the local residents that source-separate their waste but leave it to a recycling station. It can also create competitive disadvantages for the private collection contractors which offer services for the disposal of producer waste to property owners because they find it difficult to compete with the municipality's offer.

¹⁰ The Swedish Competition Act (SFS 2008:579), Ch. 3 §27.

It has also been pointed out that municipal undertakings gain a competitive advantage over private operators in that they are often involved in the development of a municipal waste management plan and the waste management system.

During the past few years the SCA has investigated three cases in the waste management sector which highlight some of the competition issues that can arise when public and private undertakings compete in the waste management sector. These three cases are discussed in further detail in the following section.

5.1 *Nordvästra Skånes Renhållnings Aktiebolag (NSR)*

The SCA received a complaint regarding NSR, a municipal waste management company, from the Swedish Recycling Industries' Association. The Association questioned several different business conducts practiced by NSR. We will focus on one of these.

The complaint alleged that NSR had a department for market services whose costs were covered by the household waste tariffs rather than the price in the commercial waste market where the costs were incurred. This, it was argued, resulted in a cross-subsidy which was detrimental to competition.

The SCA investigated these claims. Contacts with NSR clarified the costs of the market service department were distributed according to NSR's overall turnover, of which about two-thirds was related to household waste and the remaining one-third to commercial waste. NSR also confirmed the majority of work conducted by the market service department was directed towards commercial waste, in other words that the department's costs could be considered to be incurred primarily in the commercial waste market.

Such a situation gives rise to cross-subsidization, as costs incurred in the competitive market are covered by household waste tariffs, which is a monopolized service and subject to a mandatory fee for inhabitants. The analysis by the SCA considered whether this allocation of cost had the potential to distort competition. The SCA's primary concerns were that the shifting of costs from the competitive to the monopolized market could result in below cost pricing in the competitive market, resulting in predatory pricing. In this instance the investigation did not lead the SCA to believe this was the case and it discontinued its investigation concerning the market service department.

The NSR case, however, exemplifies one possible concern where public undertakings operate in both competitive and monopolized markets. As this case showed, undertakings might shift costs between the competitive and monopolized parts of their businesses. These shifts can potentially be sizeable and give rise to adverse situations where costs incurred in the competitive market are covered by increased prices in a monopolized market. This can distort competition in the competitive market and give rise to below cost pricing by the public entity in the competitive market.

5.2 *Norra Åsbo renhållnings AB (Nårab)*

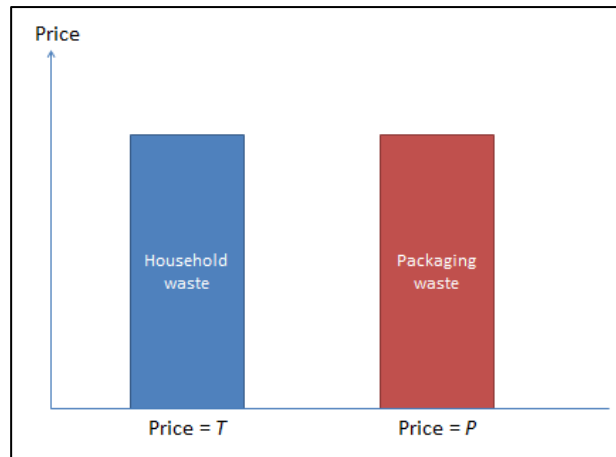
Nårab is a municipal waste management company in the south of Sweden. A private contractor complained that Nårab was using a rebate scheme which hindered competitors from offering curbside collection of packaging waste to apartment buildings.

The SCA investigated the rebate scheme operated by Nårab. The scheme allowed for two different tariffs for household waste dependent on whether households were source-separating newspaper and glass packaging. For households which did not source-separate these fractions the household waste tariff was increased by around 30 per cent. From the investigation the SCA found that in order to be eligible for the lower price on household waste the households were in fact obliged to hold a curbside collection contract regarding newspapers and glass packaging with Nårab in order for Nårab to consider the household waste to be source-separated. The lower tariff was thus conditional on households contracting with Nårab for curbside collection of packaging waste.

This setup resulted in a lowering of the effective price of curbside collection of producer waste offered by N rab as the rebate applied to the household waste fraction, in which N rab held a monopoly position. N rab could thus leverage this monopoly position to lower its effective price in the producer waste market.

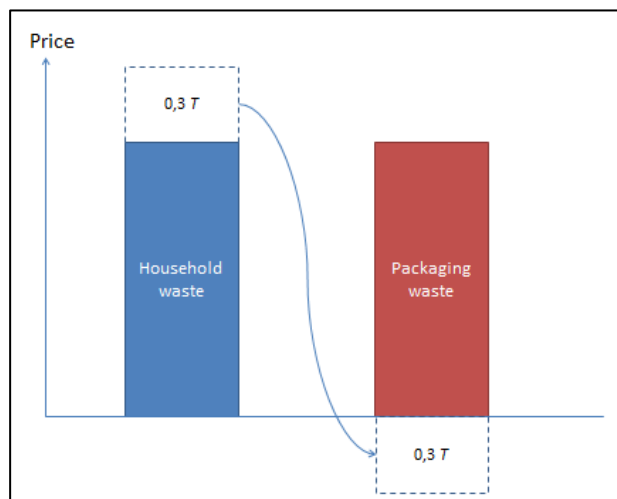
The effect is illustrated in the figures 1-3 below.

Figure 1. N rab's offer

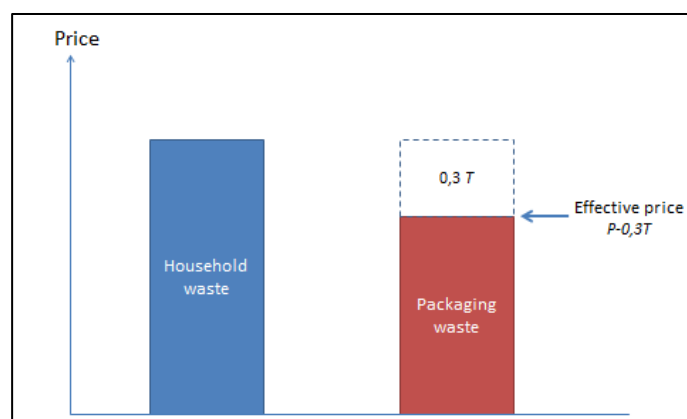


In this example we assume that the price of household waste and packaging waste is the same. In reality this will most often not be the case, rather it will be that household waste is more expensive.

Figure 2. Rebate effect



The rebate effect means that the price of the household waste fraction is increased by around 30-35 % when someone other than N rab collects the packaging waste. This is something that a competitor to N rab in the market for curbside collection of packaging waste will have to take into account for their offer to the customer to be comparable to N rab's offer.

Figure 3. N rab's effective price

The rebate leads to an effective price which is lower than N rab's listed price for curbside collection of packaging waste. The effective price is the price that an as-efficient competitor would have to offer in order to be competitive.

The SCA's calculations showed that the drop in effective price was substantial. This was due to the fact that household waste as a rule was far more expensive than packaging waste. In one instance the SCA found that the effective price was some 300 % below the listed price, i.e. that a competitor to N rab would have to *pay* a household twice what N rab charged in order to be competitive. The SCA's overall conclusion was that the rebate scheme operated by N rab led to effective prices which were substantially below costs.

During the investigation N rab elected to broaden the scope of those eligible for the rebate on household waste to also include those households which chose a private contractor for curbside collection of packaging waste. This broader interpretation was stated on N rab's public information webpage and shortly afterwards was included into the local waste regulation framework. This put an end to the SCA's competition concerns over the rebate scheme and the complainant also confirmed that the issue from their perspective was at an end. Since the competition issue was resolved the investigation was discontinued.

This case highlights the issues that can arise when a public undertaking leverages a monopoly position in one market into another, competitive, market segment. In this case, N rab claimed the rebate was used to incentivize households to source separate but as the SCA's investigation showed this also led to exclusionary effects by lowering the effective price of N rab's competitively supplied curbside collection of packaging waste.

5.3 * stra G inge Renh llningsaktiebolag ( grab)*

 grab, a municipal waste management undertaking, has a legal monopoly to collect household waste. In addition,  grab also offers curbside collection of packaging and newspapers to single houses.

The complainant in this case held that  grab offered single households curbside collection of packaging and newspapers together with the collection of household waste without any additional cost. The SCA's investigation aimed to clarify whether such a conduct was contrary to the new provision in the Swedish Competition Act regarding anticompetitive sales activities carried out by public entities.¹¹

A system where the cost of collecting producer waste is included in the tariff set for the collection of household waste can potentially lead to distortions of competition in the market for collecting producer waste.

¹¹ The Swedish Competition Act, Ch. 3 § 27.

When public entities act on a market where it has a legal monopoly as well as on a competitive market they must separate the costs incurred to avoid the risk of cross-subsidization from the monopoly to the competitive market. This is necessary for competition conditions between public and private undertakings to be as similar and neutral as possible.

In its investigation the SCA observed that public waste management undertakings offer curbside collection of packaging and newspapers to some 40,000 individual houses in Sweden. Furthermore, private undertakings only rarely offer the same service to individual households and in many municipalities this service is not offered at all. This situation can be contrasted against apartment buildings, where more than a million households use a curbside collection service. Through contacts with market actors the SCA found that one reason for the limited interest from the private undertakings to offer curbside collection to single houses was due to the low reimbursement from the PRO. Curbside collection of packaging and newspapers from single houses is also relatively expensive compared to collection from apartment buildings. A further reason for the low interest of the private undertakings was that parties were awaiting the outcome of the Government inquiry regarding the waste management sector. Private undertakings also expressed doubts as to the willingness of single houses to pay for this kind of service. Based on the fact that the SCA found that there was no market where competition could be inhibited the SCA terminated its investigation.

This case is an example of how cross-subsidization between monopolized and competitive segments can potentially give rise to competition concerns. Even though the SCA did not find anticompetitive effects in this instance the case shows the risk of possible anticompetitive effects when public undertakings do not properly separate the costs resulting from competitive and monopolized activities.

6. Final Remarks

The SCA's investigations in the waste management sector during the past few years have shown a number of different ways as to how public undertakings' activities might lead to competition concerns. In the three cases discussed the municipal waste management company has been active in both competitive and monopoly markets. In all three cases there was a concern that the municipal company in one way or another utilized the monopoly market in order to gain an advantage in the competitive market.

In the NSR case the SCA uncovered that some of the costs resulting from NSR's commercial activities were shifted to the monopoly market and covered by the mandatory fees for household waste. However, the SCA did not find that the magnitude of this cost shift was substantial enough to also result in below cost pricing by NSR in the commercial waste market.

In the N rab case N rab used a rebate on household waste which was conditional on households buying curbside collection of packaging waste from N rab. This resulted in substantial reductions in N rab's effective price of packaging waste and the effective price was found to be below costs.

In the  grab case the SCA saw an instance where costs in the competitive and monopoly markets were not separated by the municipal waste management company. This led to costs for both packaging waste, which is collected competitively, and household waste being covered by the household waste fee and thus resulted in cross-subsidization from the monopoly market to the competitive market. However since the SCA found that competition was not inhibited due to the low interest from private undertakings in this market the investigation was terminated.

Public waste management undertakings obviously have to be careful and attentive when they operate in both competitive and monopolized markets. Sweden's national regulation on anti-competitive sales activities by public entities reinforces this point as being highly relevant in the waste management sector in Sweden. At the intersection between monopoly and competitive markets there are several different ways as to how a failure by public waste management undertakings to take full consideration of their operation and conduct can lead to potentially anticompetitive effects.

CHINESE TAIPEI

This paper will illustrate the developments of waste management in Chinese Taipei and certain competition issues as well as cases investigated by the Fair Trade Commission (FTC). To prepare this paper, the FTC consulted with the Environmental Protection Administration (EPA) to provide relevant information.

1. Definition of municipal solid waste (MSW) and the development of waste management policy in Chinese Taipei

The term “waste” is defined as “general waste” and “industrial waste” under Article 2 of the “Waste Disposal Act.” “General waste” is “solid or liquid waste, including garbage, excrement and urine, and animal carcasses, from households or other non-industrial sources that is sufficient to pollute environmental sanitation.” The definition of general waste is in line with that of the internationally-used term, “municipal solid waste (MSW).” This paper addresses the developments and achievements of the general waste management policy in Chinese Taipei.

Chinese Taipei implemented the “Municipal Waste Disposal Program” in 1984 at which mainly focused on landfills, and then a “Garbage Disposal Program” that the disposal of waste started to be mainly processed by incinerators, supplemented by landfills. Later, in 1998, the government further promoted the “Four in One Resource Recycling Program” to encourage recycling and expand its coverage through recycling rewards and market mechanisms. For the sake of achieving the goal of “zero waste,” the EPA adopted a “mandatory waste sorting program” in 2005 to require that residents in certain counties and cities categorize their waste into recyclable items, food waste and garbage before handing them to the waste collectors. The mandatory waste sorting program has been fully implemented since 2006.

As result of the “waste minimization and resource recovery” waste management policy, the volume of waste clearance was reduced from 1.143 kg per capita per day in 1997 to 0.397 kg in 2012 and the recycling rate increased from 42.96% in 2007 to 65.16% in 2012, an increase of 22.2%. At the end of 2012, the treatment rate of waste¹ reached 99.99%.

2. Collection and disposal of general waste

Pursuant to Article 5 of the “Waste Disposal Act”, the environmental protection unit of municipalities, cities or counties shall be responsible for the disposal of general waste. However, the law does not prohibit public or private waste disposal organizations from being commissioned to dispose of

¹ “Treatment of waste” refers to the treatment of recyclable resources or proper disposal of garbage within a field (factory) with anti-fouling treatment facilities. “The treatment rate of waste” = (waste volume of incineration + landfill + resource recycling waste + recycling of food waste) / volume of waste generated x 100%.

waste². Nonetheless, according to the statistics compiled by the enforcement agencies of EPA, general waste is mainly collected and disposed of by the environmental protection units (cleaning teams)³.

The approaches to collection of general waste clearance and disposal fee are prescribed under to the “General Waste Disposal Fee Collection Rules” enacted by the EPA. The fee can be collected based on either the tap water consumption, per bag, or by household at a fixed rate. Each local government may consider management costs, labor costs, restoration costs, and maintenance costs to calculate the fee rates and choose one of the three collection methods. Some local governments adopt the method of per-bag fee collection to increase the economic incentives by selling specific garbage bags to the public at different prices according to the sizes of the bags for motivating the public to take the initiative to sort and reduce the volume of their waste.

3. Waste Transfer Stations

The purpose of the establishment of waste transfer stations is to reduce the wear and tear of collector vehicles and save money on labor and relevant costs by shortening the waste collection routes in the remote service areas. Current transfer stations for general waste in Chinese Taipei are established and managed by the government. The operational expenditure is budgeted pursuant to the Budget Act and relevant rules which will be reviewed and approved by local councils. In another word, the determination of price or the treatment discrimination shall not be an issue here.

4. Landfills

As mentioned above, the government adopted the policy in 1991 for waste to “mainly be processed by incinerators, supplemented by landfills.” At present, 95% of the waste is incinerated. The number of public waste landfills currently in operation has dropped from 317 to 67.

The landfill sites in Chinese Taipei can be divided into public and private sites. Public landfill sites mainly deal with general waste while private ones deal with industrial waste. Where any person has the need to operate a landfill site, the person may apply for a permit from the local government and start collecting waste for the landfill upon approval. Public landfill sites, on the other hand, are subject to the “The Administrative Rules for Public Waste Landfill Sites” enacted by the EPA. It provides that public landfill sites shall not handle hazardous waste, combustible waste, recyclable waste generated by households or businesses, food waste and other types of waste not suitable for landfills as designated by the competent authority.

General waste shall be transported to public landfill sites for burial. The public landfill sites are operated by local governments and used for disposal for waste collected by local cleaning teams at the expense of waste clearance and treatment fees. When a public landfill site has excess capacity within the area of its responsibility, it may receive general waste or industrial waste from other areas and relevant fee shall be determined by the local governments according to its waste disposal cost. Private landfill sites mostly deal with industrial waste and the fees are determined by the operators.

² Currently, more than 3,000 enterprises have been granted permits pursuant to the “Permit Management Regulations for Public or Private Waste Clearance and Disposal Organizations,” which can be further categorized into Grades A, B and C based on the waste disposal capacity of each enterprise.

³ Taking May 2013 as an example, the general waste generated was 269,367 mt, of which 260,749 mt was disposed of and transported by the environmental protection units, while the rest was processed by public or private organizations.

5. Incineration

There are currently 24 waste-to-energy incinerators in operation in Chinese Taipei, of which 5 are publicly-owned and publicly-operated, 16 are publicly-owned and privately-operated, 2 are BOTs (Build-Operate-Transfer), and 1 is a BOO (Build-Own-Operate).

Public waste incinerators mainly process waste collected by the local cleaning teams and the operating costs are covered by the waste disposal fees collected. When an incinerator has excess capacity within the area of its responsibility, general waste or general industrial waste from other areas may be transported to such an incinerator and relevant fee shall be determined by the local government according to its waste disposal cost.

Privately-operated incinerators are commissioned to process waste delivered by local governments and the price will be decided by the contract between the private incinerator and the local governments. Where “publicly-owned and privately-operated” incinerators receive industrial waste collected by private waste collection companies in other areas, the fees can be set either (1) at a rate set by the local government, or (2) at a rate set by the operators of the incinerators. For BOT and BOO, the rate shall be set by the operators.

Since some counties/cities don't have incinerators, for proper waste disposal, general waste collected by the cleaning teams of the local governments need to rely on a regional cooperation mechanism among the local governments. There is no competition issue between incinerators. However, in terms of industrial waste collected by private waste collection businesses, the nearby private incinerator enterprises (including “publicly-owned and privately-operated,” BOT, and BOO) may compete with each other. The rates may vary depending on the volume and types of waste (combustible or non-combustible, volume of ashes, etc.). Incinerator enterprises will also offer different prices to attract private waste collection businesses to transport industrial waste to their incinerators. Until now, the FTC has not yet discovered any case arising under the competition laws.

The environmental protection laws of Chinese Taipei do not prohibit any kind of area from establishing incinerators. The establishment, expansion or capacity increment of incinerators for general waste shall be subject to environmental impact assessments in accordance with Article 28 of the “Standards for Determining Specific Items and Scope of Environmental Impact Assessments for Development Activities” pursuant to Article 5, Paragraph 2 of the Environmental Impact Assessment Act.

6. Recycling

Since 1998 Chinese Taipei has been promoting the “Four in One Resource Recycling Program” which combines community residents, recycling businesses, local governments (cleaning teams) and recycling funds to fully implement the recycling and reuse plan. Moreover, pursuant to Article 15 of the Waste Disposal Act⁴, the statutory businesses (manufacturers or importers of articles and containers) shall pay

⁴ Article 15 of the Waste Disposal Act provides that, “For articles and the packaging and containers thereof that, after consumption or use, are sufficient to produce general waste possessing one of the following characteristics and cause concern of serious pollution to the environment, the manufacturer or importer of the articles and the packaging and containers thereof at issue or the manufacturer or importer of the raw materials shall bear responsibility for recycling, clearance and disposal and the vendor shall bear responsibility for recycling, clearance work. (1) difficult to clear or dispose of; (2) contains a component that does not readily decompose over a long period; (3) contains a component that is a hazardous substance; and (4) is valuable for recycling and reuse. The central competent authority shall officially announce the scopes for the articles and the packaging and containers thereof and the enterprises responsible for recycling, clearance and disposal in the foregoing paragraph.”

recycling, clearance and disposal fees to the “Resource Recycling Management Fund” operated by a “Trust Fund Management Committee (FMC) for the Resource Recycling Management Fund” under EPA. The FMC is in charge of the determination of recyclable items and subsidy rates, audit and certification, and payment of subsidies as well as allocation of funds to recycling businesses of different materials. The purpose of the fund and the FMC is to provide economic incentives to fully accelerate the recycling of announced recyclable items. There are currently 13 categories with 33 items announced to be recyclable (a total of 7 funds are established for general waste articles and containers: waste pesticides containers, waste cars/motorcycles/scooters, waste tires, waste lead-acid accumulators, waste electrical appliances, and waste computer appliances).

7. Cases investigated by the FTC in the waste disposal market

7.1 Cartels in waste electrical appliances disposal and waste information products disposal

The FTC received a complaint phone call alleging that waste electrical appliances disposal enterprises and waste computer appliances disposal enterprises had jointly established an “allocation and distribution center.” Prior to the establishment of this center, the waste disposal enterprises offered different purchasing prices for waste items, while after the center was established, the waste disposal enterprises convened periodic meetings to jointly decide on the purchasing prices for waste electrical appliances and waste computer appliances. The FTC therefore initiated an ex officio investigation in 2010.

Upon the investigation, the FTC discovered that there were 12 waste electrical appliances disposal enterprises registered with the EPA that qualified for subsidies. The enterprises in question were supposed to independently recycle and purchase waste electrical appliances from recycling businesses for disassembly and apply for subsidies with the EPA in accordance with the statutory procedures. They compete for trading opportunities through their own prices and capacity and apply for subsidies from the EPA on the basis of approved disposal volume. In this regard, they should have been deemed competitors in the same market.

The said 12 enterprises respectively entered into an “Agreement on Joint Recycling and Disposal of Waste Electrical Appliances” at different times between March 2001 and October 2011. The agreement provided for the allocation ratio, in-stock inventory, certification of recycled volume, operating fund for joint recycling, organizational establishment, performance bond, and default penalty. All of the enterprises were jointly allocated a certain volume of waste for recycling pursuant to the agreed allocation ratio. Each enterprise would apply for subsidies from the EPA based on such recycled volume in accordance with the required procedure. These enterprises also stipulated a “Management Rules Regarding Joint Recycling Agreement” which set the “Signatory Board” to serve as the highest decision-making organization and, under which, a management team and an operation center were also established. The management rules also governed specific recycling prices, in-stock inventory, daily reports, allocation and distribution operations, settlement on income and expenditure, designated areas, an operating fund for joint recycling and penalties for “driving up prices,” “concealing stock,” or “transporting across designated areas.” The action of the enterprises was witnessed by an attorney and a cashier’s check or promissory note of three million dollars was provided as a performance bond.

The parties to the agreement took turns to convene the waste electrical appliances “management team” meeting every month with meeting minutes prepared accordingly. The parties would discuss the international market prices, negotiate the prices among the enterprises and decide on the final prices at such meetings. In addition, the representative of each enterprise or the convenor by rotation would attend the Signatory Board meeting which was the ultimate decision-making organization in terms of the joint recycling and disposal matters. The meeting was convened every three months in general. At such meetings, the parties would discuss major events, such as the evaluation of new participating enterprises and the allocation ratio, exchange market information, hold receptions among enterprises, discuss any

violations by other enterprises, and so on. If the agenda involved both policy and execution issues, the meeting would be convened jointly in the name of the “Signatory Board” and “Management Team.”

The FTC concluded that the 12 enterprises evenly allocate waste electrical appliances through the management team and operation center in spite of the differences in the capital expenditure, cost structure and management and marketing ability of each disposal enterprise. In order to meet the allocation ratio, enterprises with better recycling ability would have to transfer excess recyclable waste to enterprises with less recycled volume through the operation center. It caused the capacity utilization rate of most enterprises to remain under the standard, and resulted in an erroneous allocation of resources, rigid market prices, and severe damage to the competition. Such action of the enterprises was in violation of the prohibitive rule applicable to concerted actions under Article 14, Paragraph 1 of the FTA and the 12 enterprises were fined a total of 121.9 million NT dollars, ranging from 650,000 to 25 million NT dollars respectively, on March 2, 2012. The enterprises later filed for administrative appeal upon the decision. The Petitions and Appeals Committee determined that the FTC failed to expressly describe the grounds to justify the amount of the administrative fine and revoked the original sanction. The FTC re-imposed the sanction on June 24, 2013. The enterprises were respectively fined amounts ranging from 200,000 NT dollars to 12.5 million NT dollars, or a total of 58 million NT dollars.

In addition, the FTC also discovered that 13 (12 of which were also waste electrical and electronic goods disposal enterprises) of the 16 waste computer appliances disposal enterprises that were registered with the EPA entered into an “Agreement on Joint Recycling and Disposal of Waste Computer Appliances” at different times between July 2008 and August 2009 and stipulated a “Management Rules Regarding Joint Recycling Agreement.” The contents of such documents were highly similar to those signed and stipulated by the waste electrical appliances enterprises mentioned above. The signing enterprises also remitted a check or promissory note of two million NT dollars as a performance bond to ensure that the parties to the agreement would fully perform their obligations under the agreement. The FTC found that these 13 waste computer appliances disposal enterprises jointly decided the price of waste information products and disposal volume as well as trading counterparts through the agreement in violation of the prohibitive rule applicable to concerted actions under Article 14, Paragraph 1 of the Fair Trade Act. These enterprises were respectively fined amounts ranging from 200,000 NT dollars to 2.4 million NT dollars, or a total of 18.1 million NT dollars in administrative fines.

7.2 *Medical waste*

The FTC also dealt with three complaints alleging that certain medical waste (infectious medical waste) disposal enterprises improperly charged excessive fees. During the FTC investigation, the FTC firstly reviewed whether the enterprises fell under the definition of monopolistic enterprises set forth in Article 5 of the FTA before conducting further investigation on whether the enterprises abused their monopolistic power as set forth in Article 10, Subparagraph 2 of the FTA, i.e. to improperly set, maintain or change the price for goods or the remuneration for services. In addition, pursuant to the Waste Disposal Act, although waste clearance and disposal agencies must receive approved from the competent authority before they can be established and put in operation, the operating areas are, however, not restricted. Hospitals may directly contract a legitimate clearance and disposal agency to clear infectious medical waste. Upon reviewing the market shares and the total sales amount for the preceding fiscal year of the relevant enterprises, the FTC did not find that any enterprises in these three cases fit the definition of monopolistic enterprises under Article 5 of the FTA. The FTC further reviewed the competition status of the market and did not find that any of the enterprises referred to in the complaints had “impeded the ability of others to compete” either. The FTC did not discover any medical waste disposal enterprise to be engaging in any unlawful action by abusing its monopolistic status.

TURKEY

1. Introduction

In the last decades, environmental regulations gain importance not only for the governments but also for the consumers. Environmental regulations call for solutions of environmental problems by assigning responsibilities to various actors in the society ranging from final consumers to firms and to the state. Starting from the early 90's, environmental regulations have become an important policy area for Turkey. Accordingly, many regulations have come into force to ensure successful waste management practices. This contribution aims to give an insight on the current situation in municipal solid waste (MSW) management in Turkey and Turkish Competition Authority's (The TCA) practice in the waste management sector.

2. Municipal Waste Management in Turkey

MSW collected in 2010 is 25 million tons and MSW per capita is 416 kg¹. According to Turkish Statistical Institute, 43,5 % of the MSW were dumped into dumpsites and 54,4 % is disposed in sanitary landfills, 0,8 % treated in compost facilities and 1,3 % disposed by other methods. Compared to 2008 data, MSW dumped in dumpsites decreased by 13,2% and MSW treated in disposal and recovery facilities increased by 25,6 %.²

For the management of MSW, the Metropolitan Municipality Law no. 5216 (dated 10.7.2004) and the Municipality Law no. 5393 (dated 3.7.2005) give the sole responsibility on the municipalities. Their responsibilities include collection, transportation, separation, recycling, disposal and storage of MSW. Regulations allow municipalities to assign other parties to carry out one or more of MSW management responsibilities. MSW management projects have been implemented by several municipalities and cooperation among neighboring municipalities have been realized since 2003.³

In 2008, Regulation on General Principles of Waste Management introduced regulated fees to be paid to the relevant municipality by subscribers who benefit from the waste management facilities of the municipality. Municipalities should be able to cover the expenditure of infrastructure services through the fees collected from households. Since 2008, municipalities have been preparing waste management plans which show how, when and in which way MSW will be treated. These plans should be approved by the Ministry of Environment and Urbanization (MEU) and the amount of approved waste management plans have reached 283 in 2011.⁴ In recent years mainly the metropolitan municipalities constructed their own waste management facilities and some of the municipalities contracted private undertakings to collect and treat MSW.

¹ Turkish Statistical Institute, <http://www.tuik.gov.tr/PreHaberBultenleri.do?id=10750>

² Turkish Statistical Institute, <http://www.tuik.gov.tr/PreHaberBultenleri.do?id=13134>

³ European Environment Agency, Municipal waste management in Turkey, s. 8.

⁴ Ibid, s.9.

Private enterprises have to get license from the MEU in order to operate in waste management sector. According to the MEU, the number of licensed collection, separation and recycling facilities is rapidly increasing. Number of licensed facilities has increased to 562 in 2012 compared to 28 in 2003.⁵ In 2012, 252 firms got license for non-hazardous waste collection and separation.

In terms of recycling of MSW, no accurate data is available, however it is known that the most frequent way of MSW disposal is by landfilling and the other methods like composting, incineration or recycling are not quite common.⁶ Recycling rates are very low and recycling of MSW is still a sort of green field which is open for development in Turkey. “By-Law on Control of Packaging Waste” which came into force in 2004 and was revised in 2011 aims to decrease the generation of packaging waste and also to increase the rate of recycled packaging waste. Recycling targets are determined by this by-law and authorized institutions and suppliers who are not member of an authorized institution are obliged to recycle the predetermined amount of packaging waste and document this to the MEU. There has been a dramatic increase in the amount of operators registered to the system since 2003 and the amount reached 15.192 registered operator in 2012.⁷ The Regulation on Incineration of Waste came into force in 2010 even though the incineration of solid waste has not been used commonly to dispose MSW.

3. The TCA’s Practice in Waste Management Sector

As stated above, the MEU is the responsible public agency for drafting and implementing environmental regulations. The waste management sector is still in development stage and cooperation among the MEU and the TCA is important for the development of an effective waste management sector. During the past few years the MEU Waste Management Directorate has asked for TCA’s opinion before a new environmental regulation came into force and the TCA’s opinions and concerns have been reflected to the relevant regulations. The regulations and the practices adopted by the MEU directly affect the market formation and competitive structure in waste management sector and the TCA’s involvement in the formation of regulation is considered as an important step towards an effective waste management sector. The list of the regulations the TCA opined is given below.

Name of the MEU Regulation

Date	Name of the MEU Regulation
2013	Draft Regulation on the Control of Electrical and Electronic Equipment Waste
2012	Draft Regulation on the Control of Waste Oil
2011	Draft Amendment on Regulation on Recovery of Non-Hazardous and Inert Waste
2010	Draft Amendment on Regulation on the Control of Packaging Waste
2009	Draft Regulation on End of Life Vehicles

Another dimension of environmental regulations that is in the scope of the TCA’s practice is authorized entities. Since environmental regulations are based on the producer responsibility principle, individual producers have collectively organized to determine the least costly ways to meet their responsibilities with regard to the waste management operations. The European Commission recognizes these organizations as “comprehensive systems” in which all concerned producers participate⁸.

⁵ Ibid, s. 6.

⁶ Turkish Courts of Accounts, Waste Management Report, 2010, s. 28.

⁷ European Environment Agency, Municipal Waste Management in Turkey, s. 6.

⁸ European Commission, “Concerning Issues of Competition in Waste Management Systems” DG Competition Paper 2005, p.6, <http://ec.europa.eu/competition/antitrust/others/waste.pdf>

Environmental regulations in Turkey are also based on the principle of producer responsibility. Accordingly, in various industries in Turkey, similar entities are formed and they are defined as “authorized bodies/entities”, under which the concerned producers pool and share their responsibilities with respect to the environmental regulations⁹.

Recently, in different sectors authorized entities are formed and applied for individual exemption from the application of Article 4 of the Act no. 4054 on the Protection of Competition (the Competition Act)¹⁰. Although the establishment of these organizations is based on the requirements of environmental regulations, competition authorities should be vigilant about the activities and decisions of the producer organizations. It is argued that these organizations may easily turn into platforms for anti-competitive conduct among the participating firms because they rely on the cooperation between producers, which are in fact competitors in the product market.

ÇEVKO and TURKÇEV are authorized entities in packaging waste management. There are also authorized entities in end of life tires management and waste electrical and electronic equipment management. To give an insight of the TCA’s approach towards authorized entities, Lasder decision of the TCA is elaborated.

4. Tire Industrialists Association (Lasder) Decision of the Competition Board¹¹

Lasder, the authorized entity in terms of collection and recovery of end of life tires, applied for an exemption for its end of life tires management plan. Lasder was founded by eight large tire manufacturers/importers and the total market share of the Lasder members was about 60% at the time of the decision. According to the Regulation on the Control of End of Life Tires, tire manufacturers have the responsibility of collecting a certain amount of end of life tires, delivering them to recovery facilities and documenting these activities to the MEU. Lasder’s main aim is to fulfill this responsibility on behalf of its members. According to the management plan, Lasder is to determine a fee to be collected from the new tire purchasers, make exclusive agreements with the collectors and limit their ability to sell end of life tires to recovery facilities. The TCA considered exclusivity arrangements and limiting collectors’ ability to sell the waste as restricting competition in the collection of end of tire markets. The fee which would be determined by the Lasder members and be part of the new tire price was another concern for the TCA since determination of the fee would increase the risk of collusion among Lasder members.

In general, collective waste management systems could be more efficient than individual systems due to high fixed costs and economies of scale. In Lasder case, dealing with end of life tires collectively instead of individually is regarded as an efficiency enhancing option since Lasder would prevent duplication of fixed costs. As Lasder was set up as a non-profit making organization, the cost reductions would be reflected to the fee collected from new tire purchasers. The environmental considerations were also taken into account to evaluate the benefit to consumers. In Turkey the number of end of life tires collected and recovered is far less than the amount targeted by the MEU in the relevant regulation. This is obviously detrimental for environment and for all consumers. The market for end of life tires has not developed yet and collective system like Lasder would help the development of an efficient market.

⁹ These organizations are called authorized entities since the relevant Ministry officially recognizes them as bodies performing duties related to waste management operations on behalf of their member producers. In fact, they are established and managed solely by private sector agents, mainly by producers.

¹⁰ Article 4 of the Act on Protecting Competition prohibits agreements and concerted practices or decisions of associations of undertakings which are by object or effect restricting competition.

¹¹ Competition Board Decision no 10-67/1422-538, 27.10.2010.

Lasder consists of eight tire manufacturer/exporter and there were 68 more manufacturer/exporter in the tire market at the time the decision was taken. Although the remaining manufacturers/exporters are small-scale undertakings, they still constitute about 40% of the tire market. Accordingly, they could be an alternative customer to collectors and alternative end of life tire supplier to the recovery facilities. Five years of exclusivity for the collectors is taken as necessary for the collectors to get enough return for their initial investments.

Considering the end of life tire fee, the TCA concluded that the amount to be charged from the new tire purchasers is about 0,6 to 0,7% the new tire price. Lasder specified that price or cost of new tires would not be shared between the members because the fee is calculated on the basis of end of life tires management costs. In addition, the fee would not be incorporated in the selling price of new tires and would be shown as a separate item in the invoice. The TCA decided that these points resolve the concerns about a possible collusion to increase new tire prices.

Taking account the above mentioned considerations, the TCA granted exemption to Lasder for a five year period. The exemption was granted for five years because the demand structure of end of life tires is expected to change and the market is expected to develop.

5. Conclusion

Although environmental regulations are rapidly harmonized in line with the necessities and market conditions, the ones for waste management sector have not completed its development. There is still place for development for waste markets and waste management services. During this process, the TCA's cooperation with the MEU, the responsible public agency for environmental regulations creates positive outcomes in terms of formation of regulations. Since the formation of collective systems is essential for development of efficient waste management, some restrictive trade practices such as exclusivity arrangements could be exempted even if the authorized entity has high market shares. The TCA adopts a non-interventionist approach towards authorized entities' practices in order not to impede the development of waste management markets.

UKRAINE

Scope of household waste is inherently a public (applies to everyone) and complex (associated with environmental, economic, political and social issues). With this in mind, today the effective implementation of government policy and regulation it depends on the activity of executive bodies and local authorities, as well - the level of justice and ecological culture of the population.

Annually generation of municipal solid waste (MSW) in Ukraine is about 13 million tonnes (52 million m³) being disposed to 6 thousand dumps and landfills, totaling more than 9 thousand hectares.

1. Definition of "waste"

Waste - any substances, materials and articles which generated in the production or consumption, as well as goods (products) that wholly or partially lost their consumer properties and have no further use for the place of their generation or identification of and from which the owner rid intends or should get rid of by recycling or removal (Law of Ukraine "On Waste").

Pursuant to the Decree of the President of Ukraine dated 12.03.2013 № 128 /2013 "On the National Action Plan for 2013 to implement the program of economic reforms in 2010 - 2014 " Prosperous Society, Competitive Economy, Effective State " bodies of the Antimonopoly Committee of Ukraine shall study the markets for handling solid waste including various collection, disposal, recycling and burial of solid waste.

In the implementation of the study involved 25 regional offices and regional Kyiv and Sevastopol City territorial offices of the Antimonopoly Committee of Ukraine.

2. Choosing the provider of waste management by competitive tender

Municipalities are responsible for ensuring MSW collection, removal and disposal (Article 30 of the Law of Ukraine "On Local Self-Government in Ukraine") and for choosing of housing and utility services provider under the Law of Ukraine "On Housing and Utility Services" in the procedure for providing housing and utility policy approved by the Cabinet of Ministries.

Hence, municipalities are exclusively authorized to choose MSW collection and removal provider on a competitive basis within boundaries of certain area ("On Local Self-Government in Ukraine").

All enterprises and organizations regardless of their ownership may participate in competitive tenders for waste management services within boundaries of certain area. (the Law of Ukraine "On Waste").

Municipalities choose provider of waste collection and disposal services by competitive tender (Resolution of the Cabinet of Ministers of Ukraine dated 16.11.2011 #1173 "On MSW management services")

Competitive tendering can involve economic entities authorized to handle solid waste. Number of bidders is not limited.

To succeed in tender the bidder shall:

- possess a sufficient number of equipped vehicles for collection and disposal of various household waste (solid, bulky, repair, liquid and dangerous waste) from households and enterprises within boundaries of a certain area;
- set low price of services (the lower is price, the more preferred is bidder);
- be fitted with qualified labour (including contractor proposals);
- be experienced in waste management in compliance with standards and regulations specified.

Bidder that satisfies all qualifying requirements and can provide high-quality service in sufficient quantity is considered to be chosen as winner. Preference is given to the bidder, who submitted to a competitive commission a project or approved development investment program (a program of substantial expenditures). It should include measures on solid waste collection, share of reused waste, share of secondary raw materials and share of buried waste. The provider entitled to operate during not less than 5 years.

If competitive tendering involves only one bidder, it chose as provider of waste management services within boundaries of certain area for 12 month.

Within a ten-day period tendering committee conclude contract with winner on waste management services within boundaries of certain area in conformity with provisions of Standard Contract.

Within a ten-day period after termination of a contract new tender shall be initiated.

Herewith, the economic entity succeeded in tender occupies monopoly (dominant) position within boundaries of certain area.

As for today, bodies of AMC performed research examining level of transparency while tendering by municipalities and detected problematic issues that prevent competition and potentially competitive market.

The available data shows great number (more than 50%) of violations during tender procedures on providing household waste disposal services. Tenders are not initiated or initiated with violations of current legislation of Ukraine (Resolution of the Cabinet of Ministries of Ukraine dated 16.11.2011 #1173), such as:

- unjustifiable rejecting the application;
- absence of bids after tendering;
- omitting quantification of criterion of estimation of bids in tender documentations;
- issuing but not initiating the tender in terms of absence of economic entities;
- rate calculations for household waste disposal services, without findings of the State Inspection on Cost Control;
- prescription of rates with increased level of profitability for incumbents (state-funded entities) and other consumers;
- empowering communal enterprises to provide MSW disposal without initiating a tender which can result in restriction of competition.

Hence, the territorial offices established that activities of municipalities which involved failure in initiating tenders for providing MSW disposal services, initiating tenders with violations of legislative requirements and choosing only municipal (communal) entities as service provider are considered as anticompetitive actions under Article 15 of the Law of Ukraine “On protection of Economic Competition” in the form of actions or inactivity which resulted or can result in the prevention, elimination, restriction or distortion of competition.

The available data show that bodies of AMCU issued 102 recommendations for municipalities, initiated 99 proceeding on violation of the laws of protection of economic competition and took 19 decisions on cases of violations of the laws of protection of economic competition.

During research Ministry for Regional Development, Construction, Housing and Communal Services of Ukraine, Ministry of Environment and Mineral Resources of Ukraine, National Commission on Regulation of Communal Services, State Inspection on Cost Control, State Environmental Expertise of Ukraine, public health watchdog, governmental enterprise “Institute of scientific research and technological construction of municipal services” and other authorities submitted information for AMCU.

Regulating instruments in the area of household waste management are “On Waste”, “On Protection of Environment”, “On Maintenance of Sanitary Welfare”, “On housing and utility services” and other authorizing municipalities and bodies of administrative government in area of MSW management.

The following issues were arisen: competitive situation in area of waste management ; environmental law enforcement in area of waste management, abidance by sanitary and hygienic norms in processes of MSW generation, removal, storage, recycling, utilization, disposal or burial; establishment of state policy in area of waste treatment (including rate setting for MSW removing, recycling and disposing). Furthermore, main worldwide and Ukrainian trends in technical and technological developments in concerned area were highlighted.

Considering that the complex research of MSW market was performed, the AMCU required information on competition situation in area of MSW from the Heads of regional administrations, Kyiv and Sevastopol municipal administrations.

At the time, 25 regional administrations Kyiv and Sevastopol municipal administrations have submitted information. Provided data show total number of households and number of programs on waste management; systems of sanitary and cleaning services, average rate size, which include operations on MSW removal, recycling and disposal for different types of consumers in different regions of Ukraine; means of entrepreneurial activity promotion in area of MSW treatment; number of economic entities operating on relevant markets; functioning of transporters coordination centers; construction of garbage recycling plants and landfills etc.

Pursuant to submitted information, the majority of economic entities operating in the waste management market are municipal (communal) enterprises.

3. The provisional results of research established the following:

3.1 *On separate collection of household waste*

As of 01.07.2013 only several localities in Ukraine use separate collection of household waste.

In February 2010 the Law of Ukraine ‘On waste’ was amended to establish binding obligations on separate waste collection.

Under the law owners, tenants and occupants of households and land properties are obliged to contract with service providers of garbage disposal and to pay for separate MSW collection and other services. Moreover, the law provides placing of skips and litterbins for this purpose. All citizens are obliged to participate in processes of separate collection of household waste, by means of prescribing higher rates.

In perspective multicolored skips for collection of various MSW components are supposed to be established, such as skips for bulky waste (storage hoppers) and repair waste.

The desire to reduce the nuisance, health and environmental consequences of waste gives rise to separate collection of zoogenic and phytogenic waste, especially in the areas of households.

Bulky waste and repair waste should be collected separately from other kinds of waste.

Hazardous waste should be collected separately from other kinds of waste. As follows, it should be separated at the stage of collecting or sorting waste and passed to duly authorized enterprises (that have a license for working with hazard waste).

Landfill-hosting municipalities grant the power for collection and disposal of household waste within boundaries of certain area to legal entity with specially equipped transport vehicles.

The burial of household waste is allowed only on special equipped landfills/dumping places.

It is prohibited to design, construct and exploit landfills of household waste without establishing ground water safety protection systems and reclaiming/detoxifying of biogas and filtered materials.

It is prohibited to dispose waste, among other household waste in subterraneous (underground) horizons, within boundaries of cities and other inhabited locations, in the areas of nature reserved funds, protected environmental zones and areas of recreational, health-improvement, historical and cultural importance.

Heat treatment (incineration) of household waste is allowed only within limits of specially equipped objects.

Incineration of household waste is allowed only for the purposes heat and/or electrical energy production that must be used for energy needs

Owners, tenants and occupants of households and land properties contract legal entity duly authorized as disposal services provider, pay for these services and promote separate collection of household waste.

Hence, the study highlighted the major problem that is poor infrastructure in the industry of collection, disposal and recycling of household waste.

Companies need to route transport vehicle twice to collect waste from two different dumpsters. Yet, just a few companies have technical and financial ability sufficient for routing transport vehicle twice. This problem couldn't be solved in short terms. It is necessary to develop infrastructure using the funds of municipalities, including supply of sufficient number of lidded pedal-powered skips with restricted access to valuable components, conduct long-scale informational campaigns and sensitization of consumers on issues of MSW separate collection services, its ecological and social effects.

Non-fulfillment of provisions of the laws of Ukraine "On housing and utility services" and "On waste" in terms of underfunding the promotion and allowance of objects, establishing economically

justified rates and standards of service supply and provide reasonable control of territorial distribution and usage of landfills and dumps lead to such situation.. For today, introduction of new methods and technologies is moving slowly.

3.2 *On waste burning and transfer facilities*

While the study for the Committee found the following.

Only 21 waste sorting facilities operate in the territory of Ukraine: one in each Marganets, Nikopol, Zaporizhzhia, Sevastopol, Chernivtsy, Chervonograd (Lvivska oblast), Bucha, Bila Tserkva, Pogreby (Kyivska oblast), Lugansk, Rovenki, Starobilsk in Lugansk region; two - in Dnipropetrovs'k and six such - in Kiev. Cement factory in Shpativ (Rivnenska oblast) uses AFR (Alternative Fuel from Residues).

Moreover, 23 new disposal waste complexes and waste transfer station (in Makeevka, Donetsk oblast) are supposed to be constructed.

Household waste is recovered in waste burning plant in Kiev, Lubotyn (Kharkivska oblast) and in moving waste burning unit.

New methods and technologies of collecting household waste afforded to recycle and recover near 6, 2 % of household waste. Near 2, 3% was burned in waste burning facilities and units and 3, 9% recycled in commodity points and disposal facilities.

For providing high quality services on disposal of household waste it is supposed to purchase near 34 thousands of skips for household waste (where 14 thousands of skips designed to separate collecting of household waste) and more than 310 specially equipped transport vehicles. Skips and waste trucks are going to be purchased out of the funds of local budgets, environmental protection funds and private enterprises (information is submitted by Ministry of Regional Development, Construction and Housing and Communal Services).

Nevertheless, MSW is being extremely slowly recycled for secondary raw materials. To conclude, the progressing MSW generation doesn't correspond to the methods of its preventing (along with its utilization, neutralization and disposal). Such situation may lead not only to deepening of environmental crisis, but to escalation of social and economic situation in common.

The focus of Ukraine is to increase the share of recycled and recovered household waste and to downsize share of buried MHW.

Area of household waste management needs UAH 160 billion investments to:

- promote separate collection of MSW;
- restore landfills;
- construct 60 waste sorting facilities;
- construct 30 waste recycling facilities (biological and mechanical recycling);
- construct 30 waste disposal (utilization) facilities.

3.3 *On providers of MSW burial services (landfills)*

State Inspection on Cost Control is responsible for providing findings on planned and economically justified cost calculations on waste disposal services Pursuant to provision 41 of Procedure for MSW disposal services approved by Resolution of the Cabinet of Ministries of Ukraine dated 26.07.2010.

Hence, the law of Ukraine “Concerning the Introduction of Amendments of Certain Legislative Acts of Ukraine on improving mechanism of legal regulation and for greater responsibility in area of waste management” that entered into force on 04.11.2012 amended the Law of Ukraine “On waste”. This law ranks for handling waste services:

- disposal waste services (collecting, storing and transporting);
- recycling waste services (waste treatment);
- burial waste services.

Under the law of Ukraine “On state regulation in area of communal services” waste burial services are included in adjacent markets while recycling (waste treatment) services in natural monopolies.

This Law empowered National Commission on Regulation of Communal Services on regulation in area of waste recycling and burial (from 04.11.2012).

Though the law of Ukraine “Concerning the Licensing of Certain Types of Economic Activity” yet hasn’t been amended, so in practice National Commission on Regulation of Communal Services doesn’t prescribe rates for providers operating in waste burial and recycling markets.

Moreover, according with information submitted to the Committee, State Inspection on Cost Control refuses to provide findings about planned and economically justified cost calculations on providing waste services in regard of specifying waste services.

Therefore, existing regulatory inconsistencies lead to ignorance of rates by relevant authorities. It may lead to setting independent rates by economic entities operating on markets for handling solid waste.

As for today, most of landfills are in communal ownership and provide either burial or disposal services.

It is allowed to accept household waste (except household liquid waste and household hazardous waste) from households, administrative and public institutions and organizations, commercial enterprises and catering facilities, cultural and art institutions, educational and health care settings and other entities, institutions and organizations regardless of their ownership, street, park and garden sweepings, crashed construction waste and industrial waste of III and VI categories (classes) in conformity with sanitary norms, refuse burnout from waste burn plants.

Landfills that were accepted to the services must have a passport (an authorization document) of disposal sites in conformity with the Procedure of maintenance of register of disposal sites, approved by the Resolution of the Cabinet of Ministries of Ukraine dated 03.08.98 # 1216. Yet, AMCU study stated that vast majority of landfills function without passports (authorization documents) because the operating procedure is rather complicated.

3.4 *On rates for MHW management services*

Municipalities are responsible for adjusting rates for MHW management services under Articles 14 and 31 of the law of Ukraine “On Housing and Utility Services”.

Service providers make economically justified cost calculations on providing the waste management services and bring them for approval of municipalities in conformity with legislation.

Procedure of rates adjustment for disposal household waste services was approved by Resolution of Cabinet of Ministers of Ukraine dated 26.07.2006 #1010 “On approval of Procedure of establishment rates for disposal household waste services”.

Municipalities charge for waste disposal services rates in the amount of economically justified cost for its providing. In the case of adjusting rates for service lower than costs for its providing, municipalities shall compensate the difference between rate size and economically justified costs for providing such services from the local budget.

Pursuant to Article 13 of the law of Ukraine “On Housing and Utility Services” waste disposal services is supposed to be provided to customers as a separate communal service or in complex with services of keeping houses, buildings and house territories.

Though, it should be mentioned that issue of rate adjustment for housing and utility services always has social and public reaction (feedback). Including waste disposal services within services of keeping houses, buildings and house territories complicated its reduction to economically justified costs on providing such services. For example, when fuel costs grow, municipalities have to readjust both rate for waste disposal services and rate for services of keeping houses, buildings and house territories.

Under Decree of State Committee of Ukraine on Housing and Utility Issues dated 25.04.2005 #60 “On approval the Procedure of choosing the provider for housing and utility services for households” it is supposed that in case of removing waste management services from among services of keeping houses, buildings and house territories, service provider shall be chosen by municipalities or their executive bodies.

Thereby, this Procedure has authorized municipalities to remove waste management services from among rent for services of keeping houses, buildings and house territories (housing rent) and to establish separate communal service.

This measures will afford to resolve issues of air pollution, noise load and to prevent providing the same services by few companies: when first removal truck provide services for housing space, second for store and third for public catering.

MSW disposal services include services for handling waste (collecting, storing, removing, recycling, utilization, disposal and burial) provided in inhabited locations in conformity with rules of public services and amenities under article 1 of Procedure of adjusting rates for household waste disposal approved by Resolution of Cabinet of Ministers of Ukraine dated 26.07.2006 #1010.

According to Article 8 of the Procedure rates are to be adjusted separately for each household waste treatment with respect to kind of household waste (solid, bulky, repair, liquid).

While adjusting rates, 1 m³ (or tonne) is supposed to be taken as calculation unit.

Including costs in whole planned costs shall be performed with respect to operative, financial and general expenditures.

The list and the structure of costs shall be defined by enterprise in relation to kind of operations with household waste and peculiarities of technological process (Resolution of the Cabinet of Ministries of Ukraine dated 26.07.2006 #1010).

Administrative costs shall be included in rates in amount not to exceed 15 % of planned production costs. Growth rates of administrative costs shouldn't exceed determined inflation rate.

Costs of sales of services included in rates shouldn't exceed 5 % of planned production cost of services.

Level of profitability is compiled with due regard to the necessity of paying profits tax which includes payment for technical reequipment which shouldn't exceed 12 % for each enterprise, 15% and 50 % for state-financed consumers and other consumers relevantly.

Service rates include costs on establishing reserve fund allocating for capital investments. Boundary value of capital investments shall be prescribed with respect to amount of finance necessary for promoting basic assets and intangible assets which are subject to amortization.

Capital spending, establishment of special investment funds, maintaining of profitability of invested capital is included into rates for a period not less than 5 years (in amount not to exceed 20 % of total expenditures) in conformity with duly authorized by local authorities investment program. In process of rate prescription, the enterprise should determine sources of financing capital investments on account of amortization and planned profit (target profit).

Investment program in area of household waste management provides for implementing measures developing technologies, modernizing objects, dispatching control, resource-saving, promoting ecological safety and reliability of systems and necessary assets (which include share financed from profit).

Technical and economic calculations or business plan is attached to the program in way to affirm the effectiveness of desired investments and determine sources of investment and life of the project.

To reduce intensity of use fuel and energy, material and labor resources, assets and financial reward for workers should be recovered on account of funds derived from the energy saving measures during the period of rate validity.

Rates for service include repair, reconstruction costs and other costs on renewing capital fund to the extent permitted by laws.

Rates increase on (grows on) amount of added-value tax.

Various rates adjusted for various categories of consumers: for the population, for state-funded organizations and for others. The categories of consumers were specified in terms of economic feasibility of charges allocation between consumers.

Rates equal to full costs of service are valid for one year.

Rates which include capital investment costs are valid for the period stipulated for carrying out the development program of enterprise.

Adjusting of rates during the term of its validity should be performed through adjusting of individual costs components which caused changes. These measures afford to promote economic feasibility and transparency of introduced mechanism.

State Inspection on Cost Control or its territorial offices provide findings concerning economically justified planned costs on providing household disposal services.

4. Violations of the laws of protection of economic competition in the market of MSW management services.

According to information submitted by territorial offices, 657 economic entities operating in the market of MSW management services were examined.

Moreover, territorial offices detected the most typical violations of the laws of protection of economic competition under which recommendations were issued and cases were opened. The most typical violations are:

- Adjusting unjustified rates for MSW disposal and burial services (overstating level of profitability, including extra costs which are inconsistent with current legislation, absence of findings of the State Inspection on Cost Control);
- Applying of different rates for similar types of consumers;
- Defects in contract (inaptitude to provisions of *Master Service Agreement*);
- Inefficient regulatory activities of municipalities in terms of adjusting rates.

The study highlighted the main problems that are:

- Underfunding of the procurement of current technologies;
- Lack of legislative promotion of MSW separate collection and underdeveloped infrastructure in the market of separate collection of MSW and enterprises interested in recycling processes;
- Obsolete methods and technologies of household waste management;
- Slow introduction of waste collection programs in 2011-2013;
- Increasing MSW generation may cause excess loading of landfills and waste pollution and establishing of unauthorized landfills.

It should be noted that in the period from 2011 till 1 quarter 2013, territorial offices took measures on detecting and terminating of violations of the laws of protection of economic competition on MSW disposal and burial services market. Therefore, territorial offices issued recommendations: 26 for local authorities and 17 for economic entities operating in area of MSW services; considered cases: 32 on violations of the laws of protection of economic competition by local authorities and 13 on violations of the laws of protection of economic competition by economic entities operating in MSW disposal and burial market; and imposed fines totaled in UAH 121 000.

Herewith, the typical violations by municipalities are:

- Choosing providers of MSW disposal services without competitive tender;
- Absence of the price offers of the tender's participant, when the tender has been already conducted;

- Empowering communal entities in part of behavior control of individuals and legal entities in area of MHW;
- adjusting rates for MSW disposal and burial services (overstating level of profitability, including of extra costs which are inconsistency with current legislation, absence of findings of the State Inspection on Cost Control) (Resolution of the Cabinet of Ministers of Ukraine dated 26.07.2006 #1010 “On approval of Procedure of prescribing rates on household waste disposal”).

The typical violations by economic entities are:

- Defects in contract on providing relevant services between economic entities and consumers (inaptitude to provisions of *Master Service Agreement*) (Resolution of the Cabinet of Ministers dated 10.12.2008 #1070 “On approval of Procedure on providing household waste disposal services”);
- Adjusting rates on MSW disposal and burial services (overstating of level of profitability, including of extra costs which are inconsistency with current legislation, absence of findings of the State Inspection on Cost Control) (Resolution of the Cabinet of Ministers of Ukraine dated 26.07.2006 #1010 “On approval of Procedure of prescribing rates on household waste disposal”);
- Applying different rates for similar types of consumers;
- Ignoring the importance of rates prescription for MSW disposal and burial services, provided by economic entities in area of MSW management (article 7 of the Law of Ukraine “On housing and utility services”, Resolution of the Cabinet of Ministers of Ukraine dated 01.06.2011 #869 “On providing unified approach for adjusting rates on housing and utility services”);
- Overstating of real volume of MSW disposal.

As for today, the second stage of study is performed with the purpose of detecting and terminating violations of the laws of protection of economic competition by local authorities and economic entities operating in MSW disposal and burial services and solving issues necessary for improving activities in certain markets and preventing violations of the laws of protection of economic competition.

On this grounds, for the purpose of detecting possible violations of the laws of protection of economic competition in part of economically unjustified rates for services with household wastes, the Committee authorized the territorial offices to conduct unplanned verifications in the cities of oblast subordination concerning:

- Conformity with the procedure of adjusting rates for MSW disposal and burial services;
- Practices of economic entities operating in market for waste handling in part of actual use of assets included in capital investments while prescribing rates;
- Practices of economic entities operating in market of waste burial (landfills).

UNITED KINGDOM

The Office of Fair Trading (OFT) has used a range of tools to identify and address competition concerns in the waste sector on the United Kingdom, most notably through its markets work (including advocacy) as well as, alongside the Competition Commission (CC), through merger control.¹

1. Markets work

1.1 *Organic Waste market study (2011)*²

In January 2011, the OFT launched a market study following a request by The Water Services Regulation Authority (Ofwat), the economic regulator of the water and sewerage sectors in England and Wales, for the OFT to examine the functioning of the sewage sludge treatment sector. This request was timed to fit with Ofwat's plans to undertake a comprehensive review of its regulation, with the aim of encouraging water and sewerage companies to achieve better, more sustainable ways of operating. Ofwat's interest in a potential market study was in ascertaining whether the economic regulation regime relating to the treatment, recovery and disposal of sewage sludge should be modified or other alternatives considered.

The OFT study aimed to understand whether the market for organic waste treatment services, in particular the sewage sludge treatment sector, was working well and, if not, what might be done to improve it. The study looked at three dimensions of potential competition:

- competition between water and sewerage companies (WaSCs) to treat sewage sludge;
- competition between WaSCs and other businesses to treat organic waste, and
- competition between WaSCs and other businesses to treat sewage sludge.

The OFT's report highlighted the (extremely) restricted competition between WaSCs and other waste businesses, including:

- competition between different WaSCs in the treatment of sewage sludge was very limited, with WaSCs only trading sewage sludge with each other on an ad-hoc basis;
- competition from other businesses to treat sewage sludge was extremely restricted with a number of barriers to entry; and
- the amount of other organic waste treated by WaSCs was small despite them having potential advantages in this area;

¹ The OFT has not undertaken any investigations resulting in the issuance of a Statement of Objections for a competition law breach in the waste sector under the UK Competition Act 1998 (CA98) or under Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU).

² For further detail, see <http://www.oft.gov.uk/OFTwork/markets-work/organic-waste/>.

The report identified a number of barriers to competition, including in relation to the culture of WaSCs, the regulatory framework in relation to the water sector, and to environmental regulation and planning. As a result, the OFT made a package of recommendations, with those relating to changes to economic regulation of WaSCs to foster efficiency and help create a level playing field between them and other suppliers of organic waste treatment at the centre. The study also recommended greater harmonisation of the environmental regimes applicable to sewage sludge and other organic waste. In addition, the OFT considered that planning policy could be reviewed so as to contribute to greater competition.

1.2 *Infrastructure ownership and control stock-take (2010)*³

The OFT launched a stock-take in May 2010 with the aims of:

- mapping infrastructure ownership and control across the main economic infrastructure sectors - communications, energy, transport, waste and water, and
- assessing how ownership of infrastructure affects outcomes for consumers in these markets.

Waste infrastructure was one of four case studies in the stock-take. The OFT found that:

- Government policy plays a crucial role in shaping the waste sector;
- Much waste treatment and disposal infrastructure is characterised by high barriers to entry;
- There was evidence of investment and innovation in recent years to divert waste from landfill and promote waste recovery;
- Long-term policy certainty over the regulatory framework is very important if the right conditions for investment and new entry are to be sustained;
- Where the waste market works on the basis of competition in the market, there is potential for local market power; and
- Government interactions with the waste market through both the planning system and through local authority contracts for municipal waste have the potential to impact on competitive outcomes in the market.

1.3 *More competition, less waste – Public procurement and competition in the municipal waste management sector market study (2006)*⁴

In May 2006 the OFT published a market study report that aimed to:

- identify how the use of landfill to dispose of municipal waste in England could be reduced through the development of competitive markets; and
- consider how competition could be enhanced for the municipal waste collection services.

³ For further detail, see <http://www.of.gov.uk/OFTwork/markets-work/othermarketswork/infrastructure-ownership/>

⁴ <http://www.of.gov.uk/OFTwork/publications/publication-categories/reports/advocacy/oft841>

The report drew primarily on research conducted as part of the Office of Government Commerce (OGC) Second Kelly Market (SKM) waste management project.

The key findings and recommendations in the OFT's report were:

- **Municipal waste collection:** Local authorities could make more of competition for municipal waste collection services by setting contract length based on need to recover sunk costs, avoiding selection criteria for suppliers to have previous experience in the municipal waste collection sector, and ensuring fair competition when including in-house providers in tenders.
- **Municipal waste treatment:** Local authorities often entered into long term contracts with suppliers to build treatment facilities and treat the waste. Larger businesses able to supply integrated waste management services were prevalent in the sector and in some regions a single firm might hold a very high market share. Particular care should be taken around aggregating municipal waste treatment and landfill contracts. The need to find mechanisms to deliver bids from multiple suppliers was identified as a priority to mitigate the risk of regional monopolies developing and becoming entrenched while the report also highlighted the need to guard against the risks of collusion.

2. Merger control

There have been a number of mergers in the waste sector in recent years in the UK, some of which have been examined by the OFT and CC. Notable cases include:

2.1 *Completed acquisition by Stericycle Inc. of Ecowaste Southwest Limited (2011)*

Stericycle Inc acquired the entire share capital of Ecowaste Southwest Limited. Stericycle and Ecowaste overlapped in the collection, processing and disposal of healthcare waste in the south-west of England. The OFT believed that it was or might be the case that the merger had resulted or might be expected to result in a substantial lessening of competition within the market of the collection, processing and disposal of healthcare risk waste in the wider area around Bristol and referred the transaction to the CC.⁵

The CC distinguished between the producers of healthcare risk waste, that is, large quantity generators (such major health organizations) (LQGs) and other small quantity producers (such as dentists and tattoo parlours) (SQGs). The CC concluded that the acquisition had resulted in a substantial lessening of competition in the markets for the collection, treatment and disposal of waste to both LQGs and SQGs and would lead to higher prices and lower service levels in parts of the south-west of England than would have been the case in the absence of the merger. It therefore required Stericycle to divest itself of Ecowaste.⁶

2.2 *Anticipated acquisition by SRCL Limited of Cliniserve Holdings Limited (2009)*

SRCL Limited, a subsidiary of Stericycle Inc, proposed to acquire Cliniserve Limited, including its medical waste collection business operating across the whole of the UK, its medical waste treatment facility in Littlehampton, West Sussex and its second facility in Frome.

⁵ <http://www.oft.gov.uk/OFTwork/mergers/decisions/2011/Stericycle>

⁶ <http://www.competition-commission.org.uk/media-centre/latest-news/2012/Mar/cc-requires-stericycle-to-sell-ecowaste-southwest>

The OFT concluded that, on the evidence available, there was a realistic prospect of a substantial lessening of competition arising in the treatment of healthcare risk waste in south-east England. To address the competition concerns, the parties offered, and the OFT accepted, to divest Cliniserve's alternative treatment medical waste facility at Littlehampton in lieu of a reference to the CC. This was to be sold to a purchaser on an up-front basis, that is to an actual named purchaser to be identified in advance of acceptance of the undertakings.⁷

2.3 *Completed acquisition by Stericycle International LLC of Sterile Technologies Group Limited (2006)*

Stericycle acquired Sterile Technologies Group Limited (STG) in February 2006. The OFT's subsequent investigation was prompted by a number of customer complaints. Stericycle and STG overlapped in the collection, transportation and treatment of healthcare risk waste.

On the basis of its analysis the OFT believed that the merger had resulted or might be expected to result in a substantial lessening of competition. Stericycle offered undertakings in lieu of a reference to the CC – including price undertakings and divestment of two incineration sites and an autoclave alternative technology site – but the OFT concluded that the proposed remedies did not meet the 'clear cut' and readily implementable requirements in order for it to consider undertakings and instead referred the transaction to the CC in June 2006.⁸

The CC concluded in December 2006 that the merger resulted in a substantial lessening of competition in the market for healthcare risk waste requiring high-temperature treatment in the geographical areas of northern England, the north Midlands, north Wales, the West Midlands and south-east Wales. The CC accepted Stericycle's proposal to sell a certain number of incinerators to address the competition concerns. As a further way to facilitate competition between healthcare risk waste service providers, the CC recommended to relevant health authorities that there should be longer lead times before the commencement of National Health Service (NHS) contracts covering healthcare risk waste, and that these contracts should be of shorter duration.⁹

⁷ <http://www.offt.gov.uk/OFTwork/mergers/decisions/2009/SRCL>

⁸ <http://www.offt.gov.uk/OFTwork/mergers/decisions/2006/stericycle>

⁹ <http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/stericycle-international-llc-sterile-technologies-group-limited/final-report-and-appendices-glossary>

UNITED STATES

1. Introduction

The United States Department of Justice Antitrust Division (DOJ) has extensive experience analyzing competition issues in the waste industry. Most investigations involve merger reviews, but the agency also has conducted investigations of anticompetitive practices and conduct, as well as criminal investigations involving instances of bid-rigging and market allocation. The DOJ has reviewed a variety of relevant product markets in the waste industry, including municipal solid waste disposal; small container commercial waste collection; municipal waste collection (i.e., residential/commercial waste collection for a municipality, county, or solid waste district); medical waste collection and disposal; construction and demolition waste disposal; hazardous waste disposal; and recyclables collection.

The analytical framework for waste industry merger investigations in the last ten years has remained largely unchanged and follows the framework and methodologies described in the 2010 Horizontal Merger Guidelines.¹ The focus of the DOJ's investigations has been to assess the competitive effect of a particular transaction or business practice. Defining the relevant market assists the agency in this assessment. The DOJ evaluates both horizontal effects (including coordinated and unilateral theories) and vertical effects, as appropriate.

2. Analysis of Important Waste Industry Markets

2.1 *Municipal Solid Waste Disposal*

Municipal solid waste (MSW) is putrescible solid waste commonly generated by households and businesses that does not require special handling. In the United States, the processing, storage, transportation and lawful disposal of MSW is regulated by overlapping federal, state and local environmental, zoning, and public health laws. Disposal of MSW outside of a lawfully permitted facility (i.e., illegal dumping) is subject to strict penalties. Thus, waste collection firms (i.e., haulers) typically have three options for the lawful disposal of MSW: direct haul to a landfill, transfer station² or incinerator.³

The DOJ typically has defined a single market for MSW disposal, which includes all of the disposal options within the direct-haul distance of the haulers' routes. In evaluating a merger, the agency uses a fact-specific process to assess whether a hypothetical monopolist of a given set of permitted disposal sites profitably could impose a small but significant, nontransitory increase in price on customers (local haulers of MSW) because, other than a permitted disposal facility, there is no lawful alternative for disposal of MSW.

¹ Available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>; <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

² At a transfer station, MSW is stored temporarily and consolidated for bulk shipment in tractor trailers (or railcars) to a more distant landfill for ultimate disposal.

³ Approximately 90 incinerators currently operate in the United States. Development of new incinerators has been slow due to environmental concerns and unfavorable economics.

In the DOJ's experience, the geographic market for direct-haul disposal is local or regional. Consistent with cost-minimization, haulers prefer to minimize the time spent away from the collection route and driving to the disposal site. Depending on the particular facts, the direct-haul market consists of transfer stations, incinerators, and/or landfills. When the direct-haul market consists only of landfills, the direct-haul market and the ultimate disposal market coincide. In areas with transfer stations and incinerators, the ultimate disposal market may differ from the direct-haul market. Landfills that are too far away from haulers' routes to compete in the direct-haul market nonetheless may compete in the ultimate disposal market. Landfills in or near cities may participate in the direct-haul disposal market against transfer stations as well as in the ultimate disposal market. The agency has observed that disposal markets may extend 25 to 35 miles from the collection routes. Additionally, DOJ has recognized that landfills located hundreds of miles away from local collection routes may compete in certain disposal markets through transfer stations. Price discrimination based on customer location is prevalent in the waste disposal business. Under-utilized landfills that are distant from population centers may offer significantly lower prices to distant haulers or transfer stations, in order to attract "long-haul" waste. A relevant question for antitrust analysis is whether such distant landfills can accept waste volumes sufficient to constrain the prices of disposal sites closer to local collection routes. Given the character of competition in these markets, geographic markets are defined based on the location of demand rather than the location of disposal facilities.

Typically, the DOJ evaluates whether a merger of two MSW disposal firms will likely have unilateral anticompetitive effects. The agency assesses whether, post-merger, the combined firm will possess market power derived from its locational advantage over a set of disposal customers (waste haulers), that will likely permit the combined firm to unilaterally impose an anticompetitive price increase. The agency must assess the competitive significance of alternative disposal sites, including any capacity constraints faced by such disposal sites. The agency also may consider the possibility of coordinated effects. The primary competitive concerns in MSW hauling and disposal markets are customer or territorial allocation and large (e.g., municipal) contract bid rigging. MSW hauling and disposal markets often lack transparent pricing and other indicia associated with agreements on price.

Experience shows that entry into MSW disposal markets can be costly, time-consuming and, in some heavily populated areas, virtually impossible, because of permitting restrictions for waste disposal. Stringent environmental regulation of landfills in many areas has restricted the permitting and construction of additional landfills. Market entry through a transfer station in many areas is much easier because the waste is stored only temporarily, although even transfer stations can face significant obstacles from local zoning and environmental regulators and local residents concerned about noise, traffic, and odors. In the United States, there are disparities among state and local environmental and zoning regulation. Thus, each investigation requires a careful, fact-specific inquiry into the entry barriers and the capacity of potential entrants in a particular region or local market.

In 2008, the DOJ reviewed the merger of Allied Waste, Inc. and Republic Services, Inc., which were the second and third-largest waste companies in the United States at the time. Each firm operated in hundreds of geographic areas and had thousands of collection routes and hundreds of transfer stations and landfills. The agency conducted an extensive, fact-intensive inquiry and reviewed dozens of candidate disposal markets in which the merging parties owned overlapping disposal assets. The geographic size of each market varied according to the circumstances of each geographic area. Ultimately, the DOJ concluded that, absent intervention, the merger would likely reduce competition substantially in 13 separate MSW disposal markets across the country, including major metropolitan areas such as Dallas-Fort Worth, Houston, Los Angeles, and the San Francisco Bay area.⁴

⁴ See *United States and Plaintiff States v. Republic Services, Inc. et al.*, No. 1:08-cv-02076 (D.D.C.), Competitive Impact Statement (Dec. 3, 2008) [hereinafter "*Republic/Allied*"].

2.2 *Small Container Commercial Waste Collection*

The DOJ traditionally has focused on small container commercial municipal solid waste (SCCW) collection as an area of concern in mergers and conduct investigations. The containers are “dumpsters” with two to eight cubic yards of capacity that are serviced by a front-end load truck and typically are used by restaurants and small businesses. Operation of a front-end load truck requires only one person, the driver, because the collection process is automated. Other types of trucks, such as rear-end load trucks, entail greater costs because more labor is required. With *residential* collection, containers are relatively small. With *industrial* collection, containers are much larger, and service is less frequent. Given their costs for the volume generated by commercial customers, residential and industrial collection would not be viable alternatives if a hypothetical SCCW collection monopolist were to impose a small but significant nontransitory increase in price. Therefore, in merger investigations, SCCW is a distinct product market for antitrust analysis.

The DOJ has found that SCCW collection geographic markets are local. A hauler needs route density for economic viability. The operating costs of front-end load trucks, along with transportation costs, especially with high gas prices, make geographically expansive routes costly. Large collection companies frequently have the lowest costs because they have higher route density and lower disposal prices. The denser the route, the greater the efficiencies. For a hauler already servicing a particular street, the cost of servicing an additional customer on that street is merely the cost of an additional lift.

When reviewing mergers or non-merger conduct, the DOJ evaluates both horizontal and vertical effects of a given merger or practice, as appropriate under the specific facts and circumstances of the case. A firm that owns all or most of the local disposal sites potentially may limit its rivals’ abilities to compete for collection and limit potential collection entry, because disposal costs are approximately 30 percent of SCCW collection costs. Based on the DOJ’s experience in the industry, the DOJ often will analyze the ability and incentive of firms that are vertically integrated in collection and disposal to raise rivals’ costs, or to discipline or squeeze unintegrated collection firms.

A firm with a substantial share of the local collection routes may be able to increase prices unilaterally to its collection customers. The removal of a similarly situated low-cost competitor likely will soften price competition. The remaining higher-cost competitors are less likely to constrain prices. In areas where two merging firms are close substitutes, it is more likely that the merged firm will have the post-merger incentive and ability to unilaterally raise collection prices.

Without access to disposal at competitive rates, entry into a SCCW collection market is extremely difficult. If vertically integrated companies own landfills and transfer stations, they may have less incentive to make cost-effective disposal available to their hauling competitors. On the other hand, haulers with significant waste volumes under contract often can obtain competitive disposal rates from MSW disposal firms seeking to attract waste to their sites.

Even with available disposal sites, entry and expansion into SCCW collection are difficult. The cost of customer acquisition can be high because larger haulers have dense routes that make them more efficient and an incumbent hauler can price discriminate. An incumbent hauler often can retain existing collection accounts by selectively offering discounts to the accounts that the new entrant is soliciting. Large integrated haulers often use contract provisions that can make entry difficult, including long-term contracts, evergreen provisions and liquidated damages provisions for termination outside a particular time

period.⁵ For these reasons, the DOJ has found that entry into SCCW collection is rarely *de novo*. Instead, entry usually is accomplished through the acquisition of existing routes and collection customer contracts.⁶

In *Republic/Allied*, the DOJ undertook an extensive investigation of dozens of geographic areas where the merging firms' SCCW collection operations overlapped. In each area of overlap, the agency evaluated the market shares of the merging firms, the number and competitive significance of other competitors, and the possibility of entry and/or repositioning by existing firms. The DOJ concluded that the merger would likely reduce substantially competition for SCCW collection in nine different geographic areas.

2.3 Remedies

In cases where competitive harm is likely to occur, the DOJ engages in a fact-intensive analysis to tailor an effective remedy for the anticompetitive harm. In most cases involving horizontal mergers, the DOJ prefers structural remedies to standalone conduct remedies.⁷ Structural remedies are presumed to be more effective and are easier to administer than ongoing conduct remedies. However, DOJ's aim is to tailor "remedies that effectively resolve the competitive concerns and protect the competitive process."⁸ Under some circumstances, however, a conduct remedy or a combination of structural and conduct remedies will be appropriate.⁹

In merger cases in the waste industry, the DOJ often requires "clean sweep" divestitures of one of the merging firm's assets in a relevant geographic market to preserve competition in disposal and collection. To preserve competition in disposal markets, the DOJ has required divestiture of landfills and/or transfer stations. To preserve competition in local SCCW collection markets, the DOJ has required the divestiture of routes and supporting infrastructure, such as specialized front-end load trucks and associated garages.

In *Republic/Allied*, for example, the DOJ obtained relief in 13 MSW disposal markets and nine SCCW collection markets. In most geographic areas, the DOJ obtained a "clean sweep" divestiture of one of the merging firms' assets in the area. In certain other areas, this was not necessary to remedy the competitive harm alleged. The DOJ used a flexible and fact-driven approach to relief. The *Republic/Allied* case demonstrates the fact-intensive inquiry used to identify and redress competitive harm arising from the merger of competing firms. The DOJ continues to employ this approach in its investigation of merger and non-merger conduct affecting competition in the waste industry.

Conduct remedies require more administrative time to monitor and enforce but have been used in certain circumstances in lieu of structural remedies, or in some cases, to aid the effectiveness of a divestiture. In such instances, the DOJ has required the collection firms to limit the length of collection contracts and prohibited the use of evergreen and/or liquidated damages provisions. The purpose of the contract remedies is to lower the cost of customer acquisition by a new entrant.

⁵ Evergreen provisions in contracts provide for the automatic renewal of the contract unless prior notice to terminate the contract has been given.

⁶ While modern antitrust review considers valid efficiency effects, they have been raised in only a limited number of recent Division merger investigations in the waste industry.

⁷ Antitrust Division Policy Guide on Merger Remedies (June 2011), available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

⁸ Bill Baer, Assistant Attorney General, U.S. Department of Justice, "Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes," (Sept. 25, 2013), available at <http://www.justice.gov/atr/public/speeches/300930.pdf>, at 2.

⁹ Antitrust Division Policy Guide on Merger Remedies, *supra* note 6, at 4.

BIAC

1 Introduction

The Business and Advisory Committee (BIAC) to the OECD welcomes this opportunity to submit comments to the OECD Competition Committee Working Party 2 on Competition and Regulation for its Roundtable on Waste Management Services. In the context of increasing awareness of environmental issues in the various OECD countries, effective waste management is an important policy instrument for reaching national and international targets of pollution reduction. Moreover, effective waste management and notably recycling plays an important role in developing a resource-efficient economy by providing secondary raw materials.

The application of competition law to the waste management services may (i) help to eliminate restrictions of competition and, as consequence, contribute to a more level playing field for companies and more competition in waste management sectors, but also (ii) complicate efficient co-operation between companies in these fields.

The opening of waste collection services to competition is desirable but entails specific challenges, as these services are often supplied by publicly-owned providers or under the supervision or in co-operation with local or national governments. In many cases, the award of contracts for waste management services, particularly in the market for the regular collection of household waste, takes place against a background of local monopoly, which potentially raises a number of issues, in particular potential discrimination against (new) market actors by public entities or national or local waste management service providers sponsored by (local) government. BIAC therefore strongly supports initiatives aimed at ensuring free competition in the allocation of such markets, especially through transparent and non-discriminatory bidding processes. Public procurement law and competition law can and should play an important role in these cases since competition on the market and competitive tenders lead to better public services and efficient public spending as it involves private capital and know-how and guarantees transparency as well as protection against discrimination and corruption.

BIAC also notes that OECD countries are increasingly adopting legislation to reduce the impact of their economic activities on the environment. In turn, this has led to important efforts to reduce the amount of waste generated and to achieve higher recycling rates.

In light of the scarcity of certain raw materials, a situation which is expected to worsen in the next decades, BIAC underlines the necessity to develop strategies to reduce the dependency on the importation of such materials. Increasing recycling opportunities may be an important way to reduce this dependency. As such, BIAC welcomes efforts to develop recycling technologies and services and to enable business to collaborate in recycling schemes and other initiatives to meet this objective.

One of the core strategies adopted by several countries to handle waste is embodied in the extended producer responsibility (“EPR”) principles. This concept provides that all actors along the production and distribution chain of goods are responsible for the fate of each product until the end of its life cycle¹ and

¹ See for instance Sachs, *Planning the Funeral at the Birth: Extended Producer Responsibility in the European Union and the United States*, 30(1) *Harvard Environmental Law Review* (2006), p. 51.

EPR obligations include take back and recycling/ recovery obligations. In Europe, EPR obligations are in particular embodied in the Waste Framework Directive², the Packaging Waste Directive,³ the ELV Directive regarding end-of life vehicles⁴ and electronic waste.⁵

As such, the concept of EPR appears to be a useful guiding principle to achieve the above mentioned goals, since producers may be best placed to develop products in a way that allows a reduction of waste amounts and greater repair, re-use, disassembly and recycling opportunities. However, its application in practice entails a number of issues. In particular, EPR transfers to - and imposes on - producers the responsibility to ensure the provision of services which are radically different from their core business. This situation results in specific challenges under competition law.

Although BIAC recognises that in the vast majority of cases environmental considerations and competition law have concordant goals, it notes that producers subjected to EPR obligations may be confronted with situations where there is insufficient guidance to assist producers to achieve compliance with both sets of regulations.

Indeed, the development and operation of collective waste management systems that businesses set up to meet their EPR obligations may require a degree of co-operation amongst market players. Because recycling and other waste management systems are generally specific to recyclable materials (glass, paper, metals and the like) and the products themselves (including electronic equipment, lamps, packaging waste, vehicles, batteries and lubricants), these collective systems often involve competitors. The systems may be complex and involve a network of agreements between participating producers and with third party service providers. As a consequence, companies taking part in such systems are sometimes faced with significant dilemmas in evaluating the impact of their arrangements not only on the markets for waste management services but on the underlying product markets, for example in relation to the exchange of information. BIAC therefore calls for greater clarity, guidance and advocacy to support the efficient development of such systems, thereby contributing to the achievement of environmental objectives and reducing the risk for business of inadvertently violating competition law.

BIAC also regrets the difficulty for market players to rely on environmental efficiencies to justify potential competition restraints, especially in the light of the necessity to quantify such efficiencies and the legal and practical problems of doing so where environmental benefits are concerned.

Finally, BIAC is concerned that the heterogeneity of waste management schemes implemented in the different countries and even amongst different local regions may be a significant hurdle for the development of efficient, large-scale international businesses to enhance competition in the different markets related to waste management.

2. Opening waste collection markets to competition

BIAC welcomes the opening of markets for waste collection services to competition through competitive tenders and would encourage further steps to introduce competition in this way. The complexity of these markets and their dependence on access to other facilities and services create challenges for the design and implementation of fair and effective tender processes. The importance of economies of density will mean that often awarding an exclusive contract to a single waste collector will

² Directive 2008/98/EC of 19 November 2008 on waste.

³ Directive 94/62 EC of 20 December 1994 on packaging and packaging waste.

⁴ Directive 2000/53 EC of 18 December on end-of life vehicles.

⁵ Directive 2002/96 EC of 27 January 2003 on waste electrical and electronic waste.

be the most efficient approach, so that the tender process will need to optimise competition for the market. This should, as an initial consideration, involve awarding a contract for an appropriate duration, taking account of the investments and sunk costs involved. It may also require the contracting authority to take specific measures to open the tender process to new entrants, including ensuring that the winning bidder will be able to access the necessary resources such as sorting, transit and disposal facilities where these cannot be replicated cost-effectively. Careful consideration to every aspect of the tender specifications and regulations will be required to ensure that a level playing field between private and public suppliers exists in practice as well as in law⁶. Transparency throughout the process will also assist in encouraging entry and ensuring fair treatment as between new entrants and entrenched local players.

3. Collective waste management systems: limited guidance for antitrust compliance

Collective waste management systems aimed to meet obligations deriving from EPR entail a number of specific antitrust issues for the companies involved. Such issues arise because of two features regularly present in the context of such systems: market concentration and co-operation between companies.

Many companies that are under an obligation to ensure the appropriate collection and recycling of their waste products find it efficient to enter into horizontal or vertical agreements, which can extend to entire industries, aiming at ensuring the provision of such services.

As a result, these types of co-operation often occur in concentrated markets and/or involve a large percentage of the firms active in the specific sector at hand. Competition authorities have been confronted with cases where the combination of these factors led to potential antitrust issues, mostly in the form of spill-over effects and bundling of waste management or recycling services.⁷

Spill-over effects arise from the contacts and coordination between market players in the context of their co-operation in waste management systems. Such co-operation can lead to concerns, especially when participants to the schemes are competitors. While coordination in relation to aspects which are distant from the final market, such as in the design of product packaging may be less susceptible to raise issues under competition rules, the spread of such coordination to the actual product or costs/price structures of products sold to consumers may trigger greater concerns from competition authorities.⁸ The other main concern, the bundling of waste management services, relates to the ability of market players with dominant positions on waste management markets to enter into bundling practices, for example by leveraging their dominant position for a certain type of waste into services relating to another type of waste.⁹

⁶ On the importance of the level playing field, see BIAC's Summary of Discussion Points presented to the OECD Global Forum on Competition - SOEs and Competitive Neutrality - February 2009 and prior work referred to there.

⁷ One of the prominent cases is the "Grüne Punkt" case before the European Commission (Case COMP D3/34493 - DSD) and the European Court of Justice (Cases T-151/01 & 289/01 and C-385/07); *see also e.g.*, Investigations by various United States authorities' into Stericycle Inc., and Browning-Ferris Industries, Inc. for territory allocation [State of Utah vs. Stericycle, Inc. and BFI Waste Systems (Dist. Utah, 2:03-cv-0049)].

⁸ As underlined by the European Commission DG COMP Paper Concerning Issues of Competition in Waste Management Systems.

⁹ This is also illustrated by the recent statement of objection sent by the European Commission to the Austrian company Altstoff Recycling Austria AG ("ARA"), which reaches the preliminary conclusion that ARA has used its monopoly for household packaging waste services to extend its reach into the market for commercial packaging waste services. See http://europa.eu/rapid/press-release_IP-13-711_en.htm.

The general position of competition authorities towards such conduct is relatively clear: companies are entitled to enter into collective systems to ensure the proper implementation of collection and recycling obligations, but such systems should not be the pretext for anticompetitive coordination or abuse.¹⁰ Despite the apparent clarity of these principles, BIAC is concerned about the concrete difficulties companies may be confronted with when dealing with collective systems¹¹.

It must first be noted that, due to the structural tendency of such markets to be highly concentrated, companies will only rarely benefit from safe harbour clauses provided in competition legislation and standard guidance. Companies are confronted with the difficulty of assessing the thresholds determining the legality of information exchange. While the organisation of collective waste management systems requires a certain level of exchange of information, companies benefit from only limited guidance as to the concrete limits imposed on these practices by competition law. Another example of practical difficulties follows from the different approaches that national agencies have chosen with regard to the merits of collective systems versus individual systems, as well as the desirability of competition between different collective systems.

As a result, BIAC believes that companies may experience difficulties in navigating the obligations to organise efficient waste management systems and to comply with competition law rules. While BIAC does not advocate the disapplication of competition rules, it considers that the reliance by public authorities on companies to handle structural services for the benefit of social welfare, such as the proper collection and treatment of waste for disposal from private households, should at the very least be coupled with clear and concrete guidelines allowing companies to implement their obligations without risking any subsequent antitrust proceedings.¹²

BIAC also notes that companies targeted by EPR can generally not rely on the regulated conduct defence since typically the collective solution is encouraged but not required by the legislation.

4. The difficulty of justifying competition restraints by environmental efficiencies

Competition law need not be an obstacle to the achievement of increasingly ambitious environmental objectives of governments and societies generally. Players in competitive markets may indeed be driven towards greater environmental protection, because environmental considerations may increasingly influence consumers' choice. As such, BIAC does not advocate any exclusion from competition law for environmental protection schemes.

However, the increasing reliance of public organisations on companies for the achievement of environmental goals may require a clearer articulation of the specific features of collective waste management systems in the implementation of competition rules. In some circumstances, it appears that competition and environmental objectives require a balancing exercise. In these circumstances, the

¹⁰ See also the Report from the Nordic competition authorities n° 1/2010, Competition Policy and Green Growth, Interactions and challenges.

¹¹ See also BIAC's contribution to the OECD Competition Committee roundtable on Horizontal Agreements in the Environmental Context (October 2010).

¹² Some efforts have been made in several countries such as in France with the publication in 2012 of guidelines on relations between collective systems and waste management operators. In The Netherlands efforts are being made to provide additional guidance under competition law for companies wishing to engage in joint projects that may have a positive impact on the environment. However, most operators remain confronted to a high level of uncertainty or even contradictions as to the limits imposed on their conduct.

question arises whether the current framework of analysis of competition restraints should be applied or whether a more specific approach would be more appropriate.

Collective waste management systems set up by companies targeted by EPR obligations constitute an area where this question is most pressing. It is important to consider the fact that when waste management obligations are imposed on producers, companies are obliged to organise services which are not part of their core business. In some cases it may even be doubtful whether it is possible to offer these types of services in a competitive environment, at least initially. This is illustrated by the fact that several collective waste management systems are non-profit entities.

BIAC is concerned that a rigid application of the standard competition assessment tools to waste management services may hinder the justification of competitive restrictions by environmental considerations. In considering efficiencies, competition authorities tend at best to require a detailed quantification of environmental benefits so as to determine whether these benefits outweigh competition restrictions. Although quantification is sometimes not impossible, it remains much more difficult to provide, with a sufficient degree of certainty, a reliable quantification of environmental efficiencies than for other types of efficiencies such as cost-related ones.

The specific nature of certain waste management services can be taken into consideration in the EU under the regime of services of general economic interests (SGEI). It has indeed been established that waste management may constitute a SGEIs and that restrictions to competition, notably in the form of exclusive rights, may be justified on the ground of Art. 106§2 TFEU.¹³ BIAC notes that EU Member States retain a wide discretion in the definition of SGEIs. However, BIAC points out that Art. 106 § 2 TFEU provides for a limited exemption from the competition rules and therefore has to be construed in a narrow sense and to be applied restrictively; moreover, the Member States have to respect the framework for SGI and SGEI set by the European Commission which has a special competence concerning SGI and SGEI pursuant Art. 106 § 3 TFEU.

Moreover, BIAC notes the risk that the conventional framework of analysis of competition authorities may constitute a hurdle for companies willing to take a step further in favour of environmental protection and, as such, may contradict environmental objectives targeted by governments in relation to waste management. Competition authorities generally consider competition restrictions as justified by environmental efficiencies if such restrictions are necessary for the attainment of these efficiencies. While this approach may be suited in some cases, efficiencies may be less likely to be acceptable when companies intend to adopt decisions favourable to the environment on their own initiative.

In the EU, while the previous possibility to notify such agreements allowed determining with certainty whether environmental considerations could indeed justify restrictions on competition,¹⁴ the abolition of the notification system and the resulting necessity of self-assessment make it risky for companies to engage in any form of coordination aimed to adopt common efficiencies in favour of the environment. BIAC encourages competition agencies to make liberal use of their possibilities to provide business with meaningful guidance in this area.

¹³ See for example case C-209/98, FFAD [2000], §75.

¹⁴ This allowed for example the authorization by the European Commission of an agreement among household appliances manufacturers intended bring down CO2 emissions by discontinuing the sale of each participants' least energy-efficient products (Case COMP/37894, CECED [2001]).

5. The necessary streamlining of waste management rules

More generally, BIAC underlines the important variety of national or even local schemes in the organisation of waste management in the different OECD countries.¹⁵ This situation is also reinforced by the fact that waste management policies are often implemented at a local level. As a consequence, it is difficult for companies involved in waste management to rely on competition law precedents in an attempt to attain a sufficient degree of predictability.

This variety of waste management schemes also reflects and ensures that the size of geographic markets may differ widely. The U.S. Department of Justice, for example, typically defines the geographic markets depending on the type of waste and the means of disposal. The defined geographic markets are based on the location of demand rather than the location of disposal facilities. For instance, for direct-haul municipal solid waste disposal, the Department of Justice views the market on a local or regional level, but for small container commercial waste collection, the agency views the market on a local basis only.¹⁶ Even more, for infectious waste collection, the agency views the market based on transportation costs for transferring waste from customer sites to treatment facilities.¹⁷

Because of the varying market sizes, waste management companies may have varying degrees of market power, depending on the market conditions at hand, which may contribute to a limited level of transparency and predictability. In addition, these heterogeneous market conditions further restrict the potential for market entry and cross-national competition amongst companies.

As a result, BIAC is in favour of efforts aimed at streamlining the differences between the various national and local legislations and the development of cross-national waste collection and recycling schemes that provide non-discriminatory access on reasonable, cost-oriented terms. This would provide market players with a higher level of transparency and would allow the achievement of efficiencies in the organisation of such services, which would benefit both market participants and the environment.

6. Conclusion

In conclusion, key issues for business in relation to competition in waste management services include the need to facilitate entry of private players into markets for the collection and treatment of waste, including by designing tendering processes to ensure a level playing field between public and private entities and between new entrants and entrenched local players, the need for additional guidance on the application of competition rules to collective recycling systems, the importance of clarifying how environmental benefits and efficiencies can be balanced against competition restraints and the value of efforts to streamline the rules in these complex areas.

¹⁵ See for example, the report of the French agency ADEME on European collective waste management systems, *Panorama européen des éco-organismes ou structures assumant la responsabilité des producteurs pour la gestion des produits en fin de vie*, May 2003.

¹⁶ See Department of Justice Challenge of Allied Waste, Inc.'s acquisition of Republic Services, Inc. (2008). In that challenge, the agency concluded that, absent intervention, the merger would likely reduce competition substantially in 13 separate municipal solid waste disposal markets across the country, and in nine separate small container commercial waste collection markets.

¹⁷ See Department of Justice challenge of Stericycle, Inc.'s acquisition of MedServe, Inc. (2009). In that challenge, the agency required the parties to divest all assets in certain state where the closest competitor for infectious waste collection was 300 miles away.

SUMMARY OF DISCUSSION

By the Secretariat

The Chairman noted that the municipal waste industry can be divided into collection and disposal. Collection, like postal delivery, is subject to large economies of density. That is, the closer are customers to one another, the lower the unit cost to provide services. This implies that collection is most efficiently provided by a single firm except for customers producing large quantities or waste requiring special handling. He recalled that this was the conclusion of the 1999 roundtable discussion, but noted that a few of the country submissions for the present roundtable seem to contradict this conclusion, that is, that even collection from households or from apartment buildings can be subject to competition with prices set by the market. These delegates will be heard from during the course of the afternoon. In general, though, some form of local government intervention is required, either regulated monopoly or competitive tendering, or direct supply. Competitive tendering yields a more efficient outcome when there are no substantial relationship-specific investments, outside bidders can obtain good information about the costs of providing the service and no municipal company is competing. The last condition is often not fulfilled, and indeed in many countries the municipal company receives preferential treatment, e.g., it may participate in designing the tender or have better information than its rivals. This will be discussed.

The high cost of transport of waste implies that geographic markets for disposal facilities are limited, and legislation often imposes strict rules on local disposal that further impedes the development of competition in disposal. The effectiveness and appropriateness of these rules will be discussed.

Competition enforcement in the sector should seek to ensure that horizontal mergers and arrangements do not limit competition in the tendering process for collection or in the available disposal facilities. It should also seek to ensure that vertical mergers and arrangements do not prevent competition by allowing a firm with a dominant position in collection or disposal to restrict or prevent competition in the other market.

Another main part of the discussion concerns producer responsibility, which has generated many competition cases in the recent past. This part will be introduced by Professor Antonio Massarutto.

The discussion will be organized in four main sessions:

1. competition in the market for waste collection services
2. competition questions arising in tendering, that is, competition for the market
3. competition questions in disposal services, including incineration
4. competition issues associated with producer responsibility.

1. Competition in the market for waste collection services

Sweden was asked to explain why there appeared to be a difference between who generally collected waste from single-family homes (municipal company only) and from apartment buildings (private companies competing also with the municipal company), as well as to explain the N rab case of alleged predatory rebates by a dominant firm. The delegate replied that municipalities are obliged to ensure that household waste is collected, either by themselves or by private companies chosen by competitive tender. By contrast, there is no legal obligation to offer curbside collection of newspapers and packaging waste: Instead, it is subject to a “bring” system, and households that wish to have it collected at curbside must pay for the additional service. Generally, municipalities collect waste from single-family homes, from which they also collect newspapers and packaging waste as an additional paid service. Private firms tend to collect from apartment buildings, where collection of waste, newspapers and packaging waste can be performed at larger scale. Private firms claim that the reimbursement from the producer responsibility organizations is too low to cover the cost of collecting newspapers and packaging waste from single-family households. The price of collection of newspapers and packaging is freely negotiated in the market. For households living in apartment buildings, the curbside collection contract is negotiated between the collecting companies and each building’s housing company or landlord, rather than the individual households.

Ireland was asked to describe the operation of side-by-side competition in the markets for collection and disposal, as well as to explain why there was a proposal to move household waste collection services from side-by-side competition to competitive tendering. The delegate replied that the Irish waste collection market has undergone rapid transition, with local authorities withdrawing and private companies taking over from them, as well as consolidation. Although the collection market is “open for competition” from anyone who can secure a license, is it not “highly competitive:” Areas with low populations are frequently served by just one provider; three or four serve densely-populated Dublin. The Competition Authority is working with other government bodies to establish a means to collect better information about the market. Ireland has been heavily dependent on landfills for disposal. Landfills are being closed, and the government is raising levies for landfilling as a means to discourage its being used as the first choice for disposal. The Competition Authority has not studied competition in the market for disposal, but also has not received complaints. The government has identified a number of problems in the current regulatory regime, including a low rate of household participation, insufficient separation, and variable quality of customer service. New rules address these. In Ireland, municipalities are free to choose among competition in the market, competitive tendering, and self-provision, as well as the charges for the use of the landfill. In the 2005 investigation responding to allegations of abusively high pricing by the dominant firm Greenstar in County Wicklow, the Competition Authority was of the opinion that side-by-side competition did not work well. It proposed a switch to a system of competitive tendering. But soon afterwards, the market changed substantially with significant entry by private firms. Thus, the Authority’s position has changed slightly. It takes into account the high cost of switching from the current regime of side-by-side competition to one of competitive tendering due to the possibility that many private firms may initiate legal actions. In 2010, the new government was committed to replacing side-by-side competition by competitive tendering for local household waste collection, and a discussion paper was issued in 2011. The current position is to retain side-by-side competition and strengthen the regulatory regime.

In summing up the first part of the discussion, the Chair noted that there is side-by-side competition in household waste collection in some areas. He noted that the quantity of waste generation from apartment buildings in Sweden is similar to that of small businesses, and side-by-side competition generates good and efficient services for them. The situation in Ireland is more difficult to assess.

2. Competition for the market for collection services

Most jurisdictions either use competitive tendering or direct provision by municipalities for collection of household waste. The Chairman noted that, where competitive tendering is used to allocate the services of collection of solid waste, municipal companies very often compete against private firms and the issue of competitive neutrality is often raised.

Norway was asked about the EFTA Surveillance Authority case in which the tax code was found to violate principles of competitive neutrality. The delegate replied that the collection and disposal of household waste is the legal responsibility of municipalities. They fulfill the obligation through various arrangements including an internal department, municipal companies, and inter-municipal companies. In addition, private companies serve industrial users and compete for a few tenders for household waste. In general, municipal companies are exempt from income tax. Also, municipality-owned limited companies and inter-municipal companies are effectively exempt when fulfilling the municipality's legal obligations. The 27 February 2013 EFTA state aid decision found that issues of cross subsidy and competitive non-neutrality could arise. It stipulated that municipal waste collection companies be obliged to keep separate accounts of their monopoly and competitive business units, that measures be taken to ensure that their costs were correctly allocated to the unit performing the service and to ensure that they cannot set their own fees, and that the income tax exemption be removed from those companies active in competitive markets. The Government has drafted amendments that would *inter alia* remove the tax exemption for waste management services in competitive markets but retain it for those fulfilling the municipal obligation with respect to waste collection and treatment within the municipality.

Canada was asked how it achieved such a large reduction in per capita waste disposal and recycling between 2008 and 2010, as well as how tendering for collection services is performed. The delegate replied that, while no analysis has been made that links the waste reduction during that time period to the economic crisis, the statistics—including of different fractions and sources—are consistent with such a view. The national figures, however, hide wide variations between the provinces. There is no direct competition between municipalities and private firms: Municipalities may provide the service or arrange for private firms to do so, but not both. Municipalities may, at their discretion, change tender conditions—within the constraints of provincial procurement rules—in order to change conditions of competition. These changes may include geographically splitting or combining the contractual area for collection, extending the time limit before the contract begins to enable firms to expand their capacity, and vertically splitting collection from disposal to enable non-integrated firms to compete.

Ukraine was asked how effective competitive tendering was given that private suppliers must already have their own equipped vehicles before they participate in the tender, that is, they must incur a sunk cost while winning the bid was still uncertain. Also, it was asked about competitive neutrality between municipal companies and private firms. The delegate replied that bidders may lease rather than own the vehicles, which reduces sunk cost. As well, the same firm can submit tenders in several different regions. Competitive neutrality is seen as very important: Increased transparency in the tender procedure, as provided for in draft legislation, as well as increased personal responsibility in members of the committee conducting tenders, are hoped to increase competitive neutrality.

Latvia responded to a question on tendering of collection services by noting, first, that municipalities are responsible for the collection of household waste within their territory. If a municipality owns a municipal waste collection company, then it uses its own company and there is no tendering. Otherwise, it conducts a competitive tender to be the monopoly supplier for 3-5 years, depending on the contract provision. A municipal waste collection company may compete in tenders in other municipalities against private firms.

Peru was asked to explain the large cost differences in the provision of collection services by public versus private companies. The delegate responded that, in Peru, it is usual for either all the collection in a municipality to be provided by the municipality or all by a private company, but not a mixture. Lima is therefore an exception where the private-municipal split is about 75%-25%. Here, the private firm serves households in the flat area with easy access whereas the municipality serves the outlying areas on the skirts of mountains with difficult access. So the difference in geography explains the difference in costs.

The Slovak Republic was asked to explain why the range of collection contract durations was so wide, ranging from 1 to 20 years. The Chairman noted that a reading of the country submissions for the roundtable suggested that contract durations of 3-5 years seemed to be more common. The delegate replied that she assumed that it was due to municipalities' freedom to decide how to organize *inter alia* the provision of waste services within their territories, albeit within the constraints of the Act on Public Procurement.

Lithuania was asked to describe the competition case where Vilnius municipality conditioned participation in the tender to collect household waste to the possession of a license to treat hazardous waste. The delegate replied by noting, first, that waste management cases constitute a large part of the competition authority's workload. The purpose of the tie in the Vilnius case was not discovered during the investigation, and no economies of scope were alleged. The decision of the Competition Council was not appealed, contrary to the usual practice. In some sense, Vilnius is a rare example of competition in the market for waste management. It contrasts with most of the country, where no tenders to provide collection services are organized. A fundamental question before the Constitutional Court is the relationship between national competition law and municipal autonomy; a ruling is expected in 2014.

Romania was asked to describe the competition case where a district of Bucharest municipality prolonged a concession for waste collection services by 25 years. The delegate responded that the market for collection of household waste in Bucharest was opened to private companies in 1999 when the city was divided into six districts and each district entered a separate five-year contract with private companies. In 2004, each contract was prolonged to 2007. In 2007, contracts were again prolonged but, in one district, the contract was prolonged by 25 years. The main argument made by the municipality is that such conduct is within its powers. The case is now before the Supreme Court.

The chairman noted that some jurisdictions empower the competition authority to intervene in municipal decisions where they make anticompetitive choices.

Finland was asked to describe the reform of waste services that entered into force on 1 May 2012, the tensions thereby generated, and the solutions proposed by the commission established in response. The delegate replied that the 2012 Waste Act reform did not effect revolutionary change and, in the view of the Competition Authority did not solve or aim to solve the fundamental competition problems. The authority had pointed out that the long-term rise in the value of waste would eventually lead to incentives to innovate and properly exploit it. But these require institutional change, for example freedom of choice and options for collection and exploitation. Instead, the reform strengthened and expanded exemptions from competition. Among issues addressed by the competition authority are the implications of §33 of the Finnish Waste Act. It provides that municipalities must organize waste management services—for waste meeting conditions for type and frequency—if not available otherwise. Although this provision was justified to ensure coverage in remote areas, in the opinion of the FCA it ensures that municipalities get waste that would otherwise be out of their reach. Municipalities may have incentives to divert waste into the feedstock of under-utilized municipal incinerators that would otherwise be recycled by private companies. This clearly gives rise to issues of inconsistency with the waste hierarchy, competitive neutrality and abuse of dominance.

Italy was asked about the instruments used and whether targets of separate collection of 65% by 2012 were achieved. The delegate replied that incentives were offered to reduce landfilling and encourage separate collection. Regions could impose environmental taxes on deposits in landfills by municipalities. National legislation fixed the minimum and maximum. Municipalities could get discounts if they reached certain targets for separate collection or for total waste production. These instruments have been applied quite differently and the differences one observes today at the regional level might reflect these differences of implementation. Some regions have nearly reached the 65% target whereas others are far from it. A little-used instrument was the possibility for the municipality to impose different charges for waste collection that vary according to the quantity of waste produced rather than, as now, the size of or number of people living in an apartment. In July, the Competition Authority issued an advocacy report to the Latium Region where a separate collection rate of 22% has been achieved. The report pointed out that the regional regulations favour landfilling and raise obstacles to the development of new markets in the waste sector.

A general discussion ensued, in which Professor Massarutto pointed out that there are many more opportunities for increasing efficiency along the value chain, for example in the outsourcing of the various individual tasks that are performed “behind” the contract from collection services. The chairman agreed that a strategy of outsourcing can provide both the flexibility to, e.g., meet summertime peak demand, as well as improved exploitation of economies of scale across several municipalities, can increase efficiency. The delegate from the Netherlands noted that, when the practice of outsourcing waste management was just beginning in the country, private companies were much more efficient than public ones. Subsequently, the rate of entry slowed and incumbents tended to merge in order to gain efficiency. There can be a tension between number of competitors and efficient scale. The difference in efficiency of public and private companies has decreased. This may be due to governments having put its activities at arms’ length and changed the objectives of public companies. It remains important to try to further privatize this market.

3. The market for landfill and incineration services

The Chairman noted that landfills and incinerators have local costs, with incinerators also producing hazardous residue. These negative externalities raise the total or “social” cost of disposal. If waste producers do not bear these social costs, particularly the marginal cost of producing more waste, then they have incentives to produce too much waste. This is an issue of pricing of waste services that has not been addressed yet, but may be in the future, for example imposing on municipalities different schedules for the pricing of waste disposal, as mentioned in the Italian contribution. There are also issues of location, where considerations such as NIMBY become very serious. Requirements to dispose of waste close to its production combined with varying population densities and geographic characteristics can give rise to very different social costs. The removal of rules restricting where waste can be disposed of can generate both competition and more general issues. The 1999 Roundtable concluded that there could be competition in landfills. The Chairman contrasted the Italian situation, where it was very difficult to find even one landfill near Rome, with the Estonian situation, where there appeared to be choice of landfills near the capital.

In Estonia, the Competition Authority recommended in 2010 that Tallinn municipality not direct all municipal waste to only one treatment facility. The main concern was that such an action would impede competition between new treatment facilities such as incinerators and fuel-making facilities. Consequently, there are now incinerators and at least two other facilities that compete in the waste treatment market. Landfills probably do not compete with incinerators since the landfill environmental tax raises the price paid for disposal. The new treatment facilities are placed near Tallinn because it is where waste is generated and where there is demand for district heating and electricity.

In Chinese Taipei, 95% of municipal waste that is not recycled is incinerated and only 5% is landfilled. Per capita waste has fallen from 1.1 kg to about 0.4 kg over about 15 years. There are 24

incinerators in the country. Publicly operated incinerators process waste collected by local cleaning teams and the cost of waste management is covered by fees imposed by local government. Thus, local governments determine the price based on cost. Privately operated incinerators may receive industrial waste collected by private waste collection. Their fees are set either at the rate set by local government or under conditions of competition. The significant decline in per capita waste collected between 1997 and 2012 is mainly due to the strong policy of waste minimization and resource recovery: A mandatory recycling program has been in place since 1998 and mandatory separation of waste at the household since 2005. No study has been performed to determine whether price played a major part in the large decline in the quantity of waste.

In Poland, legislation has established the concept of a waste region. A region must have a population exceeding 150 000 and encompass more than one municipality; municipalities with population exceeding half a million may form their own regions. Each region must have at least one regional facility as well as a back-up facility. A regional facility may be a landfill, an incinerator or another kind of waste treatment facility fulfilling certain criteria set out in law. A municipality may specify which disposal facility to use, and it is usually a facility owned or controlled by the municipality. Regions were introduced because of the “proximity rule,” which says that waste must not travel around the country. Therefore, facilities cannot compete with those located outside the region. This causes a number of practical problems, for example where a facility outside the region where waste is generated is closer than facilities in the same region, or where the waste generated within a region is insufficient to use the facility’s capacity. In Poland, there has been a recent shift from competition “in” the market for waste collection to competition “for” the market. Municipalities choose the waste collector by competitive tender. Over the period 2000-2010, about two-thirds of the Competition Authority’s decisions concerned monopolistic practices by municipalities in the markets of municipal services, including waste management. For example, they abused their dominance by creating preferential conditions for municipal enterprises. The competition authority’s report on competition in collection and disposal of municipal waste contains a number of examples.

In the Russian Federation, collection markets are separate relevant markets from landfills and incinerators in the practice of the competition authority. Competitive tenders for waste disposal organized by local public authorities are subject to the competition law prohibitions against bid rigging and anticompetitive conduct by public authorities, such as by providing preferential treatment. There is no direct legal prohibition of private incinerators or landfills in Russia. Both incinerators and landfills are considered to be public utilities and their prices are therefore subject to regulation as a public utility by either the federal tariff service or a local equivalent body. Public utilities are automatically considered to be dominant under Article 5 of the competition law. Thus, excessive prices can be found to be an abuse of dominance. A decision by the Supreme Arbitrazh Court concerned competition in these markets.

In the United Kingdom, the Competition Commission reviewed a number of Stericycle’s acquisitions, including that of Ecowaste in 2011. Both Stericycle and Ecowaste were fully integrated, that is, they engaged in collection, treatment and disposal of hazardous waste. They had excess capacity and were each other’s closest competitor, thus the merger would diminish competition. There may have been efficiencies due to scale economies. The Commission concluded that “collection only” companies did not provide sufficient competitive constraints on vertically integrated companies. Further, health authorities would contract only with collection companies in which they had confidence. Thus, the remedy required divestment of both an incinerator and four key contracts to supply services to health authorities. Divestment of only one of the activities—incineration or collection—was seen as an inadequate remedy.

In the Czech Republic, landfilling is as much as six times cheaper than incineration. Therefore, incinerators are built only if subsidized. For an incinerator to efficiently produce electricity and heat, it needs as much feedstock as possible. Since municipalities both generally own incinerators and are

responsible for waste management, they direct the waste they collect to the incinerators and leave little for recycling. Misaligned fees and prices in waste management yield this result.

In the United States, disposal is essential to collection services. A collection firm must have access in some way to disposal. “Collection only” companies competing with integrated collection and disposal firms will be faced by raising rivals’ costs strategies such as denial of access to disposal facilities or giving lower quality services or raising prices. Hence, merger remedies when a collecting market is at issue aim to ensure that disposal services are available to firms in the market or new entrants. They take the form of divestiture of disposal assets or in some cases conduct remedies such as contracts for disposal: whatever is needed to ensure that disposal services will be available.

4. Producer responsibility and competition

The Chairman noted that, for certain categories of waste including packaging waste, many jurisdictions have enacted laws for the collective collection and recovery of such waste. The objective of these schemes is to shift the responsibility of collection and recycling away from municipalities’ waste management services and towards manufacturers and retailers.

Professor Antonio Massarutto presented a brief description of the main issues associated with the promotion of EPR. EPR can lead to competition distortions through monopoly, mandatory targets, raising non-tariff barriers to trade, and inefficient duplication through dual systems. Evidence suggests that EPR has not prompted substantial “green” innovation. And recycling can be increased through less distortionary tools than EPR. On the other hand, there is evidence showing that EPR has resulted in the achievement of high recycling targets. The central point is that EPR may not be the most efficient tool for achieving recycling targets when markets are efficient, but it should be evaluated taking into account the existing market distortions. There are many reasons to believe that waste management markets have market failures.

Professor Massarutto reviewed arguments for market failures and analyzed the existing empirical research on EPR. Transactions costs along the recycling value chain can arise from the “lemons problem” in the quality of recyclables, as well as sunk costs. EPR can abate some of these transactions costs, as well as enable the exploitation of economies of scale and scope. Second, EPR can reduce price volatility, which induces further investment in separate collection for recycling. Third, EPR systems can be designed to create the desired balance between the market power of, respectively, collectors for EPR systems and municipal operators. Fourth, the price paid to municipal operators for collection of taken-back material is not an appropriate basis for comparing the efficiency of different countries’ systems, since the price may reflect the full cost or it may reflect a share when costs are shared between the municipality and the EPR system. Fifth, it is cheaper to manage waste through incineration, which can be regarded as an “industrial process” able to handle a variety of waste, than through recycling which generally requires an individualized solution for different types of waste, which raises average cost. Sixth, the obligation to recycle a given share of waste can be regarded in the same way as a public service obligation, where it is efficient for the obligation to be fulfilled at lowest cost by the entity that can do so at lowest cost. Finally, EPR has been a powerful tool for re-establishing public control over the destination of waste flows that would otherwise disappear in an uncontrolled way, such as illegally dumped or exported. The risk that EPR would introduce further market distortions can be reduced by appropriate design. For example, whereas monopolies were established initially to fulfill EPR, increasingly monopoly is used in some jurisdictions only as a last resort. Another concern that has been expressed is that competition may not allow the exploitation of scale economies.

Professor Massarutto put forward the following policy lessons. A barrier to competition or a legal monopoly may be necessary to efficiently attain a general interest target. The optimal tradeoff between

monopoly and competition changes with time and history and local market conditions change. It is important to avoid lock-in or irreversibility in how to organize EPR systems.

In Germany, the packaging ordinance requires producers and distributors to organize the take back and recovery from private households of all packaging used in the direct sale to consumers. The packaging concerned is defined by use but it mainly consists of plastics, glass and paper. Producers may fulfill their obligations by contracting with licensed waste management undertakings that run systems for the take back and recovery of packaging waste. Currently, there are ten such systems. The three main activities—collection, sorting and recycling—are performed by local waste disposal undertakings under contract to a licensed waste management undertaking. Typically, collection is organized jointly (by the, currently, ten) and the other two activities—sorting and recycling—are organized individually. Initially, the only waste management undertaking to offer a system of take-back and recovery was DSD. Subsequently, the three activities were vertically separated and competition was introduced. The Bundeskartellamt conducted a sectoral enquiry in 2012. Among other findings, sector costs more than halved between 2003 – before the first competitor of DSD started operations – and 2011, and the introduction of competition did not lead to a reduction in the recycling quota but rather an increase. We feel that these findings support the view that competition is no obstacle to the introduction of ambitious quotas targets in the ecological legislation. With respect to the Chairman’s question on economies of scope in the collection of the different types of household waste, it can be said that on the operational level, the local waste disposal companies typically offer the collection of both packaging waste and of other types of household waste. Concerning the latter however, the German legislation stipulates certain rights for municipalities which limit the scope for activities of private waste disposal companies. Still there is a legislative project that aims at the collection of packaging waste together with other household waste consisting of plastics and metals. The motivation for this project does not mainly refer to economies of scope but rather to increasing the amounts of waste destined for high quality recycling.

The European Union case concerns the use of containers by ARA, the unique licensed take-back and recovery system from households for packaging in Austria. One part of the case concerns whether ARA prevented rivals from accessing the household collection infrastructure. A September 2013 Austrian law requires ARA to offer its infrastructure to other systems if the other systems so wish and there are no objective reasons it cannot be shared. This implies that there will be a single collection infrastructure.

In Japan, the Japan Fair Trade Commission (JFTC) commented on a proposal by a committee comprising retailers and local government and local residents to introduce a fee on plastic bags in supermarkets to reduce their use. The ineffectiveness of other schemes in changing consumer use of plastic bags led to a decision to set the fee sufficiently high to discourage use appropriately. In this case, the unit price of plastic bags was set by five Japanese Yen per bag, however actually the JFTC did not care whether this price was directly linked with the production cost or not. The JFTC considered this pricing was appropriate in order to reduce the amount of using plastic bags considering the balance between disincentive to customers for using and the acceptable level for consumers who want to use the plastic bags. The JFTC does not know whether local or central government has in mind to impose a tax to use plastic bags. However, charging a fee through price mechanism is an effective way to reduce the amount of using plastic bags. On the other hand, a tax on only plastic bags would raise administrative costs and retailer costs, so it is doubtful that taxation scheme would work well.

In France, producer compliance schemes (PCSs) established to fulfill EPR are seen as playing two roles, both competitors and regulators, able to exercise some regulatory control over their competitors thereby gaining competitive advantages. Although PCSs are established to fulfill missions of general interest, without a profit-making aim, they act in accordance with market mechanisms and are subject to the competition rules. The competition authority has recommended that all PCSs be placed under state approval and control, *inter alia* to be able to correct anticompetitive effects. The authority also identified

future concerns. For example, if PCSs change their role from financier to operator, their statutory mission would enable them to observe and monitor other operators. But access to rivals' know-how and activities could be used anticompetitively. In this case, the authority specified that monitoring must be structurally separated from economic activities.

In Turkey, the competition authority intervened in the pricing and the exclusive agreements of Lasder, the authorized take-back and recovery system for used tyres. Lasder entered into exclusive agreements with collection companies. The competition authority was concerned that the agreements could prevent new collection companies from entering the market. However, they seemed to be necessary for the arrangement to benefit from scale economies. Lasder introduced a tender procedure for choosing collection companies, with exclusive contracts for five years. The length of the contract was determined to enable collectors to recover sunk set-up costs. Collection companies could collect tyres on behalf of other tyre producers not members of Lasder. The authority granted a five year exemption to Lasder.

The representative of BIAC addressed the need for guidance for business, since there is a strong eagerness to comply with environmental protection rules while not running afoul of the antitrust enforcement. He drew a distinction between waste management generally and the increasing recycling opportunities e.g., through EPR. Collection and disposal of waste generally should benefit from competition law enforcement particularly as regards as the creation of a level playing field. In the context of recycling, a too rigorous application of competition law might complicate the efficient cooperation among firms that is an indispensable feature of such arrangements.

He also raised a number of practical questions: Can a particular regime be mandated or must alternatives be offered? Can a third party be appointed on an exclusive basis to collect and recycle materials? How to charge for services and how to handle the information necessary to calculate charges? How to communicate charges and pass them onto customers? And he concluded by stating that some guidance on these issues would be welcome and helpful, especially since different competition authorities take different stances on some of them.

The Chairman reiterated BIAC suggestion to competition authorities to clarify their stands on specific issues within the extended producer responsibility arena and encouraged further bilateral discussion.

The Chairman summarized the discussion by noting that there has been little technological progress in the industry since the 1999 roundtable. Collection of waste from households remains, in most jurisdictions, a natural monopoly. The service is usually tendered. The tendering procedure may allow local authorities, who also own the municipal collection company, to exploit their power in favour of this company. In some jurisdictions, the competition authority is trying to disentangle this type of conflicts of interest.

He also said that in 1999, the working party had concluded that the provision of disposal services could be competitive, but today they have heard that integrated collection and disposal firms could compete, at least in specific areas of the waste industry. Finally, he mentioned that Professor Massarutto reported results obtained through the introduction of EPR that had been unimaginable 10 to 15 years ago when EPR was first introduced.. Contributions to the roundtable show that, in general, competition authorities have promoted EPR and have intervened only to removed anticompetitive restrictions that seemed to be unjustified.

SYNTHÈSE

*Par le Secrétariat **

Plusieurs points se dégagent des débats qui se sont déroulés lors de la table ronde, des contributions écrites des délégués et de l'exposé de l'intervenant :

- (1) *Les lois et réglementations qui s'appliquent au secteur des déchets, y compris à la gestion des déchets municipaux, obéissent en grande partie aux objectifs, à la taxonomie et aux pratiques historiques relevant du domaine de l'environnement. Bien qu'elles imposent des contraintes à la conduite des entreprises du secteur, la concurrence peut néanmoins être mise à profit pour stimuler l'efficacité. L'action des autorités de la concurrence peut contribuer à faire en sorte que les lois et réglementations atteignent les objectifs environnementaux en limitant le moins possible la concurrence.*

La responsabilité de la gestion des déchets municipaux est partagée entre les communes, les ménages et, lorsque la responsabilité élargie des producteurs (REP) est appliquée aux déchets d'emballage, les fabricants, importateurs et distributeurs des produits emballés. La REP incite à développer des systèmes de collecte et de reprise des types de déchets désignés, de manière à les réutiliser ou à les recycler. L'expression de ce qui est jugé préférable du point de vue de l'environnement passe souvent par une hiérarchisation qui classe dans un ordre décroissant l'absence de production de déchets, leur réutilisation, leur recyclage, leur valorisation énergétique et, en dernier lieu, leur élimination.

Le secteur de la gestion des déchets est soumis à une réglementation stricte, pour atteindre des objectifs environnementaux déterminés. Les règles peuvent avoir des effets anticoncurrentiels et les communications des pays reviennent à maintes reprises sur la nécessité de plaider en faveur de la concurrence, pour que la législation soit conçue de manière à permettre une concurrence effective, à même d'aider à atteindre les objectifs environnementaux au moindre coût.

L'expérience de l'application du droit de la concurrence ne justifie pas de réserver un traitement particulier au secteur de la gestion des déchets. Plusieurs décisions concilient de fait les objectifs environnementaux et les objectifs de concurrence. Comme dans d'autres domaines où concurrence et réglementation se coudoient, la question est de savoir si la limitation de la concurrence, par exemple sous la forme d'un accord d'exclusivité anticoncurrentiel, est réellement nécessaire à la réalisation des objectifs environnementaux poursuivis ou si le but peut être atteint avec moins d'entraves.

* Cette synthèse ne représente pas nécessairement le point de vue unanime du Comité de la concurrence. Il présente néanmoins les principaux points soulevés lors des débats de la table ronde, dans les contributions écrites des délégués, dans le rapport de l'intervenant et dans la note de synthèse du Secrétariat.

- (2) *La collecte des déchets municipaux est un monopole naturel dans beaucoup de circonstances, mais pas systématiquement. Il ressort de diverses études empiriques que les coûts sont majorés lorsque plusieurs collecteurs interviennent. Néanmoins, dans certains pays, le marché est concurrentiel.*

En général, la collecte se caractérise par de sensibles économies de densité, raison pour laquelle elle est habituellement considérée comme un monopole naturel local. La table ronde sur la gestion des déchets organisée par l'OCDE en 1999 était déjà parvenue à cette conclusion¹. Il ressort de diverses études empiriques que les coûts sont majorés lorsque plusieurs collecteurs interviennent. En conséquence, les communes prennent généralement des dispositions pour que les déchets des ménages soient collectés par un prestataire qui a le monopole de l'activité, à savoir la commune elle-même (directement ou par l'intermédiaire d'une entreprise municipale) ou une entreprise privée.

La collecte des déchets qui nécessitent des manipulations particulières ou des déchets produits en grandes quantités ne bénéficie pas d'importantes économies de densité. Elle peut donc être confiée à plusieurs prestataires concurrents. En Suède, par exemple, la collecte des fractions recyclables des déchets municipaux dans les immeubles d'habitation est soumise à la concurrence entre entreprises privées, mais ce sont les communes qui se chargent de la collecte dans les maisons individuelles.

La concurrence sur le marché de la collecte des déchets municipaux des habitations individuelles est ou a été la norme dans une poignée des pays étudiés. En Irlande et en Pologne, les entreprises privées rivalisent ou ont rivalisé pour recueillir les déchets chez les particuliers dans les zones densément peuplées. En Finlande, où la concurrence sur le marché comme la concurrence pour le marché ont cours dans différents endroits, des études montrent que le prix de la collecte des déchets municipaux est d'un à deux cinquièmes moins élevé dans les secteurs où les marchés sont attribués sur appel d'offres que dans ceux où prévaut la concurrence parallèle.

Passer de la concurrence parallèle à la concurrence pour le marché a un coût. Les entreprises privées peuvent engager une action devant la justice pour bloquer des changements qui réduisent la valeur de leurs investissements irrécupérables et les communes ne sont pas toujours aptes à concevoir des appels d'offres efficaces.

- (3) *Attribuer sur appel d'offres le monopole légal de courte durée de la fourniture de services de collecte et d'élimination comporte des avantages, mais ceux-ci peuvent être réduits si l'appel d'offres est mal conçu. Il faut notamment garantir la neutralité de la procédure et ne pas omettre que les services d'élimination sont essentiels pour les collecteurs.*

Lorsque la collecte des déchets municipaux est un monopole légal, le prestataire peut être choisi arbitrairement ou moyennant une mise en concurrence. Si le monopoleur est choisi sur appel d'offres, un certain nombre de conditions doivent être respectées pour que la procédure conduise à sélectionner un prestataire performant. Pour que l'appel d'offres soit efficace, il faut *a minima* que les investissements propres à la relation contractuelle soient limités, que les soumissionnaires extérieurs disposent d'informations satisfaisantes sur les coûts et qu'aucun candidat ne bénéficie d'un traitement préférentiel.

Pour que les collecteurs soient à même de fournir leurs services, il ne doit pas y avoir de discrimination dans l'accès aux installations d'élimination. Lorsque la collecte et l'élimination

¹ Voir <http://www.oecd.org/daf/competition/sectors/1920304.pdf>.

sont soumises à la concurrence, les entreprises qui se chargent uniquement de la collecte peuvent se trouver aux prises avec celles qui pratiquent à la fois les deux activités et tirent parti du contrôle qu'elles exercent sur les installations d'élimination pour faire monter les coûts de leurs rivales. Pour contourner cet écueil, certaines communes soumettent les services de collecte et les services d'élimination à des appels d'offres séparés, ou bien restent propriétaires des installations d'élimination et n'externalisent que les services de collecte, en spécifiant les installations d'élimination qui doivent être utilisées. D'autres font porter l'appel d'offres sur une prestation intégrée réunissant la collecte et l'élimination.

L'absence de neutralité concurrentielle limite l'efficacité des appels d'offres. Elle peut se produire lorsqu'une entreprise publique se porte candidate contre des entreprises privées. Une entreprise publique peut en effet proposer un prix inférieur au coût, car elle peut se financer à des conditions plus favorables (elle ne peut pas être déclarée en faillite) et le manque à gagner éventuel peut être couvert par des fonds publics. Ces avantages peuvent décourager des entreprises privées tout aussi efficaces de présenter une offre.

D'autres facteurs doivent être pris en considération dans la conception des appels d'offres. Par exemple, la durée des contrats de collecte doit tenir compte du temps nécessaire pour récupérer la mise de fonds initiale. Si elle est trop courte, cette mise de fonds doit être récupérée plus vite, de sorte que les prix sont plus élevés. Si elle est trop longue, une partie des avantages de la concurrence, par exemple l'efficacité dynamique, disparaît, et les entrants mettent plus de temps à atteindre une efficacité minimale, car les marchés proposés sont moins nombreux sur une période donnée.

- (4) *Les marchés de collecte et d'élimination ont en général une portée géographique limitée. Néanmoins, les restrictions concernant l'élimination peuvent nuire à la concurrence entre options d'élimination.*

Relativement élevés, les coûts de transport limitent la distance sur laquelle les déchets municipaux, une fois collectés, sont acheminés. En outre, les marchés de l'élimination se caractérisent par des barrières à l'entrée élevées. Il en découle qu'un pouvoir de marché local peut se développer en ce qui concerne la fourniture des services d'élimination.

Les restrictions spécifiant les installations dans lesquelles les déchets municipaux d'une commune doivent être éliminés et l'interdiction d'accepter les déchets n'ayant pas une origine locale aident les entreprises concernées à renforcer leur influence sur le marché de l'élimination. Beaucoup de pays ont adopté des plans régionaux de gestion des déchets qui spécifient l'endroit où les déchets municipaux doivent être éliminés, ou bien tracé des frontières intérieures que les déchets ne doivent pas franchir. A l'inverse, la concurrence peut être stimulée si les installations d'élimination ne sont pas désignées, car elles peuvent alors rivaliser pour attirer des communes ou des entreprises de collecte. De même, les communes peuvent lancer des appels d'offres à l'intention de plusieurs installations d'élimination situées aux alentours. L'équilibre entre le « principe de proximité » et les gains socio-économiques tirés de la réduction du pouvoir de marché doit être examiné, de manière à garantir l'efficacité globale².

²

Dans ce sens, les mouvements de déchets devraient être autorisés dès lors que toutes les entreprises de traitement des déchets rivales respectent l'environnement, en obéissant aux lois, réglementations et pratiques nationales auxquelles elles sont soumises.

- (5) *Si trop d'entreprises s'implantent sur le marché de l'incinération, les déchets recyclables peuvent être déclassés dans la hiérarchie des déchets et les installations peuvent être contraintes à ne pas utiliser toutes leurs capacités, ce qui augmente le coût de l'incinération. L'entrée sur le marché de l'incinération est en partie fonction des subventions publiques. Les décisions relatives aux aides d'État devraient mieux tenir compte des conditions prévalant sur les marchés concernés et sur les marchés connexes, comme ceux de la gestion alternative des déchets, pour garantir l'efficacité globale.*

Dans certains endroits, la capacité d'incinération est supérieure aux flux de déchets municipaux, ce qui incite à incinérer des déchets recyclables qui ont un fort pouvoir calorifique. La décision de construire une installation dépend, entre autres, des recettes attendues, du coût des intrants et des coûts fixes de la construction d'un incinérateur. Ces derniers peuvent être réduits au moyen de subventions publiques. Il peut en découler que les entrées soient trop nombreuses, en raison de quoi les prix ne couvrent pas les coûts et détournent les intrants d'autres usages comme le recyclage.

- (6) *Compte tenu de la grande variété des solutions apportées localement au problème de la gestion des déchets municipaux et de la diversité des traitements que les autorités de la concurrence appliquent à une même conduite dans ce secteur, il est difficile aux entreprises de formuler des stratégies qui conviennent dans la totalité des nombreuses zones où elles exercent leur activité.*

Dans la majeure partie de la zone de l'OCDE, les communes sont libres d'organiser la gestion des déchets municipaux, dès lors qu'elles respectent le cadre légal. La variété des solutions retenues engendre un environnement juridique complexe pour les entreprises privées qui fournissent des services de gestion des déchets dans plusieurs communes et pays. Les communes devraient donner une description claire de leur régime réglementaire.

Le droit de la concurrence et la pratique apportent des réponses à bon nombre des problèmes soulevés, par exemple dans l'éventualité où des concurrents s'entendent pour répercuter une cotisation de recyclage sur les consommateurs ou dans le cas où des entreprises désignent un collecteur/recycleur exclusif. Les autorités de la concurrence peuvent permettre aux entreprises de mieux comprendre les règles et de mieux les respecter en multipliant les échanges bilatéraux avec les milieux professionnels concernés (par exemple au moyen de lignes directrices spécifiques).

- (7) *Dans le cadre de la responsabilité élargie des producteurs, la conduite des éco-organismes a des incidences sur la concurrence sur les marchés des services qu'ils achètent, comme la collecte et le traitement, sur les marchés de certains déchets, et sur la concurrence entre eux-mêmes. Des appels d'offres, des restrictions aux accords d'exclusivité et la limitation de la vente liée ou groupée sont souvent imposés pour réduire les atteintes à la concurrence.*

Les éco-organismes ont été créés à la suite de l'adoption du principe de la responsabilité élargie des producteurs (REP). Les cartons, cannettes, bouteilles et journaux sont des exemples de déchets produits par les ménages et auxquels la REP est souvent appliquée. Un éco-organisme doit collecter ou reprendre les déchets désignés, les trier et les traiter de manière à les transformer en matières premières secondaires ou à les recycler. Certaines matières premières secondaires ont une valeur marchande. Les déchets de verre, par exemple, sont utilisés pour produire du verre d'emballage avec un coût inférieur à celui des matières premières vierges.

Les données montrent que les éco-organismes ont su mettre en place des marchés de matières premières secondaires et favoriser l'innovation dans les processus qui visent à transformer les

déchets en matières premières secondaires et déchets résiduels, comme le tri. Ces changements permettent d'atteindre des taux de recyclage qui, initialement, étaient jugés très ambitieux.

Beaucoup d'éco-organismes ont d'abord bénéficié d'un monopole (même si, en général, les producteurs ont aussi le droit de remplir leurs obligations individuellement), mais petit à petit, certains marchés ont été ouverts à la concurrence. Les trois activités complémentaires (collecte, tri et traitement/valorisation) peuvent être séparées dans une certaine mesure, des appels d'offres déterminant les prestataires des différents services dans différentes régions. Le recours aux appels d'offres peut accroître sensiblement l'efficacité, même lorsque l'éco-organisme est en situation de monopole : celui qui, en Allemagne, est chargé de la filière emballages utilise cette méthode pour attribuer les marchés de collecte. Les coûts ont ainsi été réduits de 30 % environ sur la période 2003-2005.

Souvent, les éco-organismes détiennent un monopole ou sont en position dominante. De ce fait, les contrats qu'ils passent avec les prestataires de services peuvent comporter des clauses qui portent atteinte à la concurrence. Ils peuvent ainsi prévoir la fourniture simultanée de plusieurs services, une durée ou des prix excessifs, et une exclusivité qui empêche le prestataire de travailler avec d'autres éco-organismes. En fait, dans la mesure où les monopoles locaux de collecte sont un passage obligé pour prendre pied sur le marché des éco-organismes ou les marchés situés en aval, c'est surtout dans l'accès aux contrats de collecte que réside le problème, comme en témoignent les affaires de concurrence traitées dans plusieurs pays. Les règles des éco-organismes sur l'allocation des matériaux valorisés (verre ou piles au plomb triés, par exemple) peuvent porter atteinte à la concurrence sur le marché des produits en aval en raison de leurs effets sur les coûts de production.

Ouvrir les marchés des éco-organismes à la concurrence se traduit parfois par des gains d'efficacité importants. D'abord monopolisé, celui des éco-organismes chargés des déchets d'emballage en Allemagne compte désormais dix concurrents, même si l'ancien monopole en détenait toujours 44 % en 2011. Les coûts du recyclage sont passés de 2 milliards EUR par an à 1 milliard EUR, ce qui revient à une économie annuelle de 50 EUR pour une famille de quatre personnes. Des innovations ont été mises en œuvre dans le tri, ce qui a entraîné une hausse de la valeur marchande des matières premières secondaires. La concurrence n'a pas fait diminuer le taux de recyclage.

NOTE DE RÉFÉRENCE

Par le Secrétariat

Introduction

Avec l'évolution, au fil des ans, des normes sociales et juridiques, plusieurs marchés se sont créés pour assurer le traitement des déchets solides. Le présent document porte plus particulièrement sur les déchets ménagers solides que l'on désigne le plus souvent sous l'appellation de déchets solides municipaux (« DSM »)¹. Les ménages produisent les déchets les plus divers qui sont collectés et triés en différentes filières suivant qu'ils sont appelés à être réutilisés, recyclés, valorisés, incinérés pour servir de combustible ou mis en décharge². Le désir de prévenir les effets néfastes que la production de déchets peut avoir sur la santé humaine et sur l'environnement a donné lieu à des lois et à des réglementations qui restreignent le comportement des ménages et des entreprises dans le secteur de la gestion des déchets.

Le cadre juridique délimite l'espace au sein duquel la concurrence peut s'exercer dans le secteur de la gestion des déchets. Les municipalités sur le territoire desquelles se situent des décharges peuvent en limiter l'accès aux déchets provenant d'autres lieux. Les municipalités peuvent également exiger que les déchets produits localement soient acheminés à l'installation locale de traitement des déchets. Les règles du commerce international permettent également aux pays de limiter l'exportation ou l'importation de divers types de déchets, notamment des déchets municipaux. La législation peut s'accompagner de mesures contraignantes spécifiant quelle est la part des différents types de déchets qui doit être recyclée ou interdisant un accroissement de la capacité des décharges et des incinérateurs, bloquant de ce fait l'entrée de nouveaux opérateurs. D'autres lois modifient les incitations afin de modifier les comportements. C'est le cas notamment de celles qui élèvent ou abaissent les taxes de mise en décharge ou les droits perçus à l'entrée des décharges³, ou qui prévoient l'application de droits sur l'électricité ou sur le chauffage générés à partir des déchets. L'adoption de mesures contraignantes sur un marché peut avoir pour objet de réorienter les incitations qui existent sur un autre. Ainsi, les réglementations qui précisent la proportion de matériaux recyclés qui doivent entrer dans la composition d'un produit font monter le prix des matières

¹ Terminologie et définitions diffèrent suivant les juridictions. Les statistiques et les marchés regroupent souvent les déchets collectés auprès des ménages et ceux qui sont collectés auprès des établissements commerciaux. Ainsi, la Directive de l'UE relative à la mise en décharge des déchets définit les déchets solides municipaux comme « les déchets ménagers ainsi que les autres déchets qui, de par leur nature ou leur composition, sont similaires aux déchets ménagers ». Le présent document ne porte ni sur la mise à la casse des véhicules, ni sur les déchets industriels ou les déchets de chantier.

² Lorsqu'il devient trop coûteux ou trop fastidieux d'éliminer des déchets de façon conforme à la loi, les ménages peuvent également s'en débarrasser illégalement en les jetant de l'arrière d'un camion par une nuit noire, sur une route isolée. Ce risque n'est pas à prendre à la légère et il limite les possibilités de recouvrement de taxes d'enlèvement des ordures ménagères. En Irlande, on estime que 19% des ménages, voire 54 % des ménages ruraux, n'ont pas eu recours à un service de ramassage des ordures ménagères en 2009. (Gorecki et Lyons, 2011, citant Ireland Environmental Protection Agency, 2011, p. 26).

³ Une taxe de mise en décharge (taxe d'incinération) est imposée par une autorité publique au titre de l'élimination en décharge (incinérateur). Un « droit d'entrée » est imposé par l'opérateur d'une décharge (ou incinérateur) au titre de l'élimination des déchets. Les utilisateurs paient le montant correspondant à la somme des deux taxes.

premières secondaires et offrent de plus grandes incitations économiques à recycler. En d'autres termes, le cadre juridique détermine les dimensions géographiques des marchés et la teneur des produits qui y sont vendus, ainsi que le niveau des prix de certaines composantes et de certains produits.

La « hiérarchie des déchets » dicte la politique des déchets dans de nombreux pays. Elle établit un classement des méthodes possibles de gestion des déchets suivant un ordre de préférences qui, de l'option la plus désirable à celle qui l'est le moins, se présente comme suit :

1. prévention, c'est-à-dire non-production de déchets ;
2. préparation en vue du réemploi ;
3. recyclage ;
4. autres méthode de valorisation, notamment énergétique ; et
5. élimination⁴.

Il peut être difficile de rattacher la hiérarchie des déchets, axée sur les résultats, à la politique de la concurrence, qui est décentralisée et axée sur le marché⁵. Par conséquent, il ne sera plus question dans ce document de la hiérarchie elle-même, mais bien plutôt de la réglementation à laquelle elle donne lieu.

La quantité de déchets municipaux a augmenté avec la croissance de la population et l'élévation du niveau de vie mais il existe également des différences nationales. Aux États-Unis par exemple, la production quotidienne de DSM par habitant était de l'ordre de 2 kilogrammes en 2011, alors qu'elle était de 1.7 kg en 1980 et de 1.2 kg en 1960.⁶ Les chiffres qui correspondent aux pays de l'UE sont inférieurs ; un habitant produisant quotidiennement 1.4 kg de DSM en 2010⁷.

Par ailleurs, dans les pays développés, les DSM sont de plus en plus souvent recyclés ou incinérés. Ainsi, dans 27 des pays membres de l'UE, la part des déchets municipaux recyclés est passée de 11 % à 24 % entre 1995 et 2009, alors qu'au cours de cette même période la proportion de déchets mis en décharge tombait de 68 % à 38 %. Les moyennes masquent d'importants écarts. Ainsi le taux de mise en décharge des déchets municipaux, pris pays par pays, se situe entre 5 % et 100 %⁸. Aux États-Unis, en

⁴ Cette hiérarchie figure à l'article 4 de la Directive cadre sur les déchets ; Directive 2008/98/CE relative aux déchets. La version des Nations Unies est plus générale, les deux premiers éléments étant communs aux trois premiers de l'UE mais il s'y ajoute 3) la promotion d'une gestion écologiquement rationnelle des déchets solides et des eaux usées ; 4) l'extension de la couverture des services en matière de déchets. (PNUE, non daté)

⁵ Difficile, mais non impossible. Gorecki *et al.* (2010) fait remarquer que la hiérarchie des déchets peut être compatible avec la démarche économique si le prix associé à chaque méthode de traitement traduit son coût net et qu'à chaque stade, le prix de la méthode la moins désirée est plus élevé que celui de la méthode la plus désirée. Il n'y a toutefois aucune garantie que cela soit le cas. (p. 8) L'imposition d'une exigence supplémentaire, - que les prix soient déterminés par les marchés plutôt que par les pouvoirs publics -, n'augmente pas les probabilités devoir se réaliser les résultats quantitatifs de la hiérarchie.

⁶ US Environmental Protection Agency (2013), tableau 4.

⁷ Eurostat (2012).

⁸ Bluementhal (2011).

1960, 6 % seulement de tous les DSM étaient valorisés (en gros, cela représente les déchets recyclés auxquels s'ajoutent les exportations nettes) alors qu'en 2010, ce chiffre était passé à 34 %⁹.

Les échanges transfrontières de DSM et de déchets dangereux doivent être notifiés au Secrétariat de la Convention de Bâle. Tout en reconnaissant que les données disponibles sont incomplètes et qu'elles datent des années 2004 à 2006, elles permettent toutefois d'établir que, tous déchets confondus, huit des dix plus grands importateurs et la totalité des dix plus grands exportateurs de déchets notifiés auprès du Secrétariat de la Convention sont des membres de l'OCDE¹⁰. On peut imputer à ces pays environ 80 % et près de 70 % du total des volumes comptabilisés. Les déchets municipaux et leurs résidus après incinération constituent 10 % du total des exportations. Quoiqu'il en soit, « la vaste majorité des déchets dangereux et des autres déchets est encore traitée dans le pays d'origine »¹¹. Les chiffres, manifestement incomplets, qui ont été notifiés sous la rubrique des déchets ménagers représentent entre 176 et 138 millions de tonnes sur cette période de trois ans, tandis que la moyenne des déchets ménagers exportés tous les ans est d'environ un million de tonnes¹².

Des problèmes de concurrence se sont posés et peuvent encore de se poser à tous les niveaux du secteur des DSM. La structure des coûts de la collecte et de l'élimination des déchets a mené à une forte concentration du marché. Si le marché de la collecte de DSM d'une municipalité est ouvert à la concurrence, celle-ci peut encore être compromise par des difficultés d'accès à des installations telles qu'une station de transfert ou une décharge; par des inégalités entre soumissionnaires publics et privés, ou par des soumissions concertées. La concurrence sur les marchés ayant trait aux services d'incinération, aux décharges ou aux stations de transfert des déchets peut être limitée par une réglementation sur l'origine géographique des déchets. Des fusions peuvent entraver la concurrence sur certains marchés dont l'entrée est protégée par des obstacles élevés. Les programmes visant à collecter, trier et valoriser les déchets recyclables pour les convertir en matières premières secondaires, notamment ceux ayant trait déchets d'emballage, peuvent donner lieu à des contrats qui ont pour effets d'exclure les rivaux du marché ou d'établir des prix excluant de tels rivaux.

1.1. Travaux antérieurs du Comité de la concurrence de l'OCDE sur la gestion des déchets

Le Comité de la concurrence de l'OCDE a examiné la question de la gestion des déchets à deux reprises au moins. La gestion des déchets municipaux solides a été examinée en 1999, lors d'une table ronde sur l'offre d'incitations aux collectivités locales afin de promouvoir l'efficacité dans la prestation de services publics locaux¹³. Les principales conclusions qui sont ressorties de cet examen sont les suivantes :

⁹ US Environmental Protection Agency (2011).

¹⁰ Les principaux importateurs sont: l'Allemagne, l'Italie, la Belgique, la France, les États-Unis, les Pays-Bas, le Mexique, le Canada (membres de l'OCDE) ainsi que le Belarus et la Malaisie (non membres de l'OCDE). Les dix principaux exportateurs sont les Pays-Bas, l'Allemagne, l'Italie, les États-Unis, la Belgique, la Suisse, la France, l'Autriche, le Canada, et l'Irlande (tous membres de l'OCDE).

¹¹ Secrétariat de la Convention de Bâle (2010), p. 4.

¹² Secrétariat de la Convention de Bâle (2010), tableaux 8, 9, 10 et 15.

¹³ OCDE (2000).

- La collecte et le traitement des déchets sont deux activités distinctes. Les économies de densité déterminent s'il peut y avoir concurrence sur le marché. Rares sont les pays qui peuvent dépendre de la concurrence qui existe sur le marché pour assurer la collecte des déchets ménagers alors que cela est possible et même courant pour la collecte des déchets industriels et commerciaux.
- La collecte des déchets peut s'effectuer de façon efficiente si l'attribution du marché se fait par voie de concurrence. Toutefois, les résultats sur le plan de l'efficience dépendent des caractéristiques de la procédure d'appel d'offres, du contrat et de la manière dont il est mis en œuvre.
- La facturation à l'unité de l'élimination des déchets augmente la demande de recyclage et décourage la production de déchets; d'un autre côté, la facturation de la collecte des déchets incite davantage à s'en débarrasser illégalement.

L'examen des accords horizontaux dans le contexte environnemental auquel s'est livré le Comité de la concurrence en 2010¹⁴ portait notamment sur les entreprises conjointes dans les services de gestion et de recyclage des déchets. Cet examen a fait ressortir que les autorités compétentes en matière de concurrence étaient intervenues pour s'opposer à des dispositions des accords sur lesquels reposent les programmes de responsabilité des producteurs¹⁵. Plus précisément, elles se sont élevées contre les dispositions qui font obstacle à la prestation de services indépendants de collecte et de recyclage; contre les quotas répartissant les produits recyclés en fonction de la part du marché occupée historiquement par un opérateur; et contre les dispositions restreignant toute interaction avec des tiers, perçues comme faisant obstacle au développement de programmes concurrents de gestion et de recyclage des déchets. Les autorités ont également interdit ou autorisé, suivant le cas, les accords prévoyant de répercuter sur les consommateurs des taxes de recyclage. L'une des conclusions les plus intéressantes auxquelles soit parvenu le Comité, c'est que les interventions ayant pour objet de supprimer les obstacles à la concurrence dans les accords conclus dans le cadre de ces programmes, loin de gêner la réalisation des objectifs environnementaux, ont au contraire abouti à un meilleur fonctionnement des marchés qui offrent désormais davantage d'incitations à l'efficience. Il a également été conclu que même si initialement un programme de collecte et de recyclage, était envisageable sous forme de monopole, les arguments en faveur d'un système unique devaient être examinés de façon critique et que si un tel programme était mis en route, les restrictions à l'entrée de nouveaux opérateurs devaient être levées le plus rapidement possible.

Le présent document s'inscrit dans le prolongement des deux documents antérieurs. Les changements technologiques et politiques survenus au cours des 14 années écoulées ont modifié les aspects économiques de la collecte des déchets et de la mise en décharge. Les décharges sont plus grandes et plus éloignées. Une plus grande quantité de déchets n'est plus mise en décharge mais soumise à des traitements qui permettent leur réutilisation ou leur recyclage, ainsi que leur utilisation dans la production d'énergie. De nouvelles structures, les programmes de responsabilité des producteurs, jouent maintenant un grand rôle dans le secteur de la gestion des déchets.

Le reste du document est organisé comme suit: la Section 1.2 décrit brièvement les traitements matériels auxquels sont soumis les déchets une fois qu'ils ont quitté les poubelles. La Section 1.3 offre un aperçu des règles applicables au commerce international des DSM. Les sections suivantes portent sur des

¹⁴ OCDE (2010).

¹⁵ Comme cela sera expliqué plus en détail ci-après (section 4), les producteurs sont de plus en plus souvent tenus pour responsables des produits qu'ils placent sur le marché même lorsque ces produits ne sont plus utilisables et qu'ils ont atteint la fin de leur durée de vie. Ils peuvent s'acquitter de l'obligation qui leur incombe à titre individuel ou s'associant à d'autres dans le cadre d'un programme de responsabilité des producteurs, ou en rémunérant des tiers pour s'assurer d'un tel service.

questions des concurrence dans les secteurs, respectivement, de la collecte (section 2) ; des stations de transfert des déchets, des décharges et des incinérateurs (section 3) ; et des dispositifs mis en place aux fins d'application du principe de la responsabilité élargie des producteurs ainsi que sur les marchés concernés par ces dispositifs (section 4). La section finale contient la conclusion.

1.2. *Au-delà des poubelles : opérations de conditionnement matérielles*

Les déchets sont une substance dont le détenteur se défait ou dont il a l'obligation de se défaire. Dès que ces déchets font l'objet d'une demande, ils cessent d'être des déchets¹⁶. Par conséquent, par définition, les déchets n'ont pas de valeur marchande ou une valeur marchande négative. De plus, les déchets impliquent souvent des coûts pour les autres, c'est à dire qu'ils ont des effets induits négatifs. Puisque les déchets sont indésirables et que, vu la taille et la densité de la population, il n'est plus possible d'en disposer librement, il existe une demande de services d'élimination et de transformation de ces déchets en non-déchets.

Une fois les déchets placés par un ménage dans une ou plusieurs poubelles, au bord du trottoir, ils sont ramassés par des camions aménagés à cet effet et généralement transportés à une station de transfert où ils sont déchargés¹⁷. Aux stations de transfert, les déchets sont souvent examinés en vue de séparer les matériaux recyclables des matières compostables et des déchets dangereux ou impropres au recyclage. Les déchets recyclables incluent des matériaux tels que des boîtes en aluminium ou en acier, le papier et le carton, le verre et d'autres emballages. Les différentes fractions de déchets sont ensuite compactées à la station de transfert, chargées sur de plus grands véhicules, dans des wagons ou des péniches, et expédiées. Au nombre des destinations possibles, figurent des installations de compostage, des installations de valorisation des matériaux où les différents déchets recyclables sont séparés et préparés en vue de leur réutilisation ou de leur recyclage, des incinérateurs permettant de récupérer ces déchets aux fins de production d'énergie, et des décharges.

Dans les pays de l'OCDE, ce schéma a largement remplacé celui utilisé auparavant pour le traitement des déchets ménagers. Le camion de ramassage des ordures municipales ne transporte plus de cargaisons de déchets non triés jusqu'à un dépot municipal. Les vieilles décharges avoisinantes ont fermé soit parce qu'elles ont atteint leur pleine capacité, soit parce que leur présence aux abords des habitations humaines est moins bien tolérée, soit encore parce que des réglementations plus strictes font qu'il est plus économique d'avoir recours à de plus grandes décharges desservant une région plus étendue. L'allongement de la distance entre points de collecte et décharge a favorisé l'apparition de stations de transfert des déchets qui réduisent le coût du transport sur de grandes distances, tant en faisant disparaître des matériaux dans des circuits de recyclage qu'en compactant les résidus¹⁸.

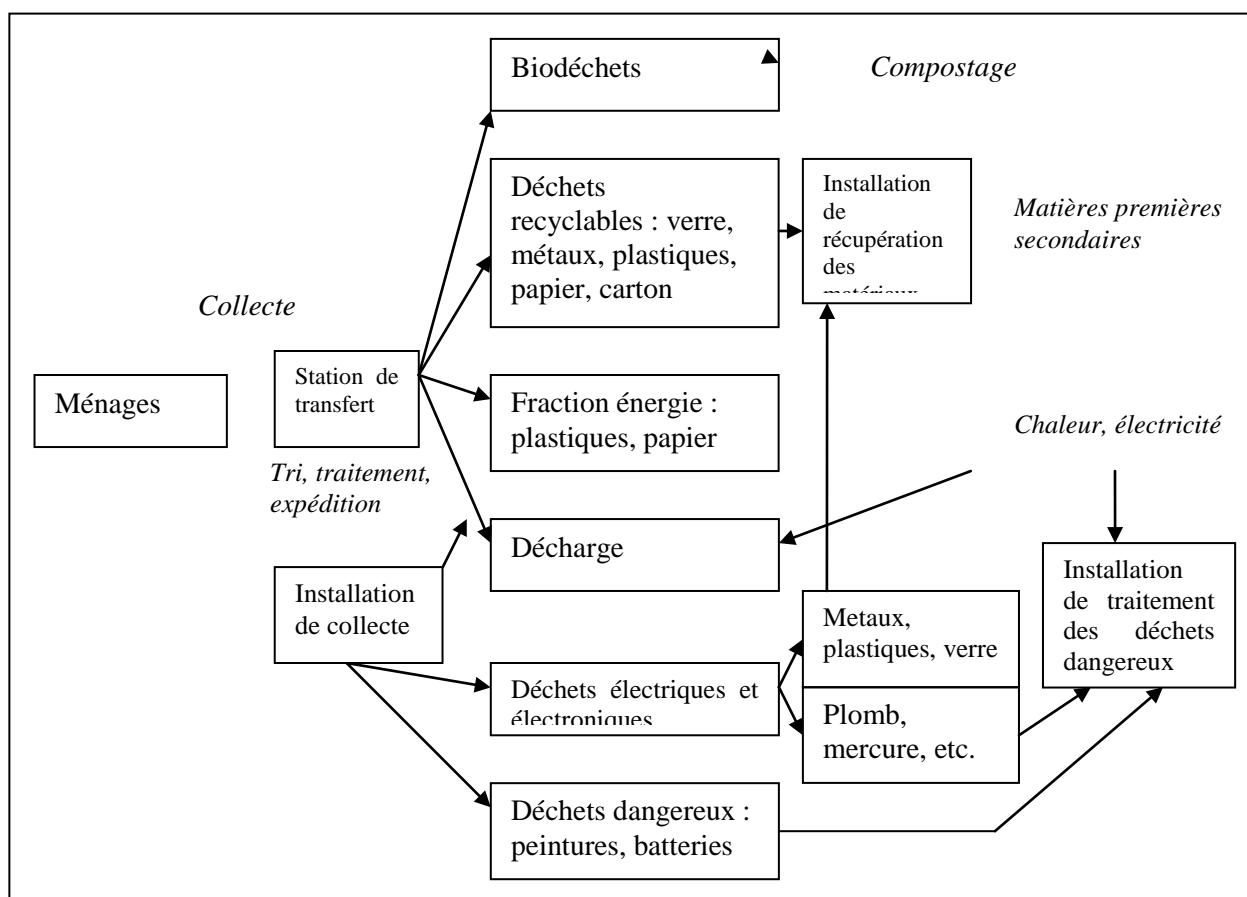
La figure 1 ci-dessous récapitule le flux.

¹⁶ La définition reprend approximativement les articles 3.1 et 6.1 de la Directive européenne [Directive 2008/98/CE].

¹⁷ Au lieu d'être ramassés sur le bord du trottoir, les déchets recyclables peuvent être déposés par leurs propriétaires dans des conteneurs situés à proximité d'où ils sont collectés. Sans cela, la station de transfert peut offrir de telles installations. En certains endroits, il se peut qu'il n'existe pas du tout de service de ramassage des ordures ménagères. Il incombe alors aux propriétaires de prendre les mesures qui s'imposent pour assurer le transport de tous leurs déchets.

¹⁸ US Environmental Protection Agency (2002).

Figure 1. Flux de DSM du stade de leur détention par les ménages jusqu'à leur transformation en matières premières secondaires ou à leur élimination



La collecte constitue la phase la plus coûteuse. Selon des estimations, elle représenterait entre 40 % et 80 % du coût total. Même dans le cas des pourcentages les plus faibles, une plus grande efficacité dans la collecte des déchets aurait des répercussions significatives sur l'efficacité de toute la chaîne de traitement des déchets.

La manière dont s'effectue la collecte des déchets a des répercussions sur les étapes suivantes. Le tri sélectif des déchets à la source peut se traduire par une meilleure qualité des matières premières secondaires qui se vendent de ce fait à un prix plus élevé. Un tel tri minimise les possibilités de mélanger différents types de matériaux, ce qui fait que les appareils de tri fonctionnent plus efficacement ; qu'il y a moins de déchets à trier pour obtenir un niveau de production donné, et que les matières premières secondaires qui résultent de ce processus sont plus homogènes. De plus, si l'on mélange le verre et le plastique par exemple, cela peut accélérer l'usure des machines.

L'introduction du principe de la responsabilité élargie du producteur (REP) appliqué aux déchets d'emballage a favorisé l'apparition de dispositifs permettant aux producteurs de s'acquitter de cette obligation. Dans le cadre de tels dispositifs, dont le programme « Point vert » allemand est un exemple, les ménages placent les déchets d'emballage dans des poubelles distinctes qui sont collectées séparément (ne serait-ce que dans un compartiment indépendant d'un camion à ordures ordinaire), et ce type de déchets suit une filière de traitement distincte, jusqu'à leur transformation en matières premières secondaires. Le même type de dispositif a été adopté pour d'autres catégories de déchets, en particulier pour ceux qui proviennent du matériel électrique et électronique, mais aussi pour les pneus, les automobiles, les piles et les accumulateurs.

Les déchets qui ne peuvent être ni recyclés, ni réutilisés sont souvent envoyés à des incinérateurs qui produisent de l'énergie utilisée pour le chauffage urbain, la production industrielle et la production d'électricité. Les décharges ne sont pas utilisées de façon aussi exhaustive¹⁹.

Ayant maintenant décrit les principaux aspects matériels du conditionnement des déchets, depuis leur ramassage sur le bord de la route jusqu'à la production de matières premières secondaires ou de combustible, ou à l'élimination permanente desdits déchets, la prochaine section donne un aperçu des règles du commerce international pertinentes en la matière. Les règles infranationales sont mentionnées dans la section portant sur la collecte et sur les décharges.

1.3 Les règles du commerce international qui s'appliquent aux DSM

Un grand nombre de pays ont trouvé que la libéralisation du commerce international des biens et services et la politique de la concurrence avaient un rôle complémentaire à jouer dans la promotion de l'efficacité économique, du développement et de la croissance²⁰. Plus récemment, une Recommandation du Conseil de l'OCDE sur la gestion écologique des déchets²¹ a fait observer que les restrictions commerciales pouvaient entraîner une distorsion de la concurrence sur les marchés où les matières premières secondaires étaient en concurrence avec les autres matières premières²². De façon analogue, les règles du commerce international peuvent entraîner des distorsions de la concurrence sur les marchés des services de gestion des déchets ainsi que dans le traitement des déchets destinés à l'incinération.

Les mouvements transfrontières de déchets sont restreints par des traités et des accords internationaux. Bien que le régime du commerce international ait pour objectif premier d'empêcher que des déchets dangereux ne soient délestés dans des pays qui ne sont pas préparés à les prendre en charge de façon écologique, le régime en vigueur limite également le commerce des déchets municipaux ainsi que celui des résidus qui subsistent encore après leur incinération. Néanmoins, le commerce de telles matières peut se produire entre pays de l'OCDE. En effet, les pays de l'UE pratiquent un tel commerce. Une partie de ce commerce couvre les mouvements de déchets à destination d'installations de valorisation spécialisées, parce que tous les pays ne disposent pas nécessairement d'une gamme complète d'installations. D'autres échanges au sein de l'UE concernent les fractions de DSM qui sont combustibles et destinées à être incinérées. Par contre, le commerce de déchets municipaux destinés à être mis en décharge est dans une large mesure bloqué.

Les DSM sont soumis à des règles spécifiques du commerce international. Les règles de l'Organisation mondiale du commerce (OMC) autorisent les États membres à imposer des restrictions au

¹⁹ L'article 11 de la Directive 2008/98/CE relative aux déchets, spécifie que les États membres doivent mettre en place, d'ici 2020, une collecte séparée des déchets ménagers, du moins pour le papier, le métal, le plastique et le verre.

²⁰ OMC (1998).

²¹ OCDE Recommandation du Conseil sur la gestion écologique des déchets [C\(2004\)100](#).

²² Le commerce des services, lorsqu'il réduit l'importance de la valeur négative des déchets a les mêmes effets d'efficacité que d'autres biens et services auxquels on attribue une valeur positive. Toutefois, si les effets négatifs induits imputables aux déchets ne sont pas pris en compte correctement, le commerce des déchets aura pour effet de réduire le niveau de bien-être de certaines personnes. Ainsi, si un importateur de déchets ne veille pas au maintien de la qualité environnementale de toute personne résidant à proximité, le commerce portera préjudice à ces résidents. Les « taxes d'accueil » dont il sera fait état ci-après en référence au commerce intérieur, constituent l'un des moyens de compenser le coût d'hébergement d'une installation de traitement des déchets. Si les bénéficiaires ou les personnes qui perçoivent une telle indemnisation ne sont pas les mêmes personnes que celles qui ont souffert des effets induits négatifs, alors le commerce porte préjudice à ces personnes.

commerce de ces déchets dans le but de protéger l'environnement, à condition toutefois que celles-ci remplissent certains critères. Aussi bien la Convention de Bâle que la Décision-Recommandation du Conseil de l'OCDE de 1990 décourage les mouvements transfrontières des DSM et des déchets dangereux. Outre ces réglementations internationales, les pays de l'UE sont tenus de respecter la législation européenne qui décourage aussi les mouvements transfrontières de déchets, mais qui autorise le commerce des déchets appelés à être incinérés dans des installations efficaces sur le plan énergétique, et qui autorise également le commerce des matériaux issus d'opérations de valorisation qui, du fait de leur traitement, ne constituent plus des déchets.²³ Ces instruments juridiques sont décrits brièvement ci-après.

L'article XX de l'Accord général sur les tarifs douaniers et le commerce (aussi connu sous l'appellation GATT) contient les règles pertinentes de l'OMC sur les restrictions au commerce aux fins de protection de l'environnement. L'encadré 1 en contient certains extraits.

Encadré 1: Article XX du GATT

« Sous réserve que ces mesures ne soient pas appliquées de façon à constituer soit un moyen de discrimination arbitraire ou injustifiable entre les pays où les mêmes conditions existent, soit une restriction déguisée au commerce international, rien dans le présent Accord [le GATT] ne sera interprété comme empêchant l'adoption ou l'application par toute partie contractante des mesures : ...

« b) nécessaires à la protection de la santé et de la vie des personnes ou des animaux, ou à la préservation des végétaux ; ...

« g) se rapportant à la conservation des ressources naturelles épuisables, si de telles mesures sont appliquées conjointement avec des restrictions à la production ou à la consommation nationales. ...»

Un test en trois parties a été mis au point aux fins de l'article XX (b)²⁴. Selon ce test, une politique doit :

- être conçue de façon à avoir pour objectif la politique de santé,
- être nécessaire à la réalisation de l'objectif, et
- satisfaire aux exigences du chapeau de l'article XX.

La jurisprudence et les décisions de l'OMC ont précisé comment interpréter trois phrases clés de l'article XX (g). Deux d'entre elles sont pertinentes ici. «Se rapportant à» a été interprété comme signifiant «visant essentiellement à», tandis que « si de telles mesures sont appliqués à» a été interprété comme une exigence d'équité dans l'imposition de restrictions.

Deux autres parties du régime de l'OMC pourraient également s'appliquer au commerce des déchets solides municipaux. L'Accord sur les obstacles techniques au commerce pourrait s'appliquer à la création

²³ Bien qu'elle ne soit pas abordée ici, il existe une jurisprudence permettant d'établir quand des déchets ne sont plus considérés comme tels ; comment faire la différence entre déchets et produits utilisés, ainsi qu'entre valorisation et élimination. Les distinctions ont une incidence sur les règles commerciales applicables.

²⁴ Division des affaires juridiques, OMC (2012), paragraphes 888 et suivants.

de normes concernant les matières premières secondaires²⁵. Il incite, sans toutefois contraindre, à l'harmonisation des normes nationales et internationales, mais ne s'oppose pas à l'adoption de normes nationales plus strictes encore. L'Accord sur les subventions et les mesures compensatoires porte notamment sur des subventions qui sont spécifiques ou qui dépendent d'une préférence accordée à l'utilisation de biens qui sont produits dans le pays plutôt qu'importés, et qui produisent des effets négatifs sur les intérêts d'un autre membre. Déterminer du caractère réellement spécifique d'une subvention dépend de son application pratique. Elle peut, par exemple, être limitée de par les caractéristiques inhérentes du bien. La question de savoir si des subventions accordées par exemple à un incinérateur qui détournerait des déchets ou qui empêcherait que des déchets aient accès à un incinérateur étranger, seraient interdites, ne semble pas encore avoir été traitée.

Malgré son titre, la Convention de Bâle sur le contrôle des mouvements transfrontières de déchets dangereux et sur leur élimination (la Convention de Bâle), s'applique aux DSM²⁶ ainsi qu'aux produits situés en aval et destinés à être recyclés, valorisés et réutilisés²⁷. La Convention de Bâle stipule *inter alia* que les états doivent réduire les mouvements transfrontières de déchets dangereux et d'autres déchets (un terme qui recouvre les DSM) à un minimum compatible avec une gestion efficace et écologiquement rationnelle desdits déchets²⁸. Les Parties ont le droit de refuser l'importation de déchets dangereux et d'autres déchets en vue de leur élimination²⁹. Les Parties doivent bloquer l'exportation à destination des pays qui ont notifié leur intention de ne pas importer des déchets, ainsi que les exportations au sud d'une latitude de 60 degrés sud. La Convention de Bâle a mis en place une procédure pour notifier et faire objection aux mouvements de déchets transfrontières³⁰.

²⁵ Low, *et al.* (2011). Bien que le document porte sur l'évaluation des mesures ayant pour objet de lutter contre les gaz à effet de serre, il n'y a pas de raison pour que les principes juridiques soient différents dans le cas d'autres mesures environnementales.

²⁶ La Convention énumère les catégories de déchets dans l'Annexe I, les déchets demandant un examen spécial dans l'Annexe II, et les caractéristiques de danger dans l'Annexe III. Les déchets de l'Annexe II sont « les déchets ménagers collectés » et les « Résidus provenant de l'incinération des déchets ménagers ». La Convention contrôle les mouvements transfrontières de déchets qui (1) relèvent de l'Annexe I et de l'Annexe III, ou qui (2) sont qualifiés de dangereux par la législation interne des États d'exportation, d'importation ou de transit, Parties à la Convention, ou qui (3) relèvent de l'Annexe II. (Secrétariat de la Convention de Bâle, « Manuel de mise en œuvre »).

²⁷ Secrétariat de la Convention de Bâle (2012).

²⁸ Article 4.2(d).

²⁹ Article 4.1(a).

³⁰ La procédure concernant les mouvements transfrontières de déchets qui a été arrêtée par la Convention de Bâle se présente comme suit. Chaque État désigne une autorité compétente. L'autorité compétente est l'autorité gouvernementale chargée de recevoir les notifications de mouvements transfrontières et d'y répondre. Celui qui produit ou exporte des déchets dans le pays exportateur notifie, par le biais de l'autorité compétente dans le pays exportateur, les autorités compétentes de tout État concerné par les mouvements transfrontières envisagés. Les États d'exportation, de transit et d'importation sont concernés. Le même formulaire est utilisé pour la Convention de Bâle, la Décision de l'OCDE et la Réglementation de la Communauté européenne. Les autorités compétentes peuvent faire objection aux mouvements transfrontières. Les exportateurs et les importateurs sont des producteurs de déchets, ou les propriétaires d'installation d'élimination ou de valorisation des déchets, ou des négociants et des courtiers reconnus. Les transporteurs de déchets, les négociants et les courtiers doivent être enregistrés, et toute personne souhaitant organiser l'expédition de déchets ne peut avoir recours qu'à des négociants ou des courtiers dûment accrédités.

La Décision-Recommandation de l'OCDE relative à la Réduction des mouvements transfrontières de déchets s'applique à tous les déchets couverts par la Convention de Bâle, qui inclut les DSM³¹. Les membres de l'OCDE doivent, conformément à des pratiques de gestion écologiquement rationnelles et efficaces, éliminer les déchets qu'ils produisent sur leur propre territoire et réduire au minimum les mouvements transfrontières de ces déchets.

Deux lois de l'UE concernant le commerce des déchets au sein de l'UE viennent compléter ces règles plus générales et guident dans l'ensemble la conduite des États membres en matière de gestion des déchets. Le règlement de 2006 concernant les transferts de déchets³² et la Directive de 2008 « Directive-cadre relative aux déchets »³³ constituent le cadre juridique. Elles imposent, entre autres choses, l'obligation de traiter les déchets d'une façon qui ne nuise ni à l'environnement, ni à la santé humaine; encouragent l'utilisation de la « hiérarchie des déchets », et disposent que les coûts afférents à l'élimination des déchets sont endossés par le détenteur de déchets, les détenteurs antérieurs ou par les producteurs du produit à partir duquel les déchets ont été transformés³⁴. Les États membres doivent constituer un réseau d'installations d'élimination des déchets et d'installations de valorisation des déchets municipaux en mélange (correspondant plus ou moins aux DSM) collectés auprès des ménages privés. Les déchets doivent être éliminés ou valorisés dans l'une des installations appropriées les plus proches. Les transferts de déchets doivent faire l'objet d'une notification préalable et aussi bien l'État d'où proviennent ces déchets que l'État auquel ils sont destinés peut s'opposer au transfert des déchets municipaux en mélange. Les États membres peuvent limiter les transferts de déchets qu'ils reçoivent s'il est établi que de tels arrivages entraîneraient des écarts par rapport aux plans de gestion des déchets, et ils peuvent limiter les transferts de déchets vers l'extérieur pour des raisons environnementales.

Il existe toutefois des limites aux restrictions qui peuvent être imposées au commerce entre États membres. En 1996, une décision préliminaire de la Cour européenne de justice (CJUE) dans *Dusseldorp*³⁵ a conclu qu'un droit exclusif de valoriser certains déchets, combiné à une interdiction d'exporter les déchets, favorisait l'entreprise nationale et renforçait sa position dominante. Toutefois en l'an 2000, la CJUE a estimé qu'un monopole légal ne violait pas nécessairement la loi sur la concurrence s'il permettait d'accomplir une mission d'intérêt économique général de la façon la moins restrictive possible³⁶.

Les changements qui sont intervenus dans les règles de l'UE telles qu'exposées dans le Règlement de 2006 et telles qu'elles apparaissent dans la Directive de 2008, ont favorisé le développement d'un marché des déchets destinés à être incinérées dans des installations efficaces au plan énergétique. Cela montre à quel point la nature de la concurrence dans le secteur de la gestion des déchets et de fait, son existence

³¹ Décision-Recommandation du Conseil de l'OCDE relative à la réduction des mouvements transfrontières de déchets [[C\(90\)178/FINAL](#)].

³² Règlement concernant les transferts de déchets No. 1013/2006 du 14 juin 2006 (JO L 190, 12.7.2006 p. 1).

³³ Directive 2008/98/CE du 19 novembre 2008 (JO L 312/3-30 22.11.2008).

³⁴ Le principe du « producteur-payeur » établit que le producteur ou le détenteur de déchets s'acquitte des frais imputables à l'élimination ou à l'atténuation des effets néfastes que ces déchets peuvent avoir sur l'environnement. Le principe élargi du pollueur-payeur impose également des obligations au producteur du produit qui, après sa durée de vie, a été transformé en déchets.

³⁵ Affaire C-203/96, *Chemische Afvalstoffen Dusseldorp BV e.a.*, Arrêt de la CJUE du 25 juin 1998, Recueil de jurisprudence [1998] page I-4075.

³⁶ Un droit exclusif, octroyé par l'État, de recevoir des déchets de chantier, était en l'occurrence, la manière la moins restrictive d'accomplir une mission d'intérêt économique général, celle de l'expansion qui permettrait de disposer d'une capacité suffisante pour recycler les déchets de chantier. Affaire C-209/98, *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v København Kommune*, Arrêt de la CJUE du 23 mai 2000, Recueil de jurisprudence [2000] page I-3743.

même, dépend de la réglementation. Le Règlement de 2006 précise que les États membres doivent interdire, de façon générale ou ne serait-ce qu'en partie, les transferts de déchets aux fins d'élimination, et la définition qui est donnée de l'élimination inclut l'incinération des déchets municipaux solides. La Directive de 2008 définit l'incinération dans des installations répondant à certaines normes d'efficacité énergétique comme étant non plus une opération d'élimination mais plutôt une opération de valorisation. Elle autorise donc le commerce des déchets aux fins d'incinération dans des installations efficaces au plan énergétique³⁷.

Les mouvements transfrontières de déchets de tous ordres au sein de l'Europe ont été étudiés dans un rapport du Centre thématique européen sur la consommation et la production durables³⁸. L'examen succinct des textes existants qui figure dans ce rapport identifie les raisons pour lesquelles les déchets pourraient être commercialisés au lieu d'être traités dans leur pays d'origine³⁹. Il mentionne entre autres choses : les différences de réglementation internationale, les différences de prix (notamment en ce qui concerne les taxes d'accès), et les différences de technologie ou de capacité. Le rapport identifie également les facteurs qui contribuent à une augmentation du commerce des déchets en Europe et notamment des différences au niveau :

- des taxes d'accès et autres taxes ;
- du coût du transport ;
- de la capacité de traitement et des traitements spécifiques qui sont disponibles ;
- des incitations au recyclage ou à la valorisation, par exemple des incitations à la production énergétique à partir des déchets ;
- de la rigueur dans la classification des matériaux.

Des barrières tarifaires et non-tarifaires peuvent faire obstacle à ces mouvements transfrontières. Des observations ponctuelles ont permis de constater le bien-fondé de ces listes de facteurs. Ainsi, le Danemark interdit le transfert des déchets destinés à être éliminés sur son territoire, à moins que le pays dont ils proviennent n'ait pas d'autres solutions acceptables et que la quantité de déchets soit insuffisante pour justifier, sur le plan de la rentabilité économique, la création d'une nouvelle installation d'élimination des déchets⁴⁰. Aux Pays-Bas, les mouvements transfrontières —importation et exportation— de déchets destinés à être mis en décharge sont interdits, mais les mouvements de déchets non-dangereux destinés à

³⁷ Une disposition du Règlement de 2006 définit les transferts de déchets municipaux en mélange (qui correspondent approximativement aux DSM) aux fins d'élimination ou de valorisation comme étant des transferts aux fins d'élimination (article 3, paragraphe 5). Une autre disposition précise qu'il est possible de s'opposer à un transfert de déchets aux fins d'élimination s'il s'agit de déchets municipaux en mélange (article 11, 1 (i)). Le Considérant 20 de la Directive dispose que : « La présente Directive doit également préciser dans quels cas l'incinération des déchets municipaux solides est efficace sur le plan énergétique et peut être considérée comme une opération de valorisation ». C'est ce qui a été fait lorsque l'incinération des déchets municipaux dans des installations pouvant faire état d'un certain niveau d'efficacité énergétique a été porté sur la liste des « opérations de valorisation ».

³⁸ ETC/SCP (2012).

³⁹ Il ressort également de cet examen que les documents d'ordre général dont on dispose privilégient nettement les études de cas portant sur l'Asie de l'est. Les caractéristiques qui poussent à la commercialisation des déchets peuvent toutefois être différentes d'un groupe de pays à l'autre. Ainsi, la législation européenne en matière de déchets n'est applicable que dans les pays de l'UE.

⁴⁰ Danemark, Ministère de l'Environnement (2010).

l'incinération ont été libéralisés en 2007⁴¹. Depuis cette date, les importations de déchets ayant vocation à être incinérés aux Pays-Bas se sont accrues rapidement⁴². En Italie, l'offre excédentaire de DSM compactés est exportée à partir de certaines régions vers d'autres pays membres, car l'accès aux capacités de décharge et d'incinération d'autres régions italiennes lui est refusé sur la base du «principe de proximité» consacré dans la Directive cadre sur les déchets^{43,44}.

En résumé, les règles internationales tendent généralement à décourager le commerce de déchets, y compris celui des DSM. Elles disposent que les transferts de déchets doivent être notifiés au préalable et que ceux-ci peuvent être refusés par le pays d'expédition ou de destination. Toutefois, les matériaux extraits des déchets peuvent faire l'objet d'une reclassification et ne plus être sujets à ces règles, et les déchets destinés à être incinérés en vue d'une production énergétique peuvent tomber sous le coup d'un régime tant soit peu libéralisé. Par conséquent, le commerce international des matières premières secondaires et des déchets destinés à incinération s'est développé.

2. La collecte des déchets

En règle générale, ce sont les municipalités qui sont responsables de la collecte des ordures ménagères et le plus souvent, elles doivent choisir entre assurer elles-mêmes ce service (éventuellement en association avec d'autres municipalités) ou sous-traiter ces activités à un prestataire privé ou public. Il arrive également, mais cela est moins fréquent, qu'à titre individuel, des ménages concluent des contrats avec des prestataires qui sont mis en concurrence. Lorsque les municipalités contractent ce type de services par voie d'appel d'offres, les problèmes de concurrence qui peuvent se manifester sont la cartellisation ou la neutralité concurrentielle entre prestataires publics ou privés, ainsi que les atteintes à la concurrence découlant des fusions entre soumissionnaires potentiels. «Les contrôles de flux», c'est à dire les lois, règlements ou contrats ayant pour effet de limiter les points de décharge des déchets, et les autres dispositions restreignant l'accès aux stations de transfert des déchets, aux décharges ou aux incinérateurs, peuvent également entraîner des distorsions sur le plan de la concurrence en limitant le nombre de soumissionnaires potentiels.

2.1 Les marchés de collecte, monopoles naturels

Plusieurs études ont cherché à déterminer si les marchés de collecte des déchets municipaux solides avaient vocation à être des monopoles naturels et s'il ne serait pas économiquement plus efficace de n'avoir qu'un seul prestataire. Ces études ont démontré que l'existence d'importantes économies de densité permettait de conclure que ces marchés sont des monopoles naturels et que, par conséquent, il était plus efficace de n'avoir recours qu'à un seul prestataire.

D'après les examens de données empiriques auxquels se sont livrés l'OCDE (2000) et l'Autorité irlandaise de la concurrence (2006), le recours à de multiples prestataires pour assurer la collecte des déchets ménagers et celle des déchets provenant de petits établissements commerciaux, implique que des économies de densité de population restent inexploitées et cela se traduit par des coûts nettement

⁴¹ Pays-Bas, Ministère du logement, de l'aménagement du territoire et de l'environnement (2008), pp. 11, 13, 14.

⁴² ETC/SCP (2012).

⁴³ Idem. (2012).

⁴⁴ Le «principe de proximité» fait référence à un concept figurant dans la Directive cadre relative aux déchets, selon lequel le réseau d'installations d'élimination et de valorisation «doit permettre l'élimination ou la valorisation des déchets ...dans l'une des installations appropriées les plus proches...» (article 16, para. 3).

supérieurs – de l’ordre de 26 à 48 % selon les estimations⁴⁵. À l’inverse, les collectes organisées auprès des gros producteurs de déchets ou les collectes de déchets qui doivent être pris en charge de façon inhabituelle ou dans des délais donnés, ne s’accompagnent pas d’importantes économies de densité de population et peuvent être confiées à des prestataires en situation de concurrence. Antonioli et Filippini (2002) estiment qu’un monopole octroyé en franchise serait plus efficace que la coexistence de concurrents directs. Walls *et al.* (2005) prétendent que les décisions des municipalités de recourir à des appels d’offres concurrentiels pour la collecte des déchets ménagers coïncident souvent avec l’existence d’importantes économies de densité de population. À l’inverse, les économies d’échelle semblent être épuisées relativement rapidement. L’OCDE (2000) cite des études qui donnent à penser qu’aux États-Unis, les économies d’échelle disparaissent à partir de 50.000 habitants, alors qu’une étude effectuée pour l’autorité italienne de la concurrence conclut que les économies d’échelle disparaissent à partir de 16.000 habitants⁴⁶.

De fait, le dispositif le plus courant pour la prestation de tels services est celui qui consiste à n’avoir qu’un seul prestataire de services de collecte des déchets pour chaque région. Toutefois, en dépit de la structure des coûts qui vient d’être décrite, il existe une concurrence sur le marché de la prestation de services de collecte des déchets, dans des lieux aussi disparates que l’Irlande, la Pologne, certaines régions de la Finlande et certaines parties des États-Unis.

Étant donné la rareté du cas, il peut être intéressant d’examiner un exemple de concurrence directe (« side-by-side ») dans le domaine de la collecte des déchets ménagers : celui de l’Irlande. En 2011, le nombre d’opérateurs dans chaque zone municipale allait de deux à quatorze, mais les opérateurs n’étaient pas en concurrence pour desservir tous les ménages résidant dans ces zones – certains opérateurs ne desservaient que quelques ménages — et dans certaines zones rurales il n’y avait pas de ramassage des ordures ménagères⁴⁷. Selon des enquêtes de marché réalisées avant 2005 par l’Autorité irlandaise de la concurrence, les grandes entreprises avaient tendance à contrôler des zones spécifiques, la concurrence ne portant que sur les ménages installés en zones limitrophes. Certaines données d’observation qui montrent

⁴⁵ Les économies de densité de population ne doivent pas être confondues avec les économies de densité. Ce dernier terme fait référence aux changements de coûts qui accompagnent un accroissement de production dans un réseau donné maintenu constant. Waters (2007) en fournit un exemple:

« Un fait nouveau important dans toute cette recherche [sur l’analyse du « coût du rail »] a été de raffiner la distinction entre économies d’échelle et densité. Cette dernière fait référence à l’évolution des coûts en réponse à un accroissement de la production dans un réseau donné, alors que les économies d’échelle portent plus particulièrement sur l’évolution des coûts lorsque le réseau se développe parallèlement à la production. » Waters, W.G. II, “Evolution of Railroad Economics.” Tiré de Dennis, S. et W. Talley, dir.pub., *Railroad Economics (Research in Transportation Economics, vol. 20)*. Oxford: Elsevier, 2007.

Puisqu’il existe une certaine souplesse au niveau des parcours de collecte des déchets, il est facile de ré-optimiser le réseau et par conséquent, les coûts sont généralement inférieurs à ceux encourus dans le cadre d’un réseau qui ne peut être modifié, comme c’est le cas de celui d’un chemin de fer.

La confusion des deux concepts peut entraîner des erreurs d’analyse. Ainsi, lors de sa déposition dans une affaire traitée par la Cour suprême irlandaise, un témoin a-t-il affirmé que, bien qu’une réduction, de deux à un, du nombre de camions à ordures mobilisés pour une seule tournée de ramassage puisse accélérer le processus de collecte de 1.9 à 2.8 poubelles par minute, la capacité des camions étant faible, cela n’a aucun effet sur le nombre de trajets ni, par conséquent, sur la quantité de déchets ménagers collectés chaque jour. La possibilité de modifier les tournées pour en réduire les coûts, en assurant par exemple un passage supplémentaire par jour, n’a été explorée ni dans la déposition, ni dans la décision dont il est fait état. *Neurendale Ltd t/a Panda Waste Services -v- Dublin City Council & Ors* [2009] IEHC 588. La déposition du témoin est examinée au paragraphe 93 et celle d’un autre témoin sur ce même sujet, au paragraphe 89.

⁴⁶ OCDE (2000), p. 112.

⁴⁷ Ireland Environmental Protection Agency (2013).

que les utilisateurs avaient tendance à changer de fournisseurs, viennent encore renforcer le tableau d'une concurrence frontale limitée. Une enquête de 2011 révèle que les ménages changent de prestataires de services de collecte des déchets à un taux (3 % au cours des douze mois antérieurs) inférieur à celui auquel ils changent leur fournisseur d'électricité (9 %) ou leur service de lignes de téléphone fixe (7 %)⁴⁸.

Une décision de l'Autorité irlandaise de la concurrence (2005) faisant suite à un enquête portant sur des allégations d'abus de position dominante par une entreprise de collecte des ordures ménagères, Greenstar, offre une image plus détaillée de la concurrence qui existe sur un marché correspondant à une zone géographique spécifique où la concurrence est autorisée, le nord-est de Wicklow. Dans cette zone, Greenstar était l'unique prestataire. Personne d'autre n'était entré sur ce marché au cours de cinq années précédentes et les prestataires des zones adjacentes n'avaient offert aucune concurrence. Il existait d'importants obstacles à l'entrée sur le marché et à l'expansion sous forme d'économies d'échelle et de densité, et les obstacles réglementaires ont retardé considérablement la création d'installations de tri et de recyclage.

Malgré cela, en 2011, lorsque l'Autorité irlandaise de la concurrence a présenté ses conclusions au ministère de l'Environnement, de la Communauté et des Collectivités locales, elle a changé d'avis et fait savoir que, tout compte fait, une situation de concurrence directe était peut-être mieux adaptée à des zones de forte population. Elle a fait valoir que cette forme de concurrence était plus prompte à réagir aux changements de technologies ainsi qu'aux changements susceptibles de se produire sur le marché. Là où les différentes municipalités sont appelées à faire des choix sur le type de concurrence qu'elles souhaitent voir adopter, autoriser la concurrence directe dans une région peut également améliorer l'offre concurrentielle dans les zones avoisinantes, dans la mesure où cela crée un réservoir de soumissionnaires potentiels. En outre, l'appel d'offres concurrentiel doit être soigneusement conçu et mis en œuvre si l'on veut qu'il produise les gains d'efficacité annoncés, mais les autorités locales ne disposent pas forcément de toutes les compétences nécessaires à cet effet. Cependant, l'Autorité de la concurrence a également découvert que la concurrence directe pouvait être instable : si une entreprise obtient une densité de clients suffisante dans une région géographique, cela lui permet d'en retirer un avantage au niveau des coûts et d'exclure des concurrents tout aussi efficaces et donc, de jouir d'une position de force sur le marché.

L'Autorité a également fait observer que là où un système de concurrence directe était déjà en place, le fait de passer à un système d'appel d'offres pouvait entraîner des frais économiques et juridiques. Entre autres frais, l'Autorité citait notamment « la nécessité d'acquérir une expertise à un niveau central en matière de marchés publics », et l'importance des frais juridiques liés à d'éventuels contentieux dès lors que « les entreprises privées avaient effectué des investissements conséquents et s'étaient constitué des droits acquis. »

Il se peut que le passage d'une prestation municipale de tels services à une prestation par voie d'appel d'offres concurrentiel n'occasionne pas de tels frais. L'aperçu que nous avons eu en Irlande de la concurrence qui existe sur le marché de la collecte des DSM, donne à penser qu'en pratique, seuls quelques ménages – ceux qui vivent dans les zones limitrophes et ceux qui vivent dans des zones à forte densité de population – ont vraiment un choix concurrentiels alors que d'autres ne bénéficient absolument d'aucun service. La demande cumulée qui résulterait de la passation de marchés par les autorités locales pourrait accroître la densité de population desservie par un seul prestataire de services de collecte des déchets, ce qui se traduirait par une baisse des coûts. Une demande cumulée pourrait également modifier la répartition du pouvoir de négociation et fournir un mécanisme permettant de subventionner le service aux ménages ruraux.

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Irlande, Ministère de l'Environnement, de la Communauté et des Collectivités locales (2012), p. 24).

En Finlande, la collecte des déchets est en concurrence directe dans certaines régions, mais dans d'autres, cela se fait par voie d'appel d'offres concurrentiel. Il ressort des données d'observation que le prix de la collecte des déchets municipaux est inférieur en cas d'appel d'offres concurrentiel : on estime que les économies ainsi réalisées sont de l'ordre de 20-25 % à 40 %⁴⁹. Tukiainen et Mälkönen (2010) ont trouvé qu'en moyenne, lorsque des municipalités lançaient un appel d'offres concurrentiel, il y avait 0.39 moins d'entreprises qui se présentaient pour répondre à l'appel des municipalités que lorsque ces entreprises étaient en concurrence directe. Contrairement à ce qui se passe en Irlande, les ménages finlandais doivent payer les services de collecte des déchets. En plus, les municipalités finlandaises peuvent donner pour instructions aux collecteurs de déchets de transporter et de traiter ces déchets dans des installations locales ou régionales⁵⁰.

La structure des coûts afférents à la collecte auprès des ménages est bien différente de celle de la collecte auprès des entreprises où la concurrence sur le marché est bel et bien la norme⁵¹. Sur le marché du transport commercial des petits conteneurs dont les clients sont des immeubles d'appartements, des magasins et des restaurants, les clients privés ont l'habitude de négocier avec les prestataires. Quelle que soit la localité, le nombre de prestataires importants n'en est pas moins habituellement limité. Aux États-Unis, ils sont quatre, peut-être même moins. En outre, pour ce type de déchets, les marchés géographiques sont restreints, les obstacles à l'entrée de nouveaux prestataires sont élevés et les économies d'échelle, importants⁵².

2.2. *Le choix du prestataire de services de collecte*

Habituellement, ce sont les municipalités qui sont chargées de la collecte des DSM dans leur région. Le plus souvent, elles s'acquittent elles-mêmes de cette tâche mais des entreprises privées peuvent également être contractées pour fournir ce service. À cet égard, les membres de l'OCDE suivent des voies divergentes, certains d'entre eux, comme l'Irlande et les États-Unis, évoluant vers une plus grande privatisation des prestations de collecte des déchets ménagers, tandis que d'autres, tels la France, l'Allemagne et certains pays d'Europe de l'est, évoluent dans le sens d'une plus grande prestation de ces services par les municipalités^{53,54}. Le changement en faveur de la prestation de services publics et non de services obtenus par voie d'appel d'offres concurrentiel est en partie imputable au fait que les autorités locales doivent trouver des moyens d'accroître leurs revenus⁵⁵.

Lorsqu'une municipalité ne fournit pas le service en régie, elle choisit souvent des prestataires par voie d'appel d'offres concurrentiel. L'appel d'offres peut ne s'adresser qu'à des entreprises privées présentant des soumissions concurrentes, ou inclure des départements municipaux ou des entreprises municipales présentant leurs soumissions au même titre que les entreprises privées.

⁴⁹ Le premier chiffre provient de l'Autorité irlandaise de la concurrence (2011) qui cite « Une enquête de 1997 réalisée par l'Association des Municipalités en Finlande » (p. A2). Le second chiffre est fourni par Tukiainen et Mälkönen (2010).

⁵⁰ Ministère irlandais de l'Environnement, de la Communauté et des Collectivités locales (2012), p. 14

⁵¹ Ainsi, aux États-Unis, en 2008 lors de la fusion entre Republic et Allied Waste, il y avait, avant la transaction, tout au plus quatre concurrents de quelque importance sur un marché.

⁵² US Department of Justice, Division antitrust (2003 et 2008).

⁵³ Veolia Environnement (2013), p. 48.

⁵⁴ En Irlande, par exemple, seules trois collectivités locales continuaient d'offrir des services de ramassage des ordures ménagères en 2011, contre quinze en 2008. Ireland EPA (2013), p. 26.

⁵⁵ Handelsblatt (2013).

Les quelques paragraphes qui suivent examinent la procédure d'appel d'offres et résument les données d'observation portant sur les différences de coûts dont s'accompagne la prestation par voie d'appel d'offres ou par voie de monopole municipal.

L'OCDE (2000) identifie les conditions qui doivent être réunies pour que l'appel d'offres se traduise par des coûts inférieurs à ceux dont sont assortis les services publics locaux, offerts en régie, par les municipalités. Ces conditions sont les suivantes : il faut

- que les investissements à fonds perdus soient peu élevés — ce qui signifie ici que des actifs clés ne se voient pas attribuer, au sein d'une relation commerciale particulière, des valeurs supérieures à celles qu'on leur attribue en dehors de cette relation,
- que l'opérateur historique ne dispose pas d'un avantage sur le plan de l'information,
- qu'il soit facile d'assurer un suivi de qualité, et
- qu'il y ait un nombre suffisant de soumissionnaires.

L'OCDE (2000) estime que ces conditions sont généralement remplies sur les marchés de collecte des ordures ménagères. Toutefois, des données récentes donnent à penser que l'opérateur historique pourrait bénéficier d'un avantage. Une étude, réalisée au Royaume Uni et portant sur les marchés de collecte des déchets ayant fait l'objet d'un nouvel appel à la concurrence, révèle que 42% de ceux qui ont remporté de tels marchés en étaient déjà détenteurs alors que 27% ne l'étaient pas^{56,57}.

Un grand nombre d'études empiriques ont été réalisées pour estimer l'effet d'un appel à la concurrence dans le cas de la prestation de services de collecte des déchets ménagers. L'examen de la documentation existante par l'Autorité irlandaise de la concurrence (2006), qui reprend en partie le rapport de l'OCDE (2000), a conclu qu'un appel d'offres concurrentiel pouvait entraîner des économies de coûts allant de 10 % à 33.5 %, un grand nombre de cas se situant aux alentours de 20 %. Dans quelques-unes de ces études, les auteurs ont cherché, sans y parvenir, à trouver des signes permettant de conclure à une baisse de qualité. Toutefois, il est dit, dans l'une de ces études, que la qualité n'était plus ce qu'elle était dans 8 % des cas où il avait été fait appel à la concurrence plutôt que de recourir aux prestations de la municipalité. Par conséquent, les données tirées de l'expérience donnent à penser qu'en ce qui concerne la collecte des déchets ménagers, l'appel à la concurrence entraîne d'importantes économies de coûts et, bien que l'on ait moins de données à ce sujet, qu'une telle démarche ne s'accompagne pas d'une baisse de la qualité.

Cependant, l'introduction d'une entreprise municipale parmi des soumissionnaires, risque d'avoir des effets de distorsions sur la concurrence si cette entreprise bénéficie d'un financement public en tant que collecteur exclusif de DSM dans une autre municipalité. Par conséquent, il est important de s'assurer qu'il existe une séparation entre activités de monopole et activités concurrentielles ; que les frais communs à l'ensemble des activités économiques soient répartis « équitablement » ; et qu'un impôt sur les bénéfices soit bien versé. Dans une récente décision concernant la Norvège, ce sont là les conditions qui ont été imposées afin de limiter le nombre d'activités bénéficiant d'un financement public qui subventionnent des activités concurrentielles⁵⁸.

⁵⁶ Aucune données, ni aucun contrat antérieur n'étaient disponibles pour les 31 pour cent restant des contrats de collecte passés par les collectivités locales. UK Office of Fair Trading (2006), p. 34.

⁵⁷ Tout marché de services de gestion des déchets confondus, un opérateur historique se trouvera toujours mieux placé pour remporter un second appel d'offres, s'il s'agit d'une entité municipale (48 %) plutôt que d'une entreprise privé (30 %). UK OFT (2006), p. 52.

⁵⁸ EFTA Surveillance Authority 2013.

Une question distincte, qui se rattache toutefois aux questions antérieures, consiste à savoir si l'inclusion d'une entreprise municipale au nombre des soumissionnaires avait pour effet d'accroître ou non la concurrence. L'OFT du Royaume Uni (UK OFT, 2006, p. 49) fait état des résultats d'une enquête portant sur les collectivités locales qui donne à penser que la présence d'un soumissionnaire public réduit légèrement la moyenne des soumissions privées, mais augmente la moyenne globale des soumissionnaires (parce qu'outre les soumissionnaires privés, il y a également un soumissionnaire public)⁵⁹.

2.3 *Améliorer la concurrence dans les appels d'offres ayant trait à la collecte*

Tant les détails du marché de la collecte des DSM sur un territoire donné que les détails de la procédure d'appel d'offres peuvent avoir une incidence sur la concurrence dans la passation du marché en question mais également lors d'appels d'offres ultérieurs. La durée des contrats a des répercussions sur la concurrence lorsque des coûts importants sont irrécupérables, parce que les offres des soumissionnaires sont ajustées pour prendre en compte le risque de goulots d'étranglement. Ce risque est peut-être moins important dans le cas de la collecte des déchets, mais lorsqu'il s'agit d'installations où les déchets sont déposés de façon temporaire ou permanente, il est considérable. Il faut soit avoir accès, soit posséder une installation d'élimination des déchets pour pouvoir prendre part aux marchés de collecte des déchets. Si la municipalité ne détient pas un tel droit ou ne possède pas une telle installation, les soumissionnaires sont alors limités à ceux qui peuvent se prévaloir d'un tel droit ou qui peuvent l'acquérir. L'absence de neutralité concurrentielle entre soumissionnaires peut avoir pour effet que le marché soit remporté par des soumissionnaires moins efficaces et que les soumissionnaires défavorisés ne participent pas à l'appel d'offres.

Des études portant sur des cas de réussite ou d'échec dans les concessions d'infrastructures offrent une ligne directrice plus générale sur la manière de structurer la concurrence ainsi que sur les contrats et les mécanismes de renégociation. Un régime réglementaire stable, une adjudication des marchés par voie d'appel à la concurrence plutôt que par voie directe, une tarification adaptée, des règles claires applicables aux réajustements tarifaires et à d'autres renégociations de contrat, une évaluation exacte de la valeur résiduelle des actifs propres à la concession, et une saine comptabilité réglementaire sont autant de facteurs qui favorisent le bon choix des concessionnaires et l'exploitation efficace de la concession⁶⁰.

L'une des conditions préalables à remplir pour être en mesure de soutenir la concurrence sur le marché de la collecte des déchets, c'est de s'assurer d'un accès à une installation où déposer, de façon temporaire ou permanente, les déchets collectés. Les installations d'élimination des déchets fonctionnent à beaucoup plus grande échelle que celles qui ont trait à leur collecte et les obstacles à l'entrée sur ce marché sont beaucoup plus importants, en termes de coûts mais aussi de temps. De ce fait, si l'entrée sur le marché de la collecte des déchets requiert la construction simultanée d'une installation d'élimination de ces déchets, l'entrée sur le marché situé en amont pourrait être considérablement retardée. Par conséquent, une stratégie permettant d'éviter qu'il faille se lancer simultanément dans deux activités, accroît la concurrence sur le marché de la collecte des déchets.

⁵⁹ L'enquête démontre qu'en l'absence d'un soumissionnaire public, il y a en moyenne 2.06 soumissionnaires crédibles, alors qu'en présence d'un tel soumissionnaire, ce chiffre est de 2.57. L'absence de neutralité concurrentielle, ou du moins la perception d'une telle absence, s'est traduit par une baisse moyenne des participants privés à l'appel d'offres, de deux soumissionnaires à environ un soumissionnaire et demi, mais cela n'a pas entraîné une baisse globale du nombre de participants, parce que la présence du soumissionnaire public a plus que compensé la réduction du nombre de soumissionnaires privés.

⁶⁰ Pour plus de détails sur la conception des contrats de concessions d'une manière générale, voir Guasch 2004.

L'une des solutions envisageable serait que la municipalité soit propriétaire d'une installation d'élimination des déchets et qu'elle donne accès à cette installation à celui qui remporte l'appel d'offres. Chose intéressante, une étude a permis de constater qu'aux États-Unis, les municipalités étaient davantage disposées à avoir recours à des services publics de collecte des déchets et des matériaux recyclables (c'est-à-dire à les fournir elles-mêmes ou dans le cadre d'un regroupement de municipalités) qu'à sous-traiter ces services ou à contracter des opérateurs privés, si elles étaient propriétaires ou qu'elles exploitaient une décharge ou un incinérateur utilisant des déchets pour produire de l'énergie. La propriété et l'exploitation d'une installation de récupération des matériaux augmentaient également les chances que ce soit les pouvoirs publics qui prennent en charge la collecte des produits recyclables⁶¹.

Si la municipalité d'où sont collectés les déchets ne possède pas une installation d'élimination, il faut alors se demander si pour être efficaces sur le marché de la collecte des déchets, les concurrents doivent posséder leur propre installation ou s'il leur suffit d'avoir accès à une installation appartenant à une autre entreprise qui pourrait se poser en rivale sur le marché de la collecte des déchets. Différentes juridictions sont parvenues à des conclusions différentes, comme le démontrent les décisions suivantes prises dans le cadre de recours présentés suite à des fusions⁶².

- Une décision canadienne de 2001 faisait valoir que « la bonne volonté et les petits ajustements qui seraient nécessaires au bon fonctionnement d'une relation à long terme de fournisseur ne permettent pas de créer le genre de climat souhaitable et nécessaire au rétablissement de la situation de concurrence perturbée par la fusion⁶³. En d'autres termes, la décision stipulait que l'entreprise de collecte devait être propriétaire de sa propre décharge afin de préserver la concurrence sur le marché de la collecte des déchets après la fusion⁶⁴.
- En 2009, la Division antitrust des États-Unis a expliqué qu'elle ne considérait pas que la vente sous contrat, pour une durée de quinze ans, d'espace dans les décharges récemment fusionnées d'une entreprise, était dans l'intérêt public. Elle craignait que l'octroi d'un accès réglementé ne gêne l'aptitude du propriétaire de la décharge à gérer et à exploiter ses biens avec succès, ce qui risquait de compromettre l'importance, sur le plan de la concurrence, des actifs que représentaient la décharge. Il était plus « important qu'un dessaisissement porte sur tous les éléments d'actifs nécessaires pour qu'un acquéreur puisse être un concurrent à long-terme performant et autonome. » Dans certains marchés géographiques, on se dessaisissait d'espace pendant une période transitoire jusqu'à ce que les acquéreurs aient trouvé une solution permanente⁶⁵. En effet, les actifs qui avaient été transférés au titre de réparation dans le cadre de la fusion entre Republic et Allied Waste, c'est-à-dire qui étaient nécessaires à un concurrent indépendant, incluaient des stations de transfert, des décharges, des droits de propriété sur l'espace, des droits, des autorisations (environnementales, par exemple), des contrats (notamment avec des prestataires de services), des comptes, ainsi que des camions et d'autres véhicules.

⁶¹ Walls *et al.* (2005).

⁶² Bien que les cas aient porté sur la collecte de petits conteneurs auprès d'institutions commerciales, il n'y a pas de raison de penser que le raisonnement puisse être différent pour la collecte de DSM.

⁶³ 2004 FAS 273 (2004), Federal Court of Appeal Docket No. A-389-04 2004.

⁶⁴ La vente d'« espace », c'est-à-dire le droit de se débarrasser d'une quantité donnée de déchets à un coût marginal d'élimination déterminé, a été rejeté comme ne constituant pas une réparation juridique au sens de la loi sur la concurrence.

⁶⁵ Division antitrust (2009) Part III.A.2.c et d.

- Contrairement à la décision de 2001 dont il est fait état ci-dessus, une décision canadienne de 2013 a conclu que la vente, sous forme de contrats de 20 ans, d'espace dans une décharge donnée, permettrait à l'acquéreur des droits d'affronter la concurrence avec succès⁶⁶.

Lorsque des entreprises intégrées ou non présentent leur soumission en vue d'obtenir une franchise de collecte des déchets, leurs offres reflètent leurs estimations respectives du coût d'accès à une installation. Un accès non-discriminatoire aurait pour résultat de favoriser l'adjudication du marché à l'entreprise de collecte la plus efficace. Il n'est pas rare que les stations de transfert des déchets, les décharges ou les incinérateurs soient tenus d'offrir un accès à des tiers ou qu'ils doivent être propriété de la municipalité ou d'un groupe de municipalités. Néanmoins, les grandes entreprises qui possèdent des installations d'élimination des déchets font savoir qu'une intégration verticale entre collecte et élimination présente des avantages⁶⁷. Elles n'ont pas précisé quels pourraient être ces avantages, à savoir s'ils découleraient d'une plus grande efficacité, d'une meilleure coordination et d'une meilleure information au sujet des déchets, ou s'il s'agissait seulement d'avantages purement pécuniaires. L'OFT (2006) n'a rien trouvé qui puisse donner à penser qu'il y ait d'importantes économies d'échelle entre la collecte et le traitement ou d'autres services⁶⁸.

L'absence de neutralité concurrentielle entre municipalités et entreprises privées peut avoir pour effet l'attribution de marchés à des soumissionnaires moins efficaces. Cela peut décourager les soumissionnaires privés et les inciter à ne pas prendre part à un appel d'offres. Une augmentation du nombre des soumissionnaires crédibles augmente considérablement les effets d'efficacité des offres.

Le Comité de la concurrence de l'OCDE a examiné la neutralité concurrentielle en 2009. Cet examen a permis de dégager deux cas où des efforts ont été déployés pour améliorer la neutralité concurrentielle dans le domaine de la gestion des déchets⁶⁹. L'un de ces cas s'est produit en Finlande où suite à des plaintes et à l'adoption de la décision *Destia* par la Commission européenne⁷⁰, les Ministères des finances et de l'environnement ont créé un groupe de travail pour enquêter sur la neutralité concurrentielle dans la gestion des déchets. Le groupe de travail a proposé différentes modifications, notamment celle de déterminer le prix d'accès aux sites municipaux d'élimination des déchets sur une base commerciale. L'autre cas s'est produit en Norvège, où l'entreprise municipale de gestion des déchets de Bergen a été contrainte de séparer la gouvernance de l'entreprise en deux : celle s'occupant de la prestation de services de monopole et celle s'occupant de la prestation de services concurrentiels.

La non-neutralité entre municipalités ou entre entreprises municipales et entreprises privées peut tenir au fait que ces institutions soient traitées différemment dans le cadre de la loi sur les faillites, tout comme dans le cadre de la loi sur l'imposition du revenu des entreprises, et que leur financement soit traité différemment sur le plan fiscal. Chacun de ces éléments a pour effet de réduire le coût du capital de ces entreprises.

⁶⁶ Bureau canadien de la concurrence (2013).

⁶⁷ Republic (2013), p. 3; Waste Management (2013), p. 6.

⁶⁸ OFT 2006 p37.

⁶⁹ OCDE (2009).

⁷⁰ Décision de la Commission du 11 décembre 2007 sur l'aide No. C 7/06 (ex NN 83/05) mise en œuvre par la Finlande pour *Tieliikelaitos/Destia*, 2008/765/CE, OJ L 270/30 10.10.2008. La décision a conclu que le fait de ne pas tomber sous le coup de la loi sur les faillites et d'être exempté de loi sur l'imposition des bénéfiques d'une société constituait une aide de l'État à une entreprise de construction de routes. La décision a été adoptée en dépit du fait que la Finlande ait imposé une caution de garantie au titre des crédits obtenus et des dettes encourues (paragraphe 277-8) et qu'elle ait retiré des bénéfiques dont le montant a été calculé en sorte de correspondre environ aux impôts sur les bénéfiques et aux dividendes payés par la concurrence (paragraphe 282-284).

La participation à un appel d'offres peut également être découragée lorsque cet appel d'offres a trait à la gestion de l'entreprise de collecte existante ainsi qu'à ses employés, ses installations, ses marchés (notamment avec des prestataires de services) ses camions et ses autres véhicules. Cela peut se produire lorsqu'il existe une entreprise municipale et que l'introduction d'appels d'offres compétitifs ne permet pas son démantèlement.

3. Stations de transfert des déchets, décharges et incinérateurs

Les marchés portant sur des stations de transfert de déchets, des décharges et des incinérateurs sont assez différents de ceux qui portent sur les services de collecte des déchets municipaux. Ces installations se caractérisent par des économies d'échelle; des obstacles considérables à l'entrée de nouveaux opérateurs sur ce marché et des actifs à longue durée de vie. La taille géographique des marchés est déterminée par les frais de transport ainsi que par les règlements juridiques qui limitent les mouvements de DSM. L'emplacement des stations de transfert des déchets est choisi de façon à minimiser les frais de transport en tenant compte aussi bien des frais afférents aux camions de ramassage des ordures que des frais auxquels les camions de transfert donnent lieu. De ce fait, les stations de transfert correspondent à des marchés géographiquement plus restreints. Par contre, les décharges et les incinérateurs peuvent desservir des régions plus étendues, surtout lorsque ces installations sont accessibles par péniche. Cependant, les règles applicables au «contrôle des flux» peuvent limiter les activités des installations d'élimination ou de valorisation auprès desquelles les DSM, collectés dans des municipalités spécifiques, peuvent être déchargés.

Les stations de transfert des déchets, les décharges et les incinérateurs sont des installations qui fonctionnent à plus grande échelle que la collecte. L'entrée ou l'expansion sur ce marché coûte cher et prend plusieurs années. Cela tient en partie aux effets induits négatifs que de telles installations imposent. Plusieurs lois et règlements concernant l'environnement, la sécurité, le zonage et les permis dictent la manière dont les DSM doivent être entreposés, manipulés, transportés, traités et éliminés. Les conditions à remplir au titre de la réglementation ainsi que l'opposition publique locale à la création ou à l'expansion des décharges, stations de transfert et incinérateurs viennent s'ajouter aux éléments ci-dessus mentionnés pour créer des obstacles considérables.

La durée de vie économique de ces installations est considérablement plus longue que celle des camions de ramassage des ordures. Gorecki *et al.* (2010) font observer que la durée de vie d'un incinérateur de grande dimension peut aller de 25 à 40 ans⁷¹. Une étude réalisée par l'OFT signale que les incinérateurs ont une durée de vie moyenne de 26 ans et que celle des usines de traitement biomécanique des déchets est de 24 ans⁷². Les décharges sont exploitées pendant des décennies, et les estimations de capacité, par exemple, sont faites pour les 20 années à venir. On estime que la durée des marchés conclus pour la construction et l'exploitation d'une infrastructure de traitement des déchets peut aller jusqu'à 30 ans⁷³. La durée des contrats a une incidence sur la concurrence lorsque des coûts importants sont irrécupérables, parce que les offres des soumissionnaires sont ajustées pour prendre en compte le risque de goulots d'étranglement. Ce risque peut être important dans le cas des installations d'élimination des déchets dont la durée de vie économique peut se prolonger suffisamment longtemps pour qu'elles soient soumises à des changements significatifs de réglementation.

La portée géographique de divers marchés d'élimination et de traitement des déchets peut varier considérablement. Ainsi, aux États-Unis ces marchés sont limités : les DSM mis en décharge ne sont pas

⁷¹ Gorecki *et al* (2010), p. 16.

⁷² UK OFT (2006), pp. 62, 64.

⁷³ Veolia Environnement (2013), p. 25.

transportés sur plus de 55 kilomètres, et dans les zones à forte densité de population, ils sont éliminés dans des stations de transfert de proximité. En réponse à des hausses de prix, les transporteurs de DSM ne modifieront probablement pas leur parcours pour se rendre dans des sites plus éloignés⁷⁴. En Angleterre, l'offre de traitement des DSM se fait au niveau régional, un ou deux opérateurs occupant une beaucoup plus grande part du marché que les autres opérateurs exerçant dans la région, et ces opérateurs ne desservent pas du tout d'autres régions⁷⁵. À l'inverse, en Europe, les déchets municipaux solides qui, suite à une opération de tri, sont appelés à servir de combustible dans des usines d'incinération efficaces sur le plan de l'énergie, peuvent être transportés sur des centaines de kilomètres, par exemple d'Irlande aux Pays-Bas ou d'Italie en Allemagne.

Les fusions peuvent restreindre la concurrence sur les marchés des décharges et des stations de transfert. Le secteur de la gestion des déchets en Amérique du Nord a connu une consolidation depuis les deux dernières décennies et, en même temps, de nombreuses décharges ont été fermées.⁷⁶ Une enquête de 2003 sur les municipalités américaines a trouvé que 43% des municipalités avaient recours au secteur privé pour la collecte et le transport des déchets ménagers solides, tandis que 52 % en faisaient autant pour leur élimination en décharges⁷⁷. En 2005, les trois plus grandes entreprises du marché de la gestion des déchets, Waste Management, Allied Waste et Republic Services, représentaient les deux-tiers des recettes totales des 100 plus grandes entreprises américaines⁷⁸. Veuillez prendre note toutefois que ce chiffre se réfère à toutes les activités de gestion des déchets et ne se limite pas aux déchets municipaux solides.

Un cas canadien de 2001 constitue un exemple de fusion anti-concurrentielle entre propriétaires de décharges⁷⁹. Dans ce cas, il a été observé que l'entrée sur le marché de l'élimination des déchets solides non-dangereux produits par des clients institutionnels, commerciaux ou industriels, dans une région géographique donnée, pouvait prendre plusieurs années en raison des procédures réglementaires, et que les frais engagés à cette fin étaient totalement irrécupérables. L'effet de transactions portant sur les parts de capacité de décharge a permis de conclure que la fusion entraînerait une baisse significative de la concurrence⁸⁰.

Le « contrôle des flux » peut restreindre la concurrence entre décharges et incinérateurs. Le contrôle des flux fait référence aux restrictions qui s'appliquent aux mouvements transfrontières des DSM, généralement des frontières entre états ou municipalités. Des mesures de contrôle peuvent stipuler que des déchets collectés dans une municipalité doivent être déposés auprès d'une installation donnée telle une station de transfert des déchets, une décharge ou un incinérateur appartenant à la municipalité. Ces mesures de contrôle reviennent à placer l'installation en situation de monopsonie. Des mesures de contrôle peuvent également être imposées afin d'empêcher que des déchets collectés hors d'une municipalité ne soient éliminés dans la décharge de la municipalité.

⁷⁴ Division antitrust des États-Unis (2008).

⁷⁵ UK OFT (2006), p. 68.

⁷⁶ Aux États-Unis, le nombre de décharges est passé de plus de 8 000 à moins de 3 000, entre 1988 et 1997, alors que la capacité totale s'est accrue. Voir Kinnaman (2006).

⁷⁷ Macauey (2009).

⁷⁸ Congressional Research Service (2007).

⁷⁹ *Le Commissaire à la concurrence c. Canadian Waste Services Holdings Inc.*

⁸⁰ 2001, Trib.Conc.35 (TC-2000-002) « Reasons and Order. » Le marché géographique est traité *inter alia* aux paragraphes 100,102,107, l'entrée sur le marché aux paragraphes 124-5, et les effets sur la concurrence aux paragraphes 204-5. http://www.ct-tc.gc.ca/CMFiles/CT-2000-002_0059a_49PXE-982004-5523.pdf.

Les mesures de contrôle des exportations peuvent être considérées comme un moyen de s'assurer d'un flux de combustible ou d'inciter à la réalisation d'investissements à fonds perdus dans des installations spécifiques telles un complexe d'incinération fournissant un chauffage urbain ou une décharge. Des restrictions de cette nature impliquent que les installations d'élimination des déchets ne sont pas obligées de se faire concurrence pour obtenir des intrants que de ce fait, elles ont moins d'incitations à être efficaces sur le plan économique.

Les mesures de contrôle des exportations peuvent être considérées comme apportant une solution à l'insuffisance de mesures politiques: les redevances de mise en décharge peuvent avoir besoin d'être fixées à un niveau inférieur au coût social total de la décharge afin de décourager des déposes illégales de déchets. Cependant, la fixation d'un prix inférieur au coût social incite les municipalités avoisinantes à se débarrasser de leurs déchets dans des décharges situées dans d'autres localités, puisque cela leur évite de supporter les frais afférents à l'offre d'une telle installation. Les municipalités pourraient toutefois imposer «des taxes d'accueil des déchets» pour équilibrer le coût privé et le coût social des déchets qui ne sont pas produits localement, et éliminer ainsi le besoin de mettre en place des mesures de contrôle des flux d'importation⁸¹.

Aussi bien en Lituanie qu'en Pologne, le contrôle des flux de déchets est une procédure qui est considérée comme enfreignant les lois de la concurrence. En Lituanie, Le Conseil de la concurrence a estimé, en 2008, que les municipalités avaient violé la loi de la concurrence en octroyant à des centres régionaux de gestion des déchets, le droit exclusif de valoriser et d'éliminer des DSM, sans recourir à une procédure d'appel d'offres concurrentiel. Cela constituait, de la part des autorités publiques et locales, un acte de discrimination à l'encontre d'autres entreprises aptes à fournir des services identiques⁸². En Pologne, plusieurs municipalités avaient contraint des entreprises exerçant des activités de ramassage des ordures ménagères sur le marché local, à éliminer ces déchets exclusivement dans la décharge municipale⁸³.

3.1 *Les marchés de l'incinération*

L'incinération convertit une charge en énergie thermique, dioxyde de carbone, eau, et scories. L'énergie qui en résulte peut être vendue soit pour le chauffage urbain, soit pour des usages industriels, ou encore être utilisée pour produire de l'électricité.

L'incinération se caractérise par des économies d'échelle, les coûts unitaires décroissant avec l'augmentation des déchets traités. Par conséquent, les coûts augmentent considérablement si une usine d'incinération traite moins de déchets qu'elle n'a la capacité pour le faire. Les déchets à haut pouvoir calorifique produisent plus de chaleur ou d'électricité. Puisque les incinérateurs sont trop petits pour avoir une incidence sur les prix du marché en aval, une augmentation de leur production se traduit par une hausse des recettes. Toutes choses étant égales par ailleurs, les propriétaires d'incinérateurs préfèrent donc

⁸¹ Kinnaman (2006) a trouvé que dans 26 municipalités de Pennsylvanie aux États-Unis les «taxes d'accueil des déchets» s'élevaient en moyenne à 4.05 USD/tonne, ce qui correspond approximativement au montant estimé de la perte de valeur des logements avoisinants de 3.05 à 4.39 USD. Ley, *et al.* (2000) a simulé les effets de diverses propositions de contrôle des flux dans le nord-est des États-Unis. Ils ont trouvé que les mesures de contrôle des flux réduiraient le bien-être économique et prédit que des taxes supplémentaires à l'importation réduiraient moins le bien-être que ne le feraient des restrictions de volume.

⁸² OCDE (2009), p. 266; Conseil lituanien de la concurrence(2008).

⁸³ Idem (2009), p. 196).

les déchets ayant un haut pouvoir calorifique. Les coûts sont d'autant plus élevés que les normes d'émission ou les frais associés à l'élimination des résidus de gaz de combustion le sont⁸⁴.

La technologie d'un incinérateur et, par voie de conséquence, son niveau d'efficacité énergétique a des incidences sur la zone géographique dans laquelle il peut être appelé à être en concurrence⁸⁵. Pour simplifier grossièrement, dans le règlement cadre de l'UE, les déchets utilisés comme combustible sont classés comme «déchets destinés à valorisation» si l'usine d'incinération opère à un certain niveau d'efficacité économique, mais ils sont classés comme «déchets destinés à élimination» si l'installation ne répond pas à ce critère. Seuls les déchets destinés à être valorisés peuvent faire l'objet de mouvements transfrontières. Par contre, bien des pays interdisent l'importation des déchets destinés à être éliminés. Toutefois, l'interdiction n'est pas universelle. Certains pays ne s'opposent plus au commerce des déchets appelés à être incinérés qui constituent une catégorie plus générale que les déchets pouvant être valorisés⁸⁶.

En Europe, les grands importateurs de déchets destinés à l'incinération sont l'Allemagne, la Suède, les Pays-Bas et la Belgique⁸⁷. D'après les données contradictoires, incomplètes et périmées dont on dispose sur le commerce des déchets au sein de l'Europe, environ 1 183 848 tonnes de déchets collectés auprès des ménages et de résidus provenant de l'incinération des déchets ménagers ont été exportés par tous les États membres de l'Union en 2009, près d'un tiers de ce volume pouvant être attribué à l'Italie, et environ 635 541 tonnes ont été importées, l'Allemagne en important les trois-quarts^{88,89,90}.

Les Pays-Bas offrent un exemple de marché de l'incinération plus libéralisé et donnent une idée de l'ampleur des effets des restrictions sur le commerce international. «Depuis quelques années...la dérèglementation du marché de l'incinération a fait l'objet d'un choix explicite, l'objectif étant d'accroître, aux Pays-Bas, la capacité d'incinération et la concurrence sur ce marché»⁹¹. Des déchets résiduels de combustible non-triés sont de plus en plus souvent utilisés. (op cit., p. 20) À partir de 2011, les Pays-Bas ont importé environ 300 kilotonnes de déchets combustibles destinés à l'incinération, soit cinq fois le chiffre de 2010, et durant les six premiers mois de 2012, ils en avaient déjà importé 350 kilotonnes⁹².

La politique des pouvoirs publics peut augmenter considérablement la demande d'incinération. Ainsi, certaines mesures peuvent favoriser la demande de produits se situant en aval de l'incinération. En Suède, le chauffage urbain a été encouragé et il est assuré, actuellement, à concurrence de 20 % par des usines

⁸⁴ Banque mondiale (1999).

⁸⁵ Deux types de traitement thermique avancés, la pyrolyse et la gazéification, produisent un gaz synthétique, qui est alors utilisé pour produire de l'énergie commercialisable et d'autres produits. Aux fins du présent document, le traitement thermique avancé fait l'objet d'un examen au même titre que l'incinération.

⁸⁶ Ministère norvégien des finances (2010) ; (2010b).

⁸⁷ Reuters (2012).

⁸⁸ Les exportations déclarées de déchets dangereux étaient de 27% supérieures à ce qu'elles étaient en 2009, et pour ce qui est des autres déchets déclarés —DSM et résidus provenant de l'incinération de DSM — les importations recensées dépassaient les exportations recensées de 36%. Certains pays ont soumis leur rapport trop tard pour être pris en considération.

⁸⁹ Les importations recensées de DSM et les résidus de l'incinération des DSM ont dépassé les exportations recensées de 36 %. Les exportations déclarées de déchets dangereux étaient de 27 % supérieures aux importations déclarées en 2009. Certains pays ont soumis leur rapport trop tard pour être pris en considération.

⁹⁰ Services de la Commission européenne (2012), tableaux 11, 32.

⁹¹ Ministère néerlandais du logement, de l'aménagement du territoire et de l'environnement (2008), p. 13.

⁹² Dutch Waste Management Association (2012).

d'incinération. Environ la moitié des DSM du pays est traitée en incinérateurs aux fins de production d'énergie⁹³. D'autres mesures peuvent avoir pour effet de supprimer la demande de produits de substitution. Une interdiction catégorique de mettre des déchets combustibles en décharge augmente la demande d'incinération. Si l'autoproduction est exemptée de taxes et d'autres redevances d'électricité, ainsi que de la nécessité de détenir des certificats verts, cela incite les entreprises industrielles à avoir recours à l'incinération des déchets pour produire chauffage et électricité. La demande d'incinération chute avec l'offre d'incitations plus généreuses au recyclage des fractions de déchets pouvant être soit recyclées soit incinérées.

La politique des pouvoirs publics peut également avoir une incidence sur la concurrence qui se présente sur le marché de l'incinération. La Norvège exporte des déchets destinés à l'incinération vers la Suède. La Suède a décidé d'éliminer une taxe sur l'incinération. Par crainte de voir les incinérateurs norvégiens offrir des prix tellement bas qu'ils ne permettent pas de couvrir l'intégralité de leurs coûts à long terme, la Norvège a éliminé sa taxe sur l'incinération le 1er octobre 2010, date à laquelle la Suède en a fait tout autant. Une autre réponse a été envisagée à l'annonce du changement de taxe en Suède, celle d'imposer une interdiction d'exporter des déchets. Cette solution a toutefois été rejetée sur la base d'un avis juridique selon lequel une telle interdiction devait se fonder sur des considérations environnementales, ce qui ne paraissait pas s'appliquer dans le cas de la Suède. (Ministère norvégien des finances 2010; 2010b)

Une apparente surcapacité a donné lieu à des demandes d'intervention en Europe⁹⁴. L'une des réponses n'était autre qu'un rappel de la base juridique sur laquelle il est possible de se fonder pour refuser l'importation de déchets destinés à être valorisés. D'autres observateurs ont fait remarquer qu'une surcapacité entraînerait la fermeture d'usines plus anciennes et moins efficaces. Le contrôle des flux entre municipalités peut limiter la concurrence sur le marché de l'incinération. Si certains détenteurs de déchets combustibles avaient un choix d'incinérateurs et que d'autres détenteurs de tels déchets étaient tenus d'utiliser un incinérateur donné, alors de façon générale, les détenteurs de déchets soumis à concurrence paieraient un prix inférieur. Une étude a permis de conclure que le prix moyen des déchets combustibles en situation de concurrence était inférieur d'un peu moins de 50% au prix demandé pour des déchets similaires astreints à une obligation de monopole⁹⁵.

La section ci-après porte sur les marchés de reprise de produits selon des programmes qui permettent la réutilisation et le recyclage des matériaux.

4. Les programmes de responsabilité des producteurs

La responsabilité élargie du producteur (REP) signifie que le producteur ou l'importateur est responsable des produits qu'il a mis sur le marché jusqu'à un stade situé en aval de la consommation.⁹⁶ L'accent est placé ici sur les systèmes de reprise des produits où les déchets sont physiquement repris des

⁹³ IEA Bioenergy (2012).

⁹⁴ Une question posée au Parlement européen portait sur la surcapacité. (E-010851-12 du 29 novembre 2012) Selon Suez Environnement *inter alia*, il n'y aurait pas de surcapacité importante sur le marché de l'incinération en Europe (Suez Environnement 2012, p. 58).

⁹⁵ Hjellnes Consult Rapport destiné à la Fédération des industries norvégiennes (2013).

⁹⁶ Le Manuel de l'OCDE définit la REP comme étant « un instrument de politique qui étend les obligations matérielles et/ou financières des producteurs au traitement ou à l'élimination des produits situés en aval de la consommation. L'imputation d'une telle responsabilité au producteur pourrait inciter à ne pas produire de déchets à la source, favoriser la conception de produits écologiques et venir appuyer les objectifs publics de recyclage et de gestion des matériaux » OCDE, 2010.

consommateurs. Les déchets d'emballage, le matériel électrique et électronique, les piles et les accumulateurs ont, entre autres types de déchets, été soumis à des obligations de reprise. Le traitement des déchets produit *inter alia* des matières premières secondaires. Afin de générer une demande de ces matériaux, l'imputation d'une telle responsabilité à un producteur est assortie d'objectifs spécifiques de recyclage et de valorisation des déchets. Pour mieux s'assurer que les déchets n'échapperont pas au programme de recyclage, il est souvent interdit d'éliminer les déchets non traités relevant de la responsabilité élargie du producteur.

Les parties responsables ont le choix de la manière dont elles peuvent s'y prendre pour s'acquitter de leurs obligations. Elles peuvent le faire à titre individuel, ou en prenant part à un programme de responsabilité des producteurs avec d'autres parties responsables ou en payant ce service à des tiers. Bien que les marchés portant sur des services offerts par des tiers puissent se ressentir d'une réglementation anticoncurrentielle, l'accent est essentiellement placé dans cette section sur les programmes de responsabilité des producteurs. Dans la mesure où ils impliquent une collaboration entre des concurrents sur le marché des produits ainsi que des accords exclusifs avec des prestataires de services ces programmes peuvent restreindre la concurrence⁹⁷.

Les programmes de responsabilité des producteurs imposent à leurs membres des redevances qui devraient refléter le coût net du traitement des déchets. En principe, le revenu provenant de cette redevance et de la vente des matières premières secondaires devrait permettre de couvrir les coûts du système⁹⁸. Les redevances ont vocation à déplacer le coût de prise en charge des déchets, de ceux qui paient les taux municipaux vers les consommateurs. À l'origine, de tels programmes avaient notamment pour objet d'inciter les producteurs à repenser leurs produits et à les recycler. Par conséquent, du moins en ce qui concerne les programmes de responsabilité des producteurs qui s'appliquent aux emballages, le montant de la redevance dépend de la quantité et du type d'emballage que « la partie responsable » place sur le marché⁹⁹.

⁹⁷ Un programme de responsabilité des producteurs peut s'appliquer à une entreprise ou à une coentreprise. Duales System Deutschland (DSD), par exemple, a commencé un consortium dont plus de 400 entreprises de détail et d'emballage ainsi que plusieurs grandes entreprises de transport de déchets étaient propriétaires. Il a été vendu par la suite à une société de fonds propres Kohlberg Kravis Roberts en 2004. À la Commission européenne (2005), les programmes de responsabilité des producteurs étaient décrits comme incluant des systèmes basés sur des accords conclus entre participants à l'échelle de tout un secteur d'activités. Certains avaient une indépendance commerciale considérable alors que d'autres dépendaient d'une organisation faitière de coordination de toutes les activités du secteur.

⁹⁸ Il reste à déterminer si en pratique le revenu couvre bien les coûts. Une étude récente a trouvé que trois des 24 programmes impliquant le versement de redevances par des producteurs d'emballage (huit des 25 programmes DEEE) dans les États membres de l'UE couvraient bien leurs coûts, mais la situation n'était pas aussi claire pour les 21 autres programmes concernant les déchets d'emballage. (Bio intelligence service 2012, pages 6-8) Lorsque les redevances sont fixées à un niveau insuffisamment élevé, cela atténue les incitations à abaisser les coûts du traitement des déchets. Lorsque les redevances sont fixées de façon insuffisamment différenciée, cela n'incite pas autant les entreprises à abaisser les coûts de traitement des déchets de leurs propres produits. Le coût d'administrer le système des redevances s'élève probablement avec le niveau de complexité, ce qui limite les différenciations possibles.

⁹⁹ Déplacer le coût de la gestion des déchets et différencier les redevances en fonction des différents coûts avaient pour objet d'inciter les consommateurs à choisir des systèmes combinant produits et emballages, qui sont moins chers sur la durée de vie du produit, puisqu'en principe une baisse des coûts de gestion des déchets se répercute sous forme d'une baisse des redevances et d'une baisse du prix des produits. À leur tour, les producteurs sont incités à revoir la conception de leurs emballages afin de faire baisser le coût de la gestion des déchets. Toutefois, une recherche menée en 2007 par le Ministère néerlandais du logement, de l'aménagement du territoire et de l'environnement a conclu que lorsqu'un système n'était pas suffisamment différencié, il n'incitait pas à revoir la conception d'un produit en vue de son recyclage. Par

En règle générale, les programmes de responsabilité des producteurs sous-traitent à des entreprises les marchés de la collecte, du tri et de la valorisation des déchets plutôt que d'accomplir ces tâches directement. Parmi ces programmes, ceux qui se spécialisent dans les déchets d'emballage de consommation doivent le plus souvent passer des contrats avec des entreprises qui assurent l'enlèvement de ces déchets auprès des habitations (comme cela se pratique avec les DSM non triés). La collecte d'autres déchets peut s'organiser autour de points de ramassage moins nombreux mais plus vastes, réunissant par exemple des conteneurs spécifiques, ou auprès de détaillants qui reprennent du matériel électrique et électronique mis au rebut, des pneus, des piles et autres déchets dangereux. Le tri peut être effectué par d'autres sous-traitants ou se faire de façon consolidée, avec l'activité de collecte des déchets.

Par conséquent, pour un type donné de déchets, plusieurs marchés se rattachent à l'exécution d'un programme de responsabilité élargie des producteurs :

- L'organisation de solutions permettant de s'acquitter de l'obligation de responsabilité élargie du producteur ;
- L'enlèvement des déchets - il peut y avoir différents marchés suivant la manière dont s'effectue la collecte, par exemple suivant qu'elle s'effectue directement auprès des ménages, d'établissements commerciaux ou de conteneurs spécialisés ;
- Le tri des déchets – il peut y avoir différentes installations spécialisées dans différentes tâches associées au tri ;
- La valorisation des déchets;
- La vente des matières premières secondaires dérivées des déchets.

Ces marchés n'ont pas tous la même étendue géographique. Si les marchés qui ont trait à la collecte des déchets sont le plus souvent locaux, ceux du tri, de la valorisation et de la vente des matières premières secondaires peuvent recouvrir une zone beaucoup plus étendue, voir même avoir une dimension internationale¹⁰⁰.

4.1 Effets sur la concurrence sur le marché des produits

Les programmes de responsabilité des producteurs peuvent se constituer à l'origine sous forme de monopole, à l'exception des parties responsables qui décident de s'acquitter de leurs obligations de façon indépendante. En tant que monopoles, ces programmes rassemblent des concurrents dans une structure coopérative, même si celle-ci n'a d'autres fins que de permettre à ses membres de remplir leurs obligations ayant trait aux déchets. Comme c'est le cas de toutes ces structures qui permettent des contacts répétés entre concurrents, les programmes de responsabilité des producteurs qui sont constitués en monopole peuvent avoir des répercussions sur la concurrence sur le marché des produits.

Les échanges d'information qui ont lieu dans le cadre des programmes de responsabilité des producteurs peuvent constituer de meilleures sources d'information sur les ventes des concurrents qu'il ne serait possible d'en obtenir autrement, par exemple, en établissant des corrélations entre les montants d'un type particulier de déchets d'emballage et les ventes du moment sur le marché. Toutefois, les déchets qui

la suite, d'autres instruments politiques spécifiques ont été introduits, notamment la Directive sur l'écoconception ou l'interdiction d'utiliser du plomb et d'autres substances dangereuses dans les produits électroniques (Pays –Bas, Ministère du logement, de l'aménagement du territoire et de l'environnement 2008, pp. 44-5).

¹⁰⁰ Vu que certains pays peuvent restreindre ou interdire le commerce des déchets, il est important que les matières dérivées des déchets ne soient plus répertoriés dans la catégorie des déchets.

apparaissent longtemps après l'achat initial, comme c'est le cas de ceux qui proviennent du matériel électrique et électronique, des pneus de véhicules ou des batteries de voiture, peuvent ne pas présenter d'intérêt sur le plan d'une information utile au suivi des marchés. De même, les déchets associés à un grand nombre de produits différents peuvent ne présenter aucun intérêt sur le plan de l'information.

La participation à un programme de responsabilité des producteurs peut réduire la concurrence au niveau des prix, dans la mesure où les membres d'un tel programme peuvent convenir du montant à facturer à chaque consommateur au titre de la gestion des déchets. Une préoccupation du même ordre ne manquerait pas de se poser si la redevance associée au programme de responsabilité des producteurs, sans être facturée indépendamment, représentait une partie substantielle du prix final. Dans ce cas, si le programme de responsabilité des producteurs est un monopole, la redevance au titre des déchets renforcerait l'uniformisation des coûts entre rivaux. En d'autres termes, la concurrence aurait moins latitude pour abaisser les coûts.

Les effets que peuvent avoir sur la concurrence les programmes de responsabilité des producteurs stipulant que les participants doivent faire apparaître de façon distincte, sur les factures des consommateurs finaux le montant de la redevance perçue au titre de l'élimination des déchets, a été examiné à plusieurs reprises. Dans sa décision de 1992 concernant l'affaire VOTOB, la Commission européenne a jugé qu'un accord de gestion des déchets, conclu entre des entreprises indépendantes de réservoirs de stockage, et instituant une redevance d'un montant fixe figurant de façon distincte sur les factures, avait pour effet d'exclure la concurrence sur une importante composante du coût.¹⁰¹ L'Autorité néerlandaise de la concurrence a fait savoir que dans la plupart des cas, elle interdisait la pratique des programmes de responsabilité des producteurs consistant à facturer séparément la redevance de prise en charge des déchets, au motif que cette pratique était une forme de fixation des prix et que les consommateurs n'en retireraient pas une part équitable des avantages. Cependant, dans l'affaire des produits blancs et bruns, l'Autorité a fait une exception après appel de son rejet initial et après l'entrée en vigueur de la Directive européenne sur les déchets provenant du matériel électrique et électronique, qui offrait la possibilité de montrer explicitement la redevance. L'Autorité a également autorisé le prélèvement, auprès des utilisateurs de ce service, d'une redevance de 45 EUR pour la mise à la casse d'un véhicule, au motif que ce montant était très peu important au regard du prix total d'une voiture neuve¹⁰².

La structure de la redevance sur les déchets peut nuire à la concurrence sur les marchés des produits aussi bien que sur le marché des programmes de responsabilité des producteurs. Ainsi, la structure de la redevance facturée par Duales System Deutschland ("DSD") a été considérée comme constituant un abus de position dominante. À l'époque, DSD facturait les consommateurs en fonction du volume d'emballage portant la marque Point vert plutôt qu'en fonction du volume d'emballage pour lequel DSD offrait des services de reprise et de recyclage. La Commission européenne a été d'avis qu'en raison de cette disposition, les fabricants et les distributeurs n'allaient pas conclure de contrat avec des concurrents de DSD puisque ils ne réduiraient pas les montants versés à DSD étant donné que le montant total d'emballage restait inchangé. DSD a modifié sa formule de fixation des prix afin d'obtempérer. Cette structure de redevance érige également des obstacles à l'entrée sur le marché allemand de producteurs étrangers vendant pour la plupart en dehors du pays. L'exigence de faire figurer le symbole Point vert sur les emballages, jointe aux économies d'échelle liées à l'utilisation d'une seule forme d'emballage, (ce qui se produit par exemple lorsqu'une entreprise n'a qu'une seule ligne de production) font qu'il coûterait cher au producteur d'offrir de petites quantités aux consommateurs allemands.

¹⁰¹ Commission européenne (2005), para 59.

¹⁰² OCDE (2010), p. 76, OCDE (2004), p. 139, Netherlands Authority for Consumers & Markets (2003).

4.2 Concurrence entre programmes de responsabilité des producteurs

La concurrence entre programmes de responsabilité des producteurs peut donner de bons résultats sur le plan de l'efficacité. Il en est pour exemple les programmes de responsabilité des producteurs portant sur les emballages en Allemagne. Des changements survenus dans les règles qui maintenaient ensemble DSD ont, avec le temps, accentué la séparation verticale et favorisé l'ouverture du marché aux programmes de responsabilité des producteurs en Allemagne. Alors qu'en 2003, DSD était détenteur d'un monopole, en 2011, l'entrée sur le marché de tels programmes avait érodé sa part du marché national à 44 %, et les coûts de ces programmes étaient tombés, passant d'environ 2 milliards EUR en 2003 à moins d'un milliard EUR en 2011. En outre, de nouvelles technologies avaient été mises au point et mises en service, notamment pour trier des emballages légers¹⁰³.

Une étude de 2006 portant sur les programmes de responsabilité des producteurs applicables aux déchets provenant de matériel électrique et électronique ne donne pas de preuves empiriques des effets des différentes structures¹⁰⁴. L'étude fait valoir que le monopole permet de tirer parti d'économies d'échelle et d'éviter les coûts afférents à un mécanisme de compensation national et à la mise en place de caissons séparés de ramassage des ordures. Elle montre toutefois que la concurrence entre de multiples prestataires maintient les coûts à de bas niveaux et qu'elle favorise la découverte de solutions efficaces et adaptées. L'étude fait apparaître qu'il existe différentes structures de marché selon les pays de l'UE. À l'époque, il y avait cinq ou six programmes au Royaume Uni, en France, en Hongrie et dans la République tchèque et un seul programme national dans plusieurs autres pays de l'UE.

Les documents accompagnant une consultation de 2013 organisée par le Ministère britannique des entreprises, de l'innovation et des compétences, au sujet de la réglementation des déchets provenant du matériel électrique et électronique illustrent le fait que la multiplicité des programmes ne garantit pas une concurrence efficace¹⁰⁵. Il existe 37 programmes de responsabilité des producteurs applicables à ce genre de déchets au Royaume Uni. Cependant, les fabricants se plaignent d'une tarification élevée et peu nombreuses sont les grandes entreprises qui sont passées d'un programme à l'autre. Le Ministère des entreprises, de l'innovation et des compétences attribue ces prix élevés à la conception de la réglementation existante. Il soutient notamment que l'obligation de collecter et de traiter 100 % des déchets éligibles et les sanctions pénales imposées aux fabricants qui ne s'acquittent pas de leurs obligations réglementaires font que ces fabricants sont tout à fait disposés à payer. D'après le Ministère si les entreprises sont peu nombreuses à passer d'un programme à un autre, cela est dû au fait que les différents programmes facturent des redevances similaires et imposent des clauses onéreuses à la sortie du système, et il affirme que la réglementation existante dissuade les programmes d'attirer de nouveaux fabricants. Les documents de la consultation suggèrent d'éventuels changements qui pourraient avoir pour effet de remédier à ces restrictions anticoncurrentielles¹⁰⁶.

¹⁰³ Office fédéral allemand des ententes (2012).

¹⁰⁴ Centres de recherche conjoints de la Commission européenne (2006).

¹⁰⁵ United Kingdom Department for BIS (2013).

¹⁰⁶ Les changements portent sur une réduction des exigences réglementaires imposées aux petits producteurs d'équipements électriques et électroniques (EEE) et sur l'octroi aux collecteurs de déchets d'équipements électriques et électroniques (DEEE) de la possibilité de gérer leurs propres flux de DEEE. Les autres modifications envisagées auraient pour objet d'introduire une taxe au titre du respect des engagements, taxe qui viendrait se substituer à l'exigence quantitative tenant actuellement lieu de preuve de respect des engagements. La relation entre ces changements et les résultats qui en sont attendus est expliquée dans le document cité.

L'un des arguments invoqués par les programmes à l'encontre de la concurrence est celui des comportements opportunistes¹⁰⁷. Faute de rigueur au stade de l'application, les fabricants et les importateurs peuvent trouver avantageux d'agir en passagers clandestins des entreprises qui, elles, s'acquittent de leur obligation au titre de la REP et qui réduisent leurs coûts, ce qui a pour effet une distorsion de la concurrence en leur faveur.

Les comportements opportunistes ont posé un problème important au début de la mise en œuvre du programme d'emballage allemand. Le système s'est pratiquement effondré en 1993, lorsque DSD a estimé que 55 à 60 % seulement de tous les emballages portant le symbole Point vert correspondaient à des emballages au titre desquels un droit de licence avait été versé, alors que seuls les emballages au titre desquels un producteur a cotisé au système peuvent revendiquer l'usage de ce symbole. Les prêts consentis, les renégociations de contrats, et l'amendement de l'Ordonnance sur les emballages dans le sens d'une incitation à devenir membre du système DSD, ont contribué à améliorer la situation financière. De plus, DSD a obtenu le droit d'imposer des amendes lorsque le symbole Point vert était utilisé sans versement d'un droit de licence. La probabilité d'être détecté et d'encourir des pénalisations en conséquence peut inciter ces passagers clandestins à modifier leurs calculs et suffire à assurer le respect de la réglementation.

Certains programmes de responsabilité des producteurs exigent des participants qu'ils transfèrent toutes leurs obligations à un seul système, c'est-à-dire que les parties responsables ne peuvent pas avoir recours à un programme de responsabilité des producteurs pour s'acquitter d'une partie seulement de leurs obligations. Cette pratique peut constituer un obstacle à l'entrée sur le marché des programmes de responsabilité des producteurs, puisqu'il se peut que les nouveaux venus ne soient pas tout de suite en mesure d'offrir toute la gamme de services nécessaires. Néanmoins, l'UE a considéré cette pratique comme « nécessaire pour encourager des investissements vitaux ... dans les infrastructures de collecte et de recyclage, » mais elle ne la considérerait plus avec autant de clémence si les objectifs de valorisation et de recyclage avaient été atteints¹⁰⁸.

Malgré leurs effets potentiellement néfastes, certains programmes ont été conçus en tant que monopoles car il n'y avait peut-être pas d'autres moyens, moins dommageables sur le plan de la concurrence, de réaliser l'objectif de politique publique dans le cas des déchets concernés. En effet, un monopole peut être nécessaire si l'on veut parvenir à une demande suffisamment intégrée pour tirer parti d'économies d'échelle ou créer des incitations à investir à fonds perdus. Dans l'affaire Sydhavnens Sten & Grus¹⁰⁹, l'État avait octroyé un droit exclusif de traiter des déchets de chantiers et la CJUE avait reconnu qu'une telle démarche était acceptable puisque la gestion des déchets pouvait être considérée comme un service d'intérêt économique général.

4.3 Concurrence entre programmes de responsabilité des producteurs et marchés connexes

Il arrive souvent que les programmes de responsabilité des producteurs ne prévoient pas d'assurer eux-mêmes les services de collecte, de tri et de valorisation des déchets mais qu'ils sous-traitent ces services. Lorsqu'un marché est un monopole naturel ou qu'il est caractérisé par une importante échelle d'exploitation minimale, alors l'octroi de contrats exclusifs peut également réduire la concurrence sur d'autres marchés. L'existence de droits exclusifs sur un marché peut notamment contraindre les nouveaux entrants à entrer simultanément sur deux marchés ou à fonctionner sous le seuil minimal d'une exploitation rentable sur certains marchés, ce qui peut être très coûteux et dissuader un opérateur éventuel d'entrer sur

¹⁰⁷ Pro Europe (2012).

¹⁰⁸ Commission européenne (2005), paras 72-75.

¹⁰⁹ Affaire C-209/98, *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune*, Arrêt de la CJUE du 23 mai 2000, Recueil de jurisprudence [2000] page I-3743.

ce marché. Ainsi, un programme de responsabilité des producteurs qui aboutit à la signature de contrats d'exclusivité avec des prestataires de services sur des marchés de monopole naturels peut verrouiller l'entrée de ce marché et faire en sorte que des programmes similaires mais concurrents n'y ait pas accès¹¹⁰.

Plusieurs des services au titre desquels les programmes de responsabilité des producteurs passent des contrats peuvent être en situation de monopole naturel ou peuvent être assurés d'échelles minimales d'efficacité assez importantes :

- La collecte des déchets recyclables (tels les déchets d'emballage) auprès des ménages peut être un monopole naturel. Une étude a permis de conclure que l'existence d'économies de densité avait le même effet sur la décision des collectivités locales de choisir un ou plusieurs prestataires de services de collecte des déchets recyclables et des déchets municipaux solides auprès des ménages, ce qui était compatible avec l'hypothèse des auteurs selon laquelle les économies de densité des deux services étaient similaires. (Walls *et al.* 2005)^{111,112}.
- Les installations qui trient des déchets recyclables de mélange bénéficient d'économies d'échelle, et les frais afférents à l'obtention de permis de construire accentuent encore ces économies d'échelle. (OFT 2006, p. 58). Si les coûts de transports sont suffisamment élevés, cela signifie qu'il existe des monopoles naturels locaux.
- Le fait que des usines de valorisation des déchets soient ou non des monopoles naturels dépend du volume et des économies d'échelle du procédé industriel spécifique. Vu que le commerce international des déchets n'est pas encouragé, les pays à faible population sont enclins à avoir des monopoles naturels qui traitent de la valorisation des déchets.

L'introduction d'appels d'offres concurrentiels pour la sélection des prestataires de services de collecte, de tri et de valorisation des déchets a permis aux programmes de responsabilité des producteurs de réaliser des économies considérables au niveau des coûts. Toutefois, la baisse des coûts imputables à une telle procédure dépend de la manière dont la concurrence est organisée.

Les autorités de la concurrence se sont rendu compte que l'octroi par les programmes de responsabilité des producteurs, de contrats exclusifs excessivement longs pouvait avoir des effets néfastes sur la concurrence sur les marchés de collecte des déchets. La Commission européenne a estimé que la durée de plus de 15 ans, des accords exclusifs conclus par DSD avec des entreprises municipales de collecte des déchets, dans les 546 districts de ramassage des ordures que compte l'Allemagne, était excessive¹¹³. L'effet cumulatif des longs contrats signifiait qu'à tous moments, l'échelle minimale

¹¹⁰ L'idée c'est que pour qu'un programme de responsabilité des producteurs fonctionne à des coûts suffisamment faibles pour soutenir la concurrence sur le marché de tels programmes, il faut que les collecteurs qui opèrent dans le cadre de ce programme aient atteint une échelle minimale d'efficacité. Toutefois, si le marché est un monopole naturel, seule une entreprise peut atteindre cette échelle minimale d'efficacité.

¹¹¹ Étant donné que la recherche a conclu que le ramassage des DSM non triés était un monopole naturel, il serait pertinent de savoir si le ramassage des DSM non triés et celui des déchets recyclables donne lieu à des économies de champ d'activité. Toutefois, l'auteur n'a toutefois pas trouvé de recherches à ce sujet. Les camions de ramassage des ordures dotés de compartiments multiples peuvent enlever simultanément les deux types de déchets. Un tel camion donne lieu à des économies de champ d'activité, mais cela se ferait nécessairement à plus petite échelle. D'autres municipalités collectent les différents types de déchets en un seul parcours, ceux-ci faisant l'objet d'un tri ultérieur. D'autres municipalités encore assurent la collecte de différents types de déchets lors de parcours de ramassage distincts, une pratique qui semblerait ne produire d'économies de champ d'activité que dans le cas de véhicules ordinaires.

¹¹² Walls *et al.* (2005).

¹¹³ Commission européenne 2005, para. 65.

d'efficacité était supérieure au nombre de contrats disponibles. Cela créait des obstacles à l'entrée sur ce marché d'entreprises de collecte de déchets aussi bien nationales qu'étrangères. La durée des contrats a été limitée à quatre ans. L'UE a rendu une décision similaire dans l'affaire *Eco-Emballages*¹¹⁴. Dans cette affaire, le programme a dû limiter à un an la durée des contrats, les autorités municipales étant habilitées à y mettre un terme de façon immédiate et à décider si ces contrats porteraient sur la totalité ou sur une partie seulement des emballages collectés. Les changements avaient pour objet de faciliter l'entrée de la concurrence sur le marché français des programmes de responsabilité des producteurs concernant les emballages¹¹⁵.

Dans le cas de DSD, l'introduction de la concurrence dans la collecte et le tri des déchets, survenue en partie en réponse à des incitations de l'Office fédéral allemand des ententes, a entraîné une réduction du coût de ces activités de plus de 20 %. En 2003, la collecte des déchets faisait l'objet d'une séparation verticale et DSD a organisé l'adjudication de marchés dans certains domaines. Cette démarche n'ayant pas produit les résultats attendus, DSD a modifié les conditions d'adjudication de façon à améliorer notamment les perspectives des petites et moyennes entreprises d'élimination des déchets, et a procédé à d'autres ventes publiques, portant pratiquement sur la moitié de ses domaines sous contrat en 2004. Ces deux séries de ventes ont abouti aux réductions de coûts dont il est fait état¹¹⁶.

En 2006, un examen des programmes de responsabilité du producteur applicables aux déchets d'équipements électrique et électronique a révélé qu'aux Pays-Bas, les programmes où intervenaient de multiples entreprises de recyclage et de transports, sélectionnées par voie d'appel d'offres concurrentiel, faisaient état de coûts inférieurs à ceux des programmes qui n'avaient fait appel qu'à un seul prestataire¹¹⁷. L'introduction de la concurrence sur les marchés publics aurait également contribué au développement de nouvelles technologies de recyclage, ce qui donne à penser que l'assurance d'une demande à grande échelle contribue à permettre de surmonter les obstacles à l'entrée sur le marché¹¹⁸.

Les arguments d'efficacité que l'on invoque à l'appui des accords d'exclusivité se fondent généralement sur l'observation qu'ils incitent les entreprises à investir à fonds perdus, mais la justification de tels accords se fonde également sur l'argument du « marché des citrons ». L'idée est que les matières collectées sont hétérogènes et qu'elles peuvent avoir des valeurs très différentes. De ce fait, si le collecteur parvient à trier les matériaux dont il dispose en fractions de déchets de plus ou moins grande valeur, et si le programme de responsabilité des producteurs ne peut vérifier à un prix abordable la qualité de ce qu'il reçoit, le collecteur peut vendre directement sur le marché les éléments de plus grande valeur et n'envoyer au programme que les éléments de moindre valeur. Vu que le programme de responsabilité des producteurs rétribue généralement le collecteur sur la base de la qualité moyenne des matériaux qui lui sont livrés, il paierait en définitive un prix excessif. Un accord exclusif, stipulant que la totalité des matériaux collectés doit être livrée au programme de responsabilité des producteurs, aurait pour effet d'empêcher le collecteur d'opérer une sélection parmi les matériaux qu'il fournit. Des dispositions figurant dans les contrats conclus entre DSD et les entreprises municipales de collecte des déchets interdisaient aux entreprises de commercialiser elles-mêmes les matériaux qu'elles avaient collectés. Cela a été modifié suite à des discussions entre le programme et la Commission européenne^{119,120}.

¹¹⁴ Décision de la Commission européenne du 15 juin 2001 *Eco Emballages*, JO 2001 L 233/37.

¹¹⁵ Il existe d'autres décisions de la Commission concernant les Programmes de responsabilité des producteurs, par exemple la décision du 16 octobre 2003, *ARA, ARGEV, ARO*, JO 2004 L 75/59.

¹¹⁶ OCDE (2006), p. 125-6.

¹¹⁷ DG du Centre commun de recherche (DG CCR) de la Commission européenne (2006), p. 38.

¹¹⁸ Veerman dans OCDE (2004), p. 145.

¹¹⁹ 2001/463/CE: Décision de la Commission du 20 avril 2001 relative à une procédure d'application de l'article 82 du traité CE (COMP D/34493-DSD) Journal officiel n° L 166/1-24 du 21/06/2001 p.0001-0024.

Les pratiques des Programmes de responsabilité des producteurs en matière d'adjudication des marchés peuvent avoir une incidence sur la concurrence dans des marchés connexes. Ainsi, une discrimination dans l'adjudication d'un marché de services de collecte et de valorisation des déchets, imputable au programme espagnol d'emballage du verre, Ecovidrio, a eu des résultats néfastes pour la concurrence. Le problème tenait au fait que des entreprises intégrées verticalement étaient en mesure de se concerter pour exclure des concurrents ne travaillant que dans la prestation de services de collecte et de valorisation des déchets. Bien que l'autorité de la concurrence ait prié Ecovidrio de traiter les soumissions issues de l'appel d'offres correspondant à ces services de façon objective, transparente et non-discriminatoire, celle-ci s'est rendue compte, en 2010, que le programme avait enfreint cette condition et privilégié les entreprises membres du programme¹²¹.

Les dispositions régissant l'attribution de marchés à des entreprises de valorisation des déchets peuvent également faire obstacle à la concurrence entre programmes.

- Dans le système DSD, les recycleurs recevaient initialement de DSD le matériel trié sans qu'il ne leur en coûte rien. DSD a ensuite modifié son système en sorte de facturer les recycleurs lorsque le prix du marché pour les matériaux fournis était positif, et d'autoriser les ventes de matériaux recyclables hors du programme, pour autant que des remises soient consenties à DSD.
- Le programme italien de responsabilité des producteurs concernant les emballages du verre, COREVE, répartissait le verre valorisé entre les utilisateurs en fonction de leur part de marché historique à un prix fixé par le programme. L'autorité italienne de la concurrence a fait valoir que la méthode de répartition ne permettait pas à de nouveaux utilisateurs d'avoir accès à ce marché, qu'elle ne permettait pas non plus de modifier les parts, et que le prix administratif ne reflétait pas le prix du marché¹²². Le programme de responsabilité des producteurs a modifié sa méthode de répartition et adopté un système adjudication aux enchères. De ce fait, les prix ont augmenté jusqu'à refléter la valeur du marché du verre valorisé et inclure la demande des opérateurs qui n'avaient pu présenter de soumissions dans le cadre de la méthode de répartition antérieure.
- Suite à la création, en 1993, du programme allemand portant sur les déchets d'emballage, les fabricants allemands de récipients en verre avaient constitué conjointement un monopsonne pour l'achat de verre valorisé à partir de déchets ménagers. La fabrication de récipients en verre fait appel à une grande fraction de verre secondaire. En 2007, l'Office fédéral allemand des ententes a estimé qu'étant donné que les quotas de recyclage du verre avaient été atteints depuis longtemps, l'accord conclu entre les fabricants de récipients en verre n'était pas nécessaire à la réalisation de l'objectif environnemental. Il a donc interdit les achats en groupe¹²³.
- En Italie, les règles de répartition qui existaient au sein d'un consortium de recyclage et de valorisation des batteries au plomb, fonctionnant à l'échelle de l'ensemble du secteur d'activité, ont fait craindre qu'une fois expiré le droit exclusif initial octroyé à titre d'exemption, elles pourraient pérenniser les parts de marché des fonderies, réduire les incitations à une plus grande efficacité du recyclage et créer des obstacles à l'entrée sur le marché de systèmes de collecte rivaux¹²⁴.

¹²⁰ Commission européenne(2005), para. 65.

¹²¹ OCDE(2010), pp. 85, 142.

¹²² Autorita Garante per la Concorrenza ed il Mercato, (2008).

¹²³ Annual Report on Competition Policy Developments in Germany, [DAF/COMP\(2007\)24/01](#)

¹²⁴ OCDE (2010), pp. 64-5,140-1. La décision de l'autorité de la concurrence à l'encontre de ces dispositions a récemment été confirmée en appel.

- En Turquie, deux programmes ont été mis en place pour la collecte et le recyclage du plomb des accumulateurs, l'un par les producteurs et les entreprises de recyclage, l'autre, beaucoup plus limité, par les importateurs. Le plus important des deux programmes incorporait des accords avec des négociants et des distributeurs en vue d'empêcher ces derniers de vendre des accumulateurs d'occasion à des collecteurs agissant au nom de l'autre programme. De plus, les entreprises de recyclage membres du premier programme n'étaient pas autorisées à acheter des accumulateurs d'occasion auprès de l'autre programme. Ces interdictions signifiaient que les programmes ne pouvaient se faire concurrence dans la prestation de service de valorisation de ce type de déchets ¹²⁵.

Outre les effets des programmes de responsabilité des producteurs, les restrictions au commerce international des matières premières secondaires peuvent entraîner des distorsions sur les marchés desdites matières.

Les normes de produits peuvent également favoriser la concurrence ou lui faire obstacle. Les matières premières secondaires sont hétérogènes et il existe des incitations à donner une image inexacte de la véritable qualité de ce produit. Ainsi, le verre de couleur verte provenant des conteneurs a moins de valeur que le verre transparent, et un verre qui présente davantage d'impuretés a également moins de valeur. À un moment donné, il arrive que la qualité laisse trop à désirer pour qu'il y ait une demande portant sur ce produit. Par conséquent, des normes ont été établies. Les normes peuvent inciter à améliorer les techniques utilisées en sorte que les produits soient de meilleure qualité et se vendent à meilleur prix. Si les normes sont appliquées de façon crédible, en sorte que des transactions puissent s'opérer sur les marchés et que différentes entreprises de valorisation offrent des produits de substitution, la concurrence peut alors se développer.

Dans les sociétés modernes, les programmes de responsabilité des producteurs jouent un rôle de liaison important entre les flux matériels, parce qu'ils garantissent qu'une certaine part des produits qui ont été mis sur le marché sont réutilisés, recyclés ou valorisés. Si l'efficacité en matière de fabrication et de distribution peut accroître le bien-être des consommateurs, il en va de même d'une plus grande efficacité dans la fermeture du flux des matériaux. Les monopoles ont moins d'incitations à rechercher des fournisseurs efficaces que n'en ont les mécanismes concurrentiels, en dépit du fait que les membres soient incités à avoir un programme efficace ¹²⁶. Le réseau d'accords au sein des Programmes de responsabilité des producteurs peut avoir des incidences anticoncurrentielles en empêchant l'entrée sur le marché de programmes rivaux de même nature et en excluant la concurrence sur les marchés de la collecte et de la valorisation, tandis qu'une réglementation mal conçue peut décourager la concurrence des tiers offrant des services intégrés de collecte et de valorisation.

¹²⁵ OCDE 2010, p. 143.

¹²⁶ Les Membres du Programme de responsabilité des producteurs ont intérêt à réduire les coûts du système. Cela peut paraître évident, mais il est surprenant de voir à quel point les consommateurs opposent une résistance à ce que des coûts soient répercutés à leur niveau. Procter & Gamble a effectué des recherches sur les attitudes des consommateurs par rapport à l'arbitrage qu'ils peuvent être appelés à faire entre le développement écologique et la performance ou la valeur des produits. Environ 70 % des consommateurs ne renonceront ni aux performances, ni à la valeur d'un produit pour bénéficier d'un environnement plus écologique. Ils préféreront plutôt opérer des choix entre différents produits afin d'obtenir de meilleures conditions pour l'environnement. Environ la moitié des autres consommateurs (15 %) se disent prêts à faire des concessions, tandis que l'autre moitié (15 %) déclare ne pas fonder ses décisions d'achats sur la base de critères de viabilité écologique. Il n'y a pas de grandes différences entre consommateurs aux États-Unis, au Japon, en Europe. Procter & Gamble (non daté).

5. Conclusions

En dépit de la nature très réglementée du secteur de la gestion des déchets, la concurrence peut encore offrir des incitations à l'efficacité. Des gains d'efficacité réduisent le coût de produire quelque chose de valeur à partir de déchets, ou celui de se débarrasser de déchets sans dommages pour l'environnement.

Les frais de transport sont conséquents dans le secteur, et de ce fait les marchés géographiques peuvent être limités, voir locaux. Les règles internationales et les législations nationales peuvent également limiter la taille des marchés en décourageant et même en interdisant le commerce international d'un grand nombre de déchets. Vu à quel point ces marchés sont limités sur le plan géographique, la concurrence est particulièrement exposée aux risques de distorsion que peut provoquer une réglementation municipale. Le contrôle des flux — obstacles au transport des déchets — en est un exemple. L'accès aux installations municipales telles les stations de transfert des déchets ou les décharges, est nécessaire pour affronter la concurrence sur le marché des services de collecte des déchets municipaux solides, mais il n'y a pas accord sur le point de savoir si l'accès à l'installation d'un concurrent permettrait aux entreprises qui ne sont pas verticalement intégrées à des installations d'élimination des déchets d'offrir une concurrence efficace. Des économies de densité de population font que la collecte des DSM se prête à être un monopole naturel. Lorsque les coûts de transactions sont élevés, la prestation de services de collecte de DSM par la municipalité peut se faire à des coûts moins élevés que cela ne serait le cas s'il fallait choisir un prestataire par voie d'appel d'offres concurrentiel. Certains observateurs ont toutefois fait part de leur préoccupation que la remunicipalisation de la collecte des DSM soit due non à des considérations de coûts de transaction mais au désir d'augmenter les recettes de la municipalité.

Un second lot de questions concernant la concurrence porte sur les programmes de collecte, de tri, de réutilisation ou de recyclage des déchets qui relèvent de la responsabilité élargie du producteur. Ces programmes peuvent être organisés de telle sorte qu'ils imposent un réseau d'accords verticaux exclusifs et de monopoles. L'expérience prouve que, pour ce qui est de certains courants de déchets à tout le moins, la concurrence entre ces programmes incite à l'efficacité. Une concurrence de cette nature présuppose une séparation verticale et la non-exclusivité, de façon par exemple que les collecteurs de déchets et ceux qui en assurent le tri aient le choix des entreprises de valorisation. Pour que la concurrence entre ces programmes soit efficace, il est également important que les parties responsables puissent comparer les offres de ces programmes et changer de programmes.

Un plaidoyer en faveur de la concurrence peut jouer un rôle important dans la gestion des déchets. Cela pourrait aider à la conception de politiques qui permettraient d'atteindre les objectifs environnementaux de façon efficace, tout en contribuant à protéger la concurrence d'éventuelles retombées négatives non-désirées. À titre d'exemple de ces retombées, citons une plus grande homogénéité des coûts ou de la conception, et une plus grande probabilité de cas de collusion en raison de la fréquence des contacts et des échanges d'information. Il est souvent difficile de quantifier les effets d'efficacité dynamique de la concurrence, mais l'étonnante baisse des coûts à laquelle les programmes de responsabilité des producteurs fonctionnant en situation de concurrence ont donné lieu, et les économies de coûts que l'introduction d'appel d'offres pour la collecte et l'élimination des DSM ont permis de réaliser, constituent des arguments très puissants en faveur des effets de la concurrence. Il existe un vieux débat sur le point de savoir si la concurrence peut stimuler l'innovation et, si tel est bien le cas, à quel moment cela se produit-il, mais il semble que dans le secteur de la gestion des déchets, la concurrence puisse clairement favoriser l'innovation.

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COMPTE RENDU DE LA DISCUSSION

Par le Secrétariat

Le Président note que le secteur des déchets municipaux peut être partagé entre collecte et élimination. La collecte, à l'image de la distribution du courrier, est susceptible d'importantes économies de densité. Autrement dit, plus les clients sont proches les uns des autres, plus le coût unitaire de la fourniture du service est bas. Il en découle que, pour atteindre son efficacité maximale, la collecte doit être assurée par une seule entreprise, sauf dans le cas des clients qui produisent de grandes quantités ou des déchets qui nécessitent une prise en charge particulière. Le Président rappelle que la table ronde de 1999 avait abouti à cette conclusion, mais il observe que quelques-unes des communications soumises à la présente table ronde semblent la contredire et indiquent que même la collecte dans les maisons individuelles ou les immeubles d'habitation peut être soumise à la concurrence et voir son prix fixé par le marché. Les délégués concernés seront auditionnés dans l'après-midi. Toutefois, en général, les autorités locales doivent intervenir d'une manière ou d'une autre, soit en encadrant un monopole, soit en lançant un appel d'offres, voire en assurant elles-mêmes la prestation. Les appels d'offres donnent un résultat plus efficace lorsqu'il n'y a pas de gros investissements propres à la relation contractuelle, que les soumissionnaires extérieurs peuvent obtenir des informations convenables sur le coût de la fourniture du service et qu'aucune entreprise municipale ne concourt. Souvent, cette dernière condition n'est pas remplie et, dans beaucoup de pays, l'entreprise municipale bénéficie d'un traitement de faveur. Il arrive ainsi qu'elle participe à la conception de l'appel d'offres ou qu'elle dispose de meilleures informations que ses rivales. Cette question est examinée plus loin.

Compte tenu du coût élevé du transport des déchets, les marchés des installations d'élimination ont une étendue géographique limitée. Qui plus est, il est fréquent que des règles strictes imposent d'éliminer les déchets localement, ce qui crée un obstacle supplémentaire au développement de la concurrence dans l'élimination. L'efficacité et le bien-fondé de ces règles sont examinés dans le cadre de la table ronde.

L'action visant à faire respecter la concurrence dans ce secteur doit s'attacher à faire en sorte que les fusions et arrangements horizontaux ne limitent pas la concurrence dans le cadre des appels d'offres de services de collecte ou entre installations d'élimination disponibles. Elle doit aussi veiller à ce que les fusions et arrangements verticaux n'entravent pas la concurrence en laissant une entreprise bénéficiant d'une position dominante dans le domaine de la collecte ou dans celui de l'élimination restreindre ou empêcher la concurrence sur l'autre marché.

Un autre chapitre important des débats concerne la responsabilité des producteurs, qui est à l'origine d'un grand nombre d'affaires de concurrence depuis quelque temps. Il sera introduit par le Professeur Antonio Massarutto.

Les débats se diviseront en quatre grandes parties :

1. concurrence sur le marché des services de collecte des déchets ;
2. questions de concurrence soulevées par les appels d'offres, autrement dit concurrence pour le marché ;

3. questions de concurrence dans les services d'élimination, incinération comprise ;
4. problèmes de concurrence liés à la responsabilité des producteurs.

1. Concurrence sur le marché des services de collecte des déchets

La Suède est invitée à expliquer pourquoi les prestataires qui collectent les déchets des maisons individuelles (entreprises municipales uniquement), d'une part, et ceux des immeubles d'habitation (entreprises privées rivales, y compris de l'entreprise municipale), d'autre part, sont généralement différents, ainsi qu'à apporter des éclaircissements sur l'affaire Nârab, dans laquelle une entreprise dominante est soupçonnée d'avoir pratiqué des rabais abusifs. Le délégué explique que les communes ont l'obligation de faire en sorte que les ordures ménagères soient collectées, soit par elle-même, soit par des entreprises privées choisies sur appel d'offres. Cependant, la loi ne les contraint pas à assurer le ramassage à domicile des vieux papiers et des déchets d'emballage. Ceux-ci doivent être apportés à des points de collecte et les ménages qui souhaitent qu'ils soient collectés chez eux doivent payer ce service supplémentaire. En général, les communes collectent les ordures ménagères des maisons individuelles, et font payer le ramassage des vieux papiers et des déchets d'emballage lorsqu'elles l'assurent en plus. Les entreprises privées se chargent la plupart du temps des immeubles d'habitation, où la collecte des ordures ménagères, du papier et des emballages peut être réalisée à plus grande échelle. Elles estiment que la rémunération versée par les organismes agréés est trop faible pour couvrir le coût de la collecte à domicile des papiers et des emballages des maisons individuelles. Le prix de la collecte des papiers et emballages est négocié librement sur le marché. Dans le cas des ménages vivant dans des immeubles d'habitation, le contrat de collecte sur place est négocié par les entreprises de collecte avec le gestionnaire ou propriétaire de chaque immeuble, et non avec les ménages individuellement.

L'Irlande est priée de décrire le fonctionnement de la concurrence parallèle sur les marchés de collecte et d'élimination, et d'expliquer pourquoi il a été proposé de faire passer les services de collecte des ordures ménagères du régime de la concurrence parallèle à celui des appels d'offres. Le délégué explique que le marché irlandais de la collecte de déchets a connu une transformation rapide, les autorités locales se désengageant au profit des entreprises privées, et un mouvement d'intégration. Bien que le marché de la collecte soit « ouvert à la concurrence », n'importe quel titulaire d'une licence pouvant y avoir une activité, il n'est pas « très concurrentiel » : souvent, les zones peu peuplées ne sont desservies que par un seul prestataire ; Dublin, où la population est dense, est desservi par trois ou quatre. L'autorité de la concurrence et d'autres organismes gouvernementaux collaborent actuellement en vue d'établir un moyen de collecter des informations de meilleure qualité sur le marché. S'agissant de l'élimination, l'Irlande est très tributaire des décharges. Ces dernières sont peu à peu fermées et les pouvoirs publics taxent la mise en décharge dans l'optique de décourager le choix de cette méthode en première intention. L'autorité de la concurrence n'a pas étudié la concurrence sur le marché de l'élimination, mais elle n'a pas reçu de plaintes non plus. D'après les pouvoirs publics, le régime réglementaire actuel soulève plusieurs problèmes. Notamment, le degré de participation des ménages est faible, le tri est insuffisant et la qualité du service aux clients est variable. De nouvelles règles ont donc été édictées. En Irlande, les communes sont libres de choisir entre la concurrence sur le marché, les appels d'offres et l'autonomie, et elles peuvent fixer le montant de la redevance d'utilisation des décharges. A l'issue de l'enquête menée en 2005 pour répondre à des accusations de surfacturation visant l'entreprise dominante, Greenstar, dans le comté de Wicklow, l'autorité de la concurrence a estimé que la concurrence parallèle n'était pas performante. Elle a proposé de passer à un système d'appels d'offres. Cependant, peu après, le marché s'est transformé en profondeur, et de nombreuses entreprises privées y sont arrivées. La position de l'autorité a donc légèrement changé. Elle prend en considération le coût élevé de l'abandon du régime actuel de concurrence parallèle au profit d'un régime d'appels d'offres, de nombreuses entreprises privées étant susceptibles d'intenter des actions en justice. En 2010, le nouveau gouvernement s'est engagé à remplacer la concurrence parallèle par les appels d'offres pour la collecte locale des ordures ménagères et un document de réflexion a été publié en 2011.

Actuellement, il est prévu de ne pas supprimer la concurrence parallèle et de renforcer le régime réglementaire.

En résumé de la première partie des interventions, le Président note que la collecte des ordures ménagères donne lieu à une concurrence parallèle dans certaines zones. Il relève que, en volume, la production de déchets des immeubles d'habitation en Suède est similaire à celle des petites entreprises, et que la concurrence parallèle leur apporte des services de qualité et efficaces. La situation en Irlande est plus difficile à évaluer.

2. Concurrence pour le marché des services de collecte

En ce qui concerne la collecte des ordures ménagères, dans la plupart des pays, la fourniture des services est adjugée sur appels d'offres ou assurée directement par les communes. Le Président note que, lorsque les marchés de collecte des déchets solides sont attribués sur appels d'offres, les entreprises municipales rivalisent très fréquemment avec les entreprises privées, et que la question de la neutralité concurrentielle se pose souvent.

La Norvège est interrogée sur un dossier traité par l'Autorité de surveillance de l'AELE, dont il ressort que le code des impôts viole les principes de la neutralité concurrentielle. Dans sa réponse, le délégué indique que la collecte et l'élimination des déchets ménagers relèvent juridiquement de la responsabilité des communes. Celles-ci remplissent leur obligation de différentes manières : service communal, entreprise communale ou entreprise intercommunale. En outre, des entreprises privées desservent les industriels et rivalisent pour remporter quelques appels d'offres concernant les ordures ménagères. En général, les entreprises municipales sont exonérées de l'impôt sur le revenu. Les sociétés anonymes à capitaux communaux et les entreprises intercommunales en sont elles aussi exonérées lorsqu'elles remplissent les obligations légales des communes. Le 27 février 2013, dans une décision sur les aides d'État, l'AELE a estimé que des problèmes de subventions croisées et de non-neutralité concurrentielle pouvaient se poser. Cette décision stipulait que les entreprises communales de collecte des déchets devaient être tenues d'établir des comptes séparés pour leur monopole, d'une part, et pour leurs activités concurrentielles, d'autre part ; que des mesures devaient être prises pour que leurs coûts soient correctement imputés à l'unité qui exécute la prestation et pour qu'elles ne puissent pas fixer elles-mêmes leurs propres redevances ; et que l'exonération de l'impôt sur le revenu devait être supprimée dans le cas des entreprises ayant des activités sur le marché concurrentiel. Le gouvernement a préparé des modifications du cadre légal, aux termes desquelles l'exonération devrait être levée dans le cas des services de gestion des déchets assurés sur les marchés concurrentiels, mais maintenue dans celui des activités répondant aux obligations des communes en matière de collecte et de traitement des déchets.

Le Canada est invité à expliquer comment il a obtenu une réduction aussi importante de l'élimination et du recyclage de déchets par habitant entre 2008 et 2010, et comment se déroulent les appels d'offres relatifs à la collecte de déchets. Le délégué indique que, même si aucune analyse n'atteste l'existence d'un lien entre la réduction de la production de déchets au cours de cette période et la crise économique, les statistiques (y compris par fractions et sources) concordent avec cette hypothèse. Néanmoins, les chiffres nationaux masquent de grandes variations entre provinces. Il n'y a pas de concurrence directe entre les communes et les entreprises privées : les premières peuvent soit assurer le service, soit le confier à des entreprises privées, mais pas les deux à la fois. Les municipalités peuvent modifier comme elles l'entendent les conditions d'appel d'offres (dans le respect des règles provinciales sur les marchés publics) de manière à changer les conditions de concurrence. Ces modifications peuvent consister à diviser ou unifier géographiquement le territoire de collecte couvert par le marché, à repousser la date limite de démarrage du contrat pour permettre aux entreprises de développer leurs capacités, et à séparer verticalement la collecte et l'élimination pour permettre aux entreprises non intégrées de soumissionner.

L'Ukraine est invitée à indiquer si son régime d'appels d'offres est efficace, dans la mesure où les prestataires privés doivent disposer de leurs propres véhicules équipés avant même de soumissionner, autrement dit assumer des coûts irrécupérables alors qu'ils ne sont pas certains d'obtenir le marché. Elle est également interrogée sur la neutralité concurrentielle entre entreprises communales et entreprises privées. Le délégué explique que les candidats peuvent louer les véhicules au lieu de les posséder en propre, ce qui réduit les coûts irrécupérables. En outre, une même entreprise peut soumettre des offres dans plusieurs régions différentes. La neutralité concurrentielle est jugée très importante : l'amélioration de la transparence des procédures d'appel d'offres, prévue par un projet de loi, ainsi que le renforcement de la responsabilité personnelle des membres des commissions d'appels d'offres, ont vocation à conforter la neutralité concurrentielle.

La Lettonie répond à une question sur l'adjudication des services de collecte en indiquant que les communes sont responsables de la collecte des ordures ménagères sur leur territoire. Celles qui possèdent une entreprise communale de collecte des déchets y font appel et ne lancent pas d'appel d'offres. Les autres lancent un appel d'offres pour confier le monopole de l'activité à un prestataire sur une durée de 3 à 5 ans, selon les dispositions du contrat. Une entreprise communale de collecte des déchets peut participer aux appels d'offres d'autres communes, contre des entreprises privées.

Le Pérou est invité à expliquer l'écart important entre les coûts des entreprises privées qui assurent les services de collecte et ceux des entreprises publiques. Le délégué indique que dans son pays, habituellement, la collecte est assurée soit par la commune elle-même, soit par une entreprise privée. Lima fait cependant exception, le secteur privé et la commune se répartissant la prestation dans une proportion de 75 % et 25 %, respectivement. En l'occurrence, l'entreprise privée dessert les ménages qui vivent dans la partie plate de la ville, facile d'accès, alors que la commune se charge de la périphérie, à flanc de montagne et difficile d'accès. C'est donc la géographie qui explique l'écart entre les coûts.

La République slovaque est priée d'expliquer pourquoi la durée des contrats de collecte est si variable (de 1 à 20 ans). Le Président note que la lecture des communications transmises par le pays à l'occasion de la table ronde semble indiquer qu'une durée de 3 à 5 ans paraît plus courante. La déléguée suppose que ces variations sont dues au fait que les communes sont libres de décider comment organiser, entre autres, la fourniture des services de déchets sur leur territoire, dans le respect toutefois des dispositions de la loi sur les marchés publics.

La Lituanie est invitée à décrire l'affaire dans laquelle la municipalité de Vilnius a subordonné la participation à l'appel d'offres relatif à la collecte des ordures ménagères à la possession d'une licence autorisant à traiter les déchets dangereux. Le délégué commence par indiquer que les affaires de gestion des déchets sont à l'origine d'une grande partie de la charge de travail de l'autorité de la concurrence. Dans le cas de Vilnius, l'objet du lien n'a pas été mis en évidence au cours de l'enquête et les économies de gamme n'ont pas été invoquées. Il n'a pas été fait appel de la décision du Conseil de la concurrence, ce qui est inhabituel. Dans un certain sens, Vilnius est l'un des rares exemples de concurrence sur le marché de la gestion des déchets. En effet, dans la majeure partie du pays, la fourniture de services de collecte ne fait pas l'objet d'appels d'offres. La relation entre la loi nationale sur la concurrence et l'autonomie des communes fait partie des questions fondamentales posées à la Cour constitutionnelle. Sa réponse est attendue fin 2014.

La Roumanie est invitée à décrire l'affaire dans laquelle un secteur de la ville de Bucarest a prolongé de 25 ans la concession des services de collecte des déchets. Selon le délégué, le marché de la collecte des déchets ménagers a été ouvert aux entreprises privées en 1999, la ville étant alors divisée en six secteurs dont chacun a conclu son propre contrat de cinq ans avec une de ces entreprises. En 2004, tous les contrats ont été prolongés jusqu'à 2007. En 2007, ils ont de nouveau été prorogés, mais dans un secteur, il l'a été de 25 ans. Le principal argument de la municipalité est que cette décision est dans le champ de ses prérogatives. Le dossier a été transmis à la Cour suprême.

Le Président note que dans certains pays ou collectivités, l'autorité de la concurrence est investie du pouvoir d'intervenir dans les décisions des communes dès lors que celles-ci entravent la concurrence.

La Finlande est priée de décrire la réforme des services de déchets entrée en vigueur le 1^{er} mai 2012, les tensions qu'elle a engendrées et les solutions proposées par la commission mise en place de ce fait. Le délégué indique que cette réforme de la loi sur les déchets n'a pas entraîné de changements révolutionnaires et que, d'après l'autorité de la concurrence, elle n'a pas résolu les problèmes fondamentaux de concurrence et ne visait d'ailleurs pas à les résoudre. L'autorité a relevé que l'appréciation de la valeur des déchets à long terme finirait par encourager l'innovation et une exploitation correcte des déchets. Un changement institutionnel est néanmoins nécessaire dans ce cadre, par exemple la liberté et la possibilité de choisir entre plusieurs options pour la collecte et l'exploitation. A l'inverse, la réforme a renforcé et étendu les exceptions aux règles de la concurrence. Parmi les problèmes étudiés par l'autorité de la concurrence figurent les implications du §33 de la loi finlandaise sur les déchets. Celui-ci prévoit que les municipalités doivent organiser les services de gestion des déchets (dans le cas des déchets qui remplissent les conditions de type et de fréquence) s'ils ne sont pas assurés par ailleurs. Cette disposition visait à garantir que les zones reculées seraient desservies, mais selon l'autorité finlandaise de la concurrence, il en découle que les communes recueillent des déchets dont elles ne pourraient pas disposer dans d'autres circonstances. Les communes peuvent être incitées à les détourner pour alimenter des incinérateurs municipaux sous-exploités alors qu'ils pourraient être recyclés par des entreprises privées. Ce phénomène est manifestement en contradiction avec les règles relatives à la hiérarchie des déchets, à la neutralité concurrentielle et à l'abus de position dominante.

L'Italie est interrogée sur les instruments utilisés et invitée à indiquer si l'objectif de collecte sélective, à savoir 65 % en 2012, a été atteint. Le délégué explique que des mesures sont prévues pour inciter à réduire la mise en décharge et encourager la collecte sélective. Les régions peuvent imposer aux communes des taxes environnementales sur les dépôts en décharge. Les montants minimum et maximum sont fixés dans la législation nationale. Les communes peuvent obtenir des réductions si elles atteignent certains objectifs de collecte sélective ou de production totale de déchets. Ces instruments sont mis en œuvre de manières très diverses et les différences observées aujourd'hui au niveau régional peuvent être le reflet de cette diversité. Ainsi, certaines régions ont presque atteint l'objectif de 65 %, tandis que d'autres en sont loin. Un instrument est peu utilisé, à savoir la possibilité offerte aux communes d'imposer des redevances de collecte des déchets variant en fonction de la quantité produite et non pas, comme c'est le cas actuellement, de la taille du logement ou du nombre de personnes qui y résident. En juillet, l'autorité de la concurrence a remis un rapport à la région du Latium, où le taux de collecte sélective est de 22 %. Ce document souligne que les réglementations régionales favorisent la mise en décharge et font obstacle au développement de nouveaux marchés dans le secteur des déchets.

Une discussion générale s'engage, au cours de laquelle le Professeur Massarutto relève qu'il reste de nombreuses manières d'accroître l'efficacité le long de la chaîne de valeur, par exemple en sous-traitant les diverses tâches qui sont exécutées « derrière » le contrat de services de collecte. Le Président convient qu'une stratégie d'externalisation peut à la fois apporter de la souplesse, par exemple pour répondre aux pointes estivales, et améliorer l'exploitation des économies d'échelle entre plusieurs communes, et peut accroître l'efficacité. Le délégué des Pays-Bas indique que, au tout début de l'externalisation de la gestion des déchets dans son pays, les entreprises privées étaient beaucoup plus efficaces que les entreprises publiques. Par la suite, le rythme des entrées a ralenti et les entreprises en place ont eu tendance à fusionner pour gagner en efficacité. Il peut y avoir une tension entre nombre de concurrents et échelle optimale. L'écart d'efficacité entre entreprises publiques et entreprises privées a diminué. Cela est peut-être dû au fait que les pouvoirs publics ont soumis leurs activités aux règles de la concurrence et modifié les objectifs des entreprises publiques. Il demeure important d'essayer de continuer à privatiser ce marché.

3. **Marché des services de mise en décharge et d'incinération**

Le Président indique que les décharges et les incinérateurs ont des coûts localement, et que les incinérateurs produisent en outre des résidus dangereux. Les externalités négatives majorent le coût total ou « social » de l'élimination. Si les producteurs de déchets n'assument pas ces derniers, en particulier le coût marginal de la production de déchets supplémentaires, ils sont incités à produire trop de déchets. Ce problème de tarification des services de déchets n'a pas encore été résolu, mais il pourrait l'être dans le futur, par exemple en imposant aux communes des grilles tarifaires différentes pour l'élimination, comme l'évoque la contribution italienne. Il existe aussi des problèmes de localisation, lorsque le refus des riverains de voir s'implanter une décharge, par exemple, prend des proportions importantes. Compte tenu de la variabilité de la densité de population et des caractéristiques géographiques, l'obligation d'éliminer les déchets à proximité de leur lieu de production peut entraîner des coûts sociaux très différents. La suppression des règles restreignant le choix des sites où il est possible d'éliminer les déchets peut engendrer des problèmes de concurrence et des problèmes plus généraux. A la table ronde de 1999, il a été conclu qu'il pouvait y avoir de la concurrence dans le secteur des décharges. Le Président compare la situation italienne, où il est très difficile de trouver ne serait-ce qu'une décharge à proximité de Rome, et la situation estonienne, où il existe plusieurs décharges aux alentours de la capitale.

En Estonie, l'autorité de la concurrence a recommandé en 2010 à la municipalité de Tallinn de ne pas confier tous les déchets municipaux à une seule et même installation de traitement. Elle voulait principalement éviter que cela n'empêche la concurrence entre les nouveaux équipements tels que les incinérateurs et les installations de valorisation énergétiques. Par conséquent, il existe désormais des incinérateurs et au moins deux autres installations qui rivalisent sur le marché du traitement des déchets. Les décharges ne concurrencent probablement pas les incinérateurs dans la mesure où la taxe environnementale à laquelle elles sont assujetties majore leurs prix. Les nouvelles installations de traitement sont implantées près de Tallinn parce que c'est là que les déchets sont produits et qu'il existe une demande de chauffage urbain et d'électricité.

Au Taipei chinois, 95 % des déchets municipaux qui ne sont pas recyclés sont incinérés et seuls 5 % sont mis en décharge. En une quinzaine d'années, la production de déchets par habitant est passée de 1.1 kg à 0.4 kg environ. Le pays compte 24 incinérateurs. Les incinérateurs publics se chargent des déchets collectés par les équipes locales de nettoyage et la gestion des déchets est financée par des droits prélevés par les autorités locales. Ce sont donc ces dernières qui fixent le prix, en fonction des coûts. Les incinérateurs privés peuvent recevoir des déchets industriels collectés par des entreprises privées. Lorsque leurs tarifs ne sont pas identiques à ceux que pratiquent les autorités locales, ils sont dictés par la concurrence. L'effondrement de la production de déchets par habitant entre 1997 et 2012 est principalement dû à une politique résolue de minimisation des déchets et de valorisation des ressources : un programme de recyclage obligatoire est en vigueur depuis 1998 et les ménages sont tenus de trier leurs déchets depuis 2005. Aucune étude n'a été faite pour déterminer si les prix jouaient un rôle important dans la forte diminution de la quantité de déchets produits.

En Pologne, le législateur a créé le concept de « région » de gestion des déchets. Une région doit compter plus de 150 000 habitants et plus d'une commune ; les communes dont la population dépasse un demi-million d'habitants peuvent former une région à elles seules. Chaque région doit disposer d'un moins une installation régionale et d'une installation de secours. Il peut s'agir d'une décharge, d'un incinérateur ou d'un autre type d'installation d'élimination remplissant certains critères définis par la loi. Une commune peut spécifier l'installation à utiliser et il s'agit en général d'une installation qu'elle possède ou contrôle. Les régions ont été créées pour faire respecter la « règle de la proximité », aux termes de laquelle les déchets ne doivent pas être transportés à travers le pays. Les installations ne peuvent donc pas se concurrencer d'une région à l'autre. Cette situation engendre des problèmes pratiques, par exemple lorsqu'une installation extérieure à la région où les déchets sont produits est plus proche que les

installations de la région elle-même, ou lorsque le volume de déchets produits dans une région est inférieur aux capacités de l'installation. En Pologne, dernièrement, la concurrence « sur » le marché de la collecte des déchets a cédé la place à la concurrence « pour » le marché. Les municipalités choisissent l'entreprise de collecte sur appel d'offres. Sur la période 2000-2010, environ les deux tiers des décisions de l'autorité de la concurrence ont concerné des pratiques monopolistiques des communes sur le marché des services municipaux, y compris la gestion des déchets. Par exemple, les communes abusent de leur position dominante en créant des conditions qui favorisent leurs entreprises. Le rapport de l'autorité de la concurrence sur la concurrence dans la collecte et l'élimination des déchets municipaux contient un certain nombre d'exemples.

Dans la Fédération de Russie, les marchés de la collecte sont séparés des marchés des décharges et des incinérateurs dans la pratique de l'autorité de la concurrence. S'agissant de l'élimination des déchets, les appels d'offres organisés par les autorités locales sont soumis au droit de la concurrence, qui interdit les soumissions concertées, ainsi que les comportements anticoncurrentiels des autorités publiques (traitement préférentiel, par exemple). Les incinérateurs et décharges privés ne sont pas interdits par la loi en Russie. Les uns et les autres sont considérés comme relevant du service public, et les prix pratiqués sont à ce titre réglementés, soit par le Service fédéral des tarifs, soit par un organisme local équivalent. Les entreprises de service public sont automatiquement considérées comme des entreprises dominantes aux termes de l'article 5 de la loi sur la concurrence. En conséquence, des prix excessifs peuvent être perçus comme un abus de position dominante. La Cour suprême d'arbitrage a rendu une décision concernant la concurrence sur les marchés en question.

Au Royaume-Uni, la commission de la concurrence a examiné un certain nombre d'acquisitions de Stericycle, dont celle d'Ecowaste en 2011. Stericycle et Ecowaste étaient l'une et l'autre totalement intégrées et avaient à ce titre des activités de collecte, de traitement et d'élimination de déchets dangereux. Leurs capacités étaient excédentaires et elles étaient les plus proches concurrentes l'une de l'autre, de sorte qu'une fusion devait réduire la concurrence. Des économies d'échelle étaient susceptibles de se traduire par des gains d'efficacité. La commission a conclu que les entreprises qui ne proposent « que la collecte » ne représentaient pas une concurrence suffisante face aux entreprises intégrées verticalement. De plus, les autorités sanitaires ne passent selon elle des contrats qu'avec des entreprises de collecte auxquelles elles font confiance. Les mesures correctrices ont donc consisté à demander la cession d'un incinérateur et le désengagement de quatre gros contrats de fourniture de services aux autorités sanitaires. Le désengagement de l'une des deux activités seulement (soit l'incinération, soit la collecte) n'a pas été jugée suffisante pour résoudre le problème.

En République tchèque, la mise en décharge est six fois moins chère que l'incinération. Des subventions sont donc indispensables pour que des incinérateurs soient construits. Pour que la production d'électricité et de chaleur d'un incinérateur soit rentable, il faut autant de combustible que possible. Dans la mesure où les communes possèdent en général leur propre incinérateur et, en même temps, sont responsables de la gestion des déchets, elles font livrer les déchets collectés aux incinérateurs et n'en destinent qu'une petite quantité au recyclage. Cette situation est due au fait que les droits et les prix sont mal ajustés dans le domaine de la gestion des déchets.

Aux États-Unis, l'élimination est essentielle aux services de collecte. Il est vital, pour une entreprise de collecte, d'avoir accès d'une manière ou d'une autre à l'élimination. Les entreprises qui pratiquent uniquement la collecte et qui sont en concurrence avec des entreprises intégrées (collecte plus élimination) sont confrontées à des stratégies qui visent à faire monter les coûts des concurrents, comme le refus d'accès aux installations d'élimination, la fourniture de services de qualité inférieure ou la majoration des prix. Par conséquent, lorsqu'un marché de collecte est en jeu, les mesures correctrices applicables aux fusions visent à faire en sorte que des services d'élimination soient à la disposition des entreprises déjà présentes ou de celles qui arrivent. Elles consistent à démanteler des actifs utilisés dans l'élimination ou,

dans certains cas, sont de nature comportementales et prennent alors la forme, par exemple, de contrats d'élimination. En tout état de cause, tout est fait pour que des services d'élimination soient disponibles.

4. Responsabilité des producteurs et concurrence

Le Président note que, s'agissant de certaines catégories de déchets, dont les déchets d'emballage, beaucoup de pays ou collectivités adoptent des dispositions visant la collecte et la valorisation collectives. L'objectif est de faire porter la responsabilité de la collecte et de la valorisation non plus aux services de gestion des déchets des communes, mais aux fabricants et aux détaillants.

Le Professeur Antonio Massarutto décrit brièvement les principaux problèmes liés au développement de la responsabilité élargie des producteurs (REP). La REP peut entraîner des distorsions de la concurrence dues à l'existence de monopoles ou d'objectifs obligatoires, à l'apparition d'obstacles non tarifaires aux échanges et à des doublons inefficients en cas de systèmes duals. D'après les données, elle n'est pas à l'origine d'une forte innovation « verte ». Le recyclage peut être accru au moyen d'instruments qui provoquent moins de distorsions. Toutefois, des données montrent que la REP permet d'atteindre des objectifs ambitieux de recyclage. L'essentiel est que, même si elle n'est pas l'outil le plus performant pour atteindre les objectifs de recyclage lorsque les marchés sont efficaces, elle doit être évaluée en tenant compte des distorsions du marché existantes. Il existe en effet beaucoup de raisons de penser que les marchés de la gestion des déchets présentent des défaillances.

Le Professeur Massarutto passe en revue les réflexions concernant les défaillances du marché et analyse les études empiriques existantes sur la REP. Des coûts de transaction et des coûts irrécupérables peuvent survenir le long de la chaîne de valeur du recyclage dès lors que la qualité des produits recyclables donne lieu à des problèmes d'antisélection. Premièrement, la REP peut réduire en partie ces coûts de transaction, et permettre d'exploiter des économies d'échelle et de gamme. Deuxièmement, elle peut limiter la volatilité des prix, ce qui se traduit par un accroissement des investissements dans la collecte sélective axée sur le recyclage. Troisièmement, les systèmes de REP peuvent être conçus de manière à créer l'équilibre voulu entre le pouvoir de marché des collecteurs appartenant à ces systèmes, d'une part, et celui des opérateurs communaux, d'autre part. Quatrièmement, le prix payé aux opérateurs communaux en contrepartie de la collecte des matériaux repris n'est pas un bon indicateur pour comparer l'efficacité des systèmes de différents pays, car il peut refléter soit le coût total soit une fraction de celui-ci lorsqu'il est partagé entre la commune et la filière REP. Cinquièmement, il revient moins cher de recourir à l'incinération, qui peut être considérée comme un « procédé industriel » à même de prendre en charge des déchets variés, qu'au recyclage, qui nécessite en général une solution spécifique à chaque type de déchets, ce qui majore les coûts moyens. Sixièmement, l'obligation de recycler une proportion donnée des déchets peut être assimilée à une obligation de service public, cette obligation étant remplie de manière efficace par l'entité qui affiche les coûts les plus bas. Enfin, la REP est un instrument performant pour rétablir le contrôle des pouvoirs publics sur la destination des flux de déchets qui, sinon, risqueraient par exemple d'être jetés ou exportés illégalement. Si les systèmes sont correctement conçus, le risque que la REP ne fausse le marché peut être limité. Ainsi, des monopoles ont certes été créés dans un premier temps pour mettre la REP en œuvre, mais dans certains pays ou collectivités, ils ne sont plus guère utilisés qu'en dernier recours. Il a aussi été dit que la concurrence pouvait empêcher d'exploiter les économies d'échelle.

Le Professeur Massarutto présente les enseignements suivants. Un obstacle à la concurrence ou un monopole légal peuvent être nécessaires pour atteindre avec efficacité un objectif d'intérêt général. Le dosage optimal entre monopole et concurrence varie en fonction du moment, de l'histoire et de l'évolution des conditions sur le marché local. Il importe d'éviter de verrouiller l'organisation des systèmes de REP ou de la rendre irréversible.

En Allemagne, un décret sur les emballages stipule que les producteurs et les distributeurs doivent organiser la reprise auprès des particuliers de tous les emballages utilisés dans la vente directe aux consommateurs, ainsi que leur valorisation. Les emballages concernés sont définis par leur utilisation et sont principalement constitués de plastique, de verre et de papier. Les producteurs peuvent remplir leur obligation en passant contrat avec des entreprises agréées exploitant des systèmes de reprise et de valorisation des déchets d'emballage. Actuellement, il existe dix systèmes de ce type. Les trois activités principales (collecte, tri et recyclage) sont réalisées par des entreprises locales d'élimination des déchets sous contrat avec une entreprise agréée de gestion des déchets. En général, la collecte est organisée conjointement (actuellement par les dix systèmes) et les deux autres activités (tri et recyclage) sont organisées individuellement. Initialement, la seule entreprise de gestion des déchets qui proposait un système de reprise et de valorisation était DSD. Par la suite, les trois activités ont été séparées verticalement et ouvertes à la concurrence. La Bundeskartellamt a consacré une enquête au secteur en 2012. Il en est ressorti, entre autres, que les coûts avaient été divisés par plus de deux entre 2003 (avant que le premier concurrent de DSD ne commence ses activités) et 2011, et que la concurrence n'avait pas entraîné de recul du taux de recyclage, mais plutôt une augmentation. Ces résultats nous semblent confirmer que la concurrence ne fait pas obstacle à la définition d'objectifs ambitieux de recyclage dans la législation environnementale. S'agissant de la question du Président sur les économies de gamme dans la collecte de différents types de déchets ménagers, on peut dire que, sur le plan opérationnel, les entreprises locales d'élimination des déchets proposent en général la collecte des déchets d'emballage et d'autres types de déchets ménagers. Toutefois, en ce qui concerne ces derniers, la législation allemande accorde aux communes certains droits qui limitent le champ des activités des entreprises privées d'élimination des déchets. Un projet de loi propose néanmoins d'autoriser la collecte simultanée des déchets d'emballage et d'autres déchets ménagers composés de plastique et de métal. Il n'est pas justifié au premier chef par référence aux économies de gamme, mais à l'augmentation des quantités de déchets destinés à un recyclage de qualité supérieure.

Le dossier de l'Union européenne concerne l'utilisation des conteneurs par ARA, seul système agréé de reprise et valorisation d'emballages ménagers en Autriche. Il porte en partie sur la question de savoir si ARA a empêché des concurrents d'accéder à l'infrastructure de collecte mise à la disposition des ménages. Une loi autrichienne de septembre 2013 contraint l'entreprise à laisser ses concurrents utiliser son infrastructure s'ils le souhaitent, dès lors qu'il n'y a pas de raison objective empêchant de la partager. Cela implique qu'il n'y aura qu'une seule infrastructure de collecte.

Au Japon, la Fair Trade Commission (JFTC) a commenté la proposition d'un comité de détaillants, d'autorités locales et de résidents, qui vise à créer un droit sur les sacs plastiques des supermarchés pour en réduire l'usage. Étant donné que les autres systèmes ayant pour but de modifier l'usage que font les consommateurs des sacs plastiques sont inefficaces, il a été décidé de fixer ce droit à un niveau suffisamment élevé pour qu'il ait un effet dissuasif. En l'occurrence, le prix a été établi à 5 JPY par sac. Cependant, la JFTC n'a pas fait en sorte que ce prix soit lié directement au coût de production des sacs. Elle a estimé qu'il favoriserait une diminution de la quantité de sacs utilisés, compte tenu de l'équilibre entre l'effet dissuasif pour les consommateurs et le tarif acceptable pour ceux qui souhaitent en utiliser. La JFTC ne sait pas si les autorités locales ou centrales ont l'intention de taxer l'utilisation des sacs plastiques. Quoi qu'il en soit, faire payer ces sacs est un moyen efficace pour en réduire l'usage. À l'inverse, une taxe ferait augmenter les coûts administratifs et les coûts des détaillants, et l'on peut donc supposer qu'elle ne serait guère performante.

En France, les éco-organismes créés pour mettre en œuvre la responsabilité élargie des producteurs (REP) sont considérés comme jouant deux rôles, à savoir celui de concurrents et celui de régulateurs, et sont donc à même d'exercer un contrôle réglementaire sur leurs rivaux, ce qui leur confère un avantage concurrentiel. Bien qu'ils aient une mission d'intérêt général, sans but lucratif, ils obéissent aux mécanismes du marché et sont tenus de respecter les règles de la concurrence. L'Autorité de la concurrence a recommandé que tous les éco-organismes soient soumis au principe de l'agrément et du contrôle de

l'État, entre autres pour corriger les effets anticoncurrentiels de leur action. Elle a aussi mis en évidence les problèmes qui se profilaient. Par exemple, si le rôle des éco-organismes devenait plus celui d'opérateurs que de financeurs, leur mission statutaire leur permettrait d'exercer un droit de regard et un contrôle sur les autres opérateurs. Cependant, l'accès au savoir-faire et aux activités de leurs concurrents pourrait être utilisé de telle sorte que la concurrence s'en trouverait faussée. Dans ces circonstances, l'autorité a spécifié qu'une séparation structurelle devrait être opérée entre les activités de contrôle et les activités économiques.

En Turquie, l'autorité de la concurrence est intervenue au sujet de la tarification des services et des contrats d'exclusivité de Lasder, système agréé de reprise et de valorisation des pneumatiques usagés. Lasder a conclu des contrats d'exclusivité avec des entreprises de collecte. L'autorité de la concurrence craignait que ces contrats n'empêchent de nouvelles entreprises de collecte de s'implanter sur le marché. Cependant, ils semblaient nécessaires pour que le dispositif tire parti des économies d'échelle possibles. Lasder a mis en place une procédure d'appels d'offres pour sélectionner les entreprises de collecte, les contrats d'exclusivité ayant une durée de cinq ans. Cette durée a été fixée de manière à permettre aux entreprises en question de récupérer leurs coûts de démarrage. Les entreprises de collecte pouvaient recueillir des pneumatiques pour le compte de producteurs non adhérents de Lasder. L'autorité a accordé une exemption de cinq ans à ce dernier.

Pour le représentant du BIAC, les entreprises ont besoin d'être orientées, car elles souhaitent ardemment respecter les règles de protection de l'environnement sans pour autant contrevenir au droit de la concurrence. Il établit une distinction entre la gestion des déchets en général et les possibilités croissantes de recyclage, par exemple dans le cadre de la REP. La collecte et l'élimination des déchets en général devraient bénéficier de l'application du droit de la concurrence, notamment pour que les règles du jeu soient équitables. S'agissant du recyclage, une application trop rigoureuse du droit de la concurrence pourrait nuire à l'efficacité de la coopération entre entreprises, pourtant indispensable aux dispositifs.

Il pose en outre plusieurs questions pratiques : un régime particulier peut-il être imposé ou plusieurs possibilités doivent-elles être proposées ? Une tierce partie peut-elle recevoir l'exclusivité de la collecte et du recyclage des matières ? Comment faire payer les services et gérer les informations nécessaires au calcul du prix ? Comment communiquer sur les frais et les répercuter sur les clients ? Pour conclure, il indique que des orientations sur ces aspects seraient bienvenues et utiles, d'autant que toutes les autorités de la concurrence ne partagent pas la même position sur certains d'entre eux.

Le Président réitère la suggestion que le BIAC a adressé aux autorités de la concurrence, à savoir préciser leur position sur certaines questions concernant la responsabilité élargie des producteurs, et il encourage les parties concernées à poursuivre leurs discussions bilatérales.

Dans son résumé des débats, le Président relève que peu de progrès techniques ont été faits dans le secteur depuis la table ronde de 1999. Dans la plupart des pays et des collectivités, la collecte des déchets des ménages reste un monopole naturel. L'attribution du marché donne généralement lieu à un appel d'offres. La procédure permet parfois alors aux autorités locales, lorsqu'elles possèdent l'entreprise communale de collecte, d'exploiter leur pouvoir en faveur de cette entreprise. Dans certains pays et collectivités, l'autorité de la concurrence s'efforce de dénouer ce type de conflit d'intérêt.

Le Président rappelle aussi qu'en 1999, le groupe de travail avait conclu que la fourniture de services d'élimination pouvait être soumise à la concurrence ; aujourd'hui, des entreprises intégrées de collecte et d'élimination peuvent rivaliser, au moins dans certaines parties du secteur des déchets. Enfin, il souligne que les résultats signalés par le Professeur Massarutto étaient inimaginables 10 à 15 ans plus tôt, c'est-à-dire à l'époque de la mise en œuvre de la REP. Les contributions à la table ronde montrent que, de manière générale, les autorités de la concurrence encouragent la REP et n'interviennent que pour supprimer des restrictions anticoncurrentielles qui paraissent injustifiées.

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