



POLICY ROUNDTABLES

Competition in Local Services: Solid Waste Management

1999

Introduction

The OECD Competition Committee debated competition in local services – Solid Waste Management -- in October 1999. This document includes an executive summary and the documents from the meeting, including an analytical note by Mr. Darryl Biggar for the OECD, written submissions from France, Hungary, Italy, Japan, Norway, the Slovak Republic, Spain, the United Kingdom, the United States, as well as an aide-memoire of the discussion.

Overview

Many natural monopolies are the responsibility of local or municipal governments. Do they have incentives to ensure competition and efficiency in the provision of services under their authority? The answer may depend on central-local government relations and factors such as the size of transfers of funds from central to local government.

In most cities, one such natural monopoly is the collection of solid waste from households and small businesses. Because the level of sunk investment in providing these services is limited, they can be purchased through competition for-the-market in the form of competitive tendering. Experience in many cities shows that competitive tendering can yield greater efficiency and lower prices than either self-provision or a regulated monopoly. Competitive tendering is far from straightforward.

Attention must be paid to the promoting competition in the bidding process, to the prevention of "hold-up" problems and to maintaining incentives for investment, quality and efficient adjustment of prices over the life of the contract. Competition in the bidding process can be enhanced by careful attention to the specification of the services that are tendered and ensuring that any government-owned firms compete on a level playing field with private firms. Competition law enforcement is essential to prevent bid-rigging and market-sharing agreements.

Related Topics

Competition in Bidding Markets (2006)
Competition and Regulation in the Water Sector (2004)
Competition Policy in Subsidies and State Aid (2001)

Unclassified

DAFFE/CLP(2000)13



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

OLIS : 31-Jul-2000
Dist. : 04-Aug-2000

English text only

DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMMITTEE ON COMPETITION LAW AND POLICY

DAFFE/CLP(2000)13
Unclassified

**COMPETITION IN LOCAL SERVICES:
SOLID WASTE MANAGEMENT**

94119

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

English text only

FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Competition in Local Services (Solid Waste Management), which was held by the working party No. 2 of the Committee on Competition Law and Policy in October 1999.

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 several published in a series 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 la concurrence dans les services aux collectivités locales (gestion des déchets solides), qui s'est tenue en octobre 1999 dans le cadre de la réunion du Groupe de travail no. 2 du Comité du droit et de la politique de la concurrence.

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".

Visit our Internet Site -- Consultez notre site Internet

<http://www.oecd.org/daf/clp>

OTHER TITLES

SERIES ROUNDTABLES ON COMPETITION POLICY

1.	Competition Policy and Environment	OCDE/GD (96)22
2.	Failing Firm Defence	OCDE/GD (96)23
3.	Competition Policy and Film Distribution	OCDE/GD (96)60
4.	Competition Policy and Efficiency Claims in Horizontal Agreements	OCDE/GD (96)65
5.	The Essential Facilities Concept	OCDE/GD (96)113
6.	Competition in Telecommunications	OCDE/GD (96)114
7.	The Reform of International Satellite Organisations	OCDE/GD (96)123
8.	Abuse of Dominance and Monopolisation	OCDE/GD (96)131
9.	Application of Competition Policy to High Tech Markets	OCDE/GD (97)44
10.	General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises	OCDE/GD (97)53
11.	Competition Issues related to Sports	OCDE/GD (97)128
12.	Application of Competition Policy to the Electricity Sector	OCDE/GD (97)132
13.	Judicial Enforcement of Competition Law	OCDE/GD (97)200
14.	Resale Price Maintenance	OCDE/GD (97)229
15.	Railways: Structure, Regulation and Competition Policy	DAFFE/CLP (98)1
16.	Competition Policy and International Airport Services	DAFFE/CLP (98)3
17.	Enhancing the Role of Competition in the Regulation of Banks	DAFFE/CLP (98)16
18.	Competition Policy and Intellectual Property Rights	DAFFE/CLP (98)18
19.	Competition and Related Regulation Issues in the Insurance Industry	DAFFE/CLP (98)20
20.	Competition Policy and Procurement Markets	DAFFE/CLP (99)3

21.	Regulation and Competition Issues in Broadcasting in the light of Convergence	DAFFE/CLP (99)1
22.	Relationship between Regulators and Competition Authorities	DAFFE/CLP (99)8
23.	Buying Power of Multiproduct Retailers	DAFFE/CLP (99)21
24.	Promoting Competition in Postal Services	DAFFE/CLP (99)22
25.	Oligopoly	DAFFE/CLP (99)25
26.	Airline Mergers and Alliances	DAFFE/CLP (2000)1
27.	Competition in Professional Services	DAFFE/CLP (2000)2

TABLE OF CONTENTS

EXECUTIVE SUMMARY	7
SYNTHÈSE	11
BACKGROUND NOTE	17
NOTE DE RÉFÉRENCE	43
QUESTIONNAIRE SUBMITTED BY THE SECRETARIAT	73
QUESTIONNAIRE SOUMIS PAR LE SECRETARIAT	79
NATIONAL CONTRIBUTIONS	
France..	85
Hungary..	93
Italy..	107
Japan..	113
Norway	119
Slovak Republic	143
Spain.....	149
United Kingdom	153
United States	159
AIDEMEMOIRE OF THE DISCUSSION	173
AIDEMÉMOIRE DE LA DISCUSSION	185

EXECUTIVE SUMMARY

In the light of the written submissions, the background note and the oral discussion, the following points emerge:

- (1) *The incentives on local governments to organise their purchasing and regulation efficiently are often weak. Some OECD countries have imposed requirements on local governments which seek either to directly improve their efficiency in purchasing and regulation or which seek to improve the incentives on local governments to carry out these activities efficiently.*

Although the impact of any one local government may be small relative to the size of a domestic economy, the collective impact of all local government intervention can be sizeable. Local government revenues are typically between five and 15 percent of the GDP of OECD countries. The incentives on local government for efficiency in procurement and regulation depends on various factors including the softness of the local government budget constraint and the responsiveness of local taxes to local spending decisions. Local governments with a soft budget constraint face weak incentives for ensuring cost minimisation in the services they provide. There may be a link between a soft budget constraint and the size of transfers from the central government – the higher the transfers from the central government, the softer the incentives on the local government. Local governments can often act strategically to enhance the likelihood of additional transfers from central government (further softening their budget constraint) by cutting or threatening to cut those services, which are most politically sensitive.

Many OECD central governments impose various forms of constraints on local governments in order to improve the efficiency of the services they provide. Examples include the requirement on many local governments in the US to maintain a balanced budget or the requirement in the United Kingdom to conduct competitive tendering for the provision of local services. Italy is currently considering adopting a law, which would make competitive tendering mandatory.

- (2) *The waste services sector can be divided into two activities – waste collection and waste treatment and disposal. The opportunities for conventional in-the-market competition in waste collection depend on the economies of density. These are strongest (and the opportunities for competition lowest) in the market for regular collection of household waste. Few countries rely on in-the-market competition for the collection of household waste. Competition in the market is both possible and common for industrial and commercial waste.*

The scope for competition in the market in waste collection depends on the economies of density. As in many other network industries, the economies of density appear to be strong in the regular collection of household waste in urban areas. Few countries rely on competition in the market for the provision of waste collection services to small commercial and residential waste producers in urban areas. An important exception is Finland, where in-the-market competition for waste collection has a long tradition. However, a recent Finnish study found that collection costs were 20-25 percent higher in those regions with in-the-market competition compared to those regions with a local monopoly chosen by competitive tendering.

The primary regulatory issues in the waste sector relate to the organisation of waste collection for residential and small commercial customers. As with other non-competitive services, there are a range of policy options for providing this service, including regulation of a local monopoly, direct provision by the state, and periodic competition for-the-market in the form of competitive tendering. In addition, decisions must be made over who pays for the service (customers or the local government), how much they pay (whether a flat rate or according to the amount of waste produced) and how quality is maintained. Almost all the range of possible different approaches can be found in practice amongst the local authorities of OECD countries.

- (3) *The characteristics of waste collection are such that it can be efficiently provided through a system of competition for-the-market known as competitive tendering. Economic studies of the efficiency of different approaches find that competitive tendering results in lower costs than in-house production. However, the effectiveness of competitive tendering depends upon close attention to a number of factors including the level of competition in the bidding process, competitive neutrality between the bidders, prevention of hold-up problems and, throughout the life of the contract ensuring incentives are maintained for investment, quality and efficient adjustment of prices.*

Competition for-the-market (in the form of periodic competitive tendering for the right to provide a service) will be more efficient than either a regulated monopoly or direct state provision when the following conditions are met: when the level of sunk investment required is low, when other firms can assess how much it costs to provide the service, when the quality of the service can be easily measured and when there are a sufficient number of firms with the potential to compete in the tendering process. Residential waste collection meets all these conditions and so can be efficiently provided through competitive tendering. Almost all submissions noted that competitive tendering was common, and in most cases, the predominant form of provision of residential waste services. For example, more than two-thirds of all municipalities in Denmark, Norway and Sweden use competitive tendering to select a waste collection service provider.

A number of studies have compared the costs of private and public provision of waste collection in different OECD countries. These studies have found that private collection (with competitive tendering) results in costs 15-40 percent lower than public collection. A UK study found that the differences are primarily due to greater productivity in private operators compared to local government-owned firms (and not simply to lower wages).

The effectiveness of competitive tendering depends on the level of attention given to a number of factors, including the level of competition in the bidding process, competitive neutrality between the bidders, prevention of hold-up problems and, throughout the life of the contract: incentives for investment, quality and efficient adjustment of prices. These issues also arise in other public procurement exercises. In many countries the procedures for competitive tendering in the waste sector are governed by the general laws on public procurement (such as the EC and WTO rules on procurement).

- (4) *The level of competition in competitive tendering processes, as in other public procurement processes, can be enhanced through attention to the tendering process and the size, length and specification of the contracts being offered and by action to ensure a level playing field between potential bidders, especially between local government-owned entities and private providers.*

Various practices can facilitate the level of competition in the bidding process. Practices which were raised in the submissions include enhancing the transparency and visibility of tender procedures, actively seeking out new bidders, ensuring that the contractual terms and conditions and criteria for selecting service providers are clear, and actively punishing bid-rigging and corruption amongst local officials. In France, the bids are opened by an independent commission to

enhance transparency and eliminate the risk of collusion between bidders and local officials. As discussed in the CLP study on procurement, there may be a trade-off between transparency and collusion – publishing the bids enhances transparency but may facilitate collusion among bidders.

The geographic size of the waste collection contracts should be no larger than is necessary for economies of scale, so as not to dissuade small firms from bidding. This may involve breaking a city up into smaller regions for the purposes of waste collection contracts. Cost studies from the US suggest that economies of scale are exhausted with a geographic region which comprises 50 000 inhabitants.

In general, the tender contract should be long enough to allow the chosen service provider to earn a satisfactory return on any sunk investment. The level of sunk investment in waste collection is relatively low – the largest capital investments are in garbage trucks, for which there is typically some form of second-hand market. The level of sunk investment in waste disposal is much higher, leading to longer contracts. In some cases a municipality may wish to retain ownership of certain long-lived facilities (such as an incinerator) in order to reduce the level of investment required, reduce the length of the contract and increase the number of potential bidders. In any periodic tendering process, the incentive to invest in other assets (such as training of staff, maintaining and sustaining a reputation for good performance, investment in innovation) drops off as the end of the contract period approaches.

Potential bidders may be dissuaded from participating in the bidding process if they consider that there is a lack of competitive neutrality, e.g., if the “playing field” is tilted in favour of a service provider owned by the local authority. Concerns have been raised that local government-owned enterprises may not be subject to the same disciplines as private enterprises (such as the ability to go bankrupt) or may be able to cross-subsidise the provision of waste services from other local government revenues. One approach, used in the US is for the city itself to certify that the bid of its own provider is financially viable. As far as possible, local government-owned entities should be required to operate under the same legal structures as private sector firms, with separate accounts, separated from all aspects of contract management and liable for all relevant taxes and charges including an appropriate rate of return on capital.

- (5) *As in all competitive tenders, there is a risk that the chosen provider will seek to renegotiate the terms and conditions during the life of the contract. This threat, known as “hold up” can be reduced by requiring the successful bidder to post a bond or by the local government retaining some capability to provide the service itself. This threat can also be reduced (along with the threat of excess profits) by a mechanism for periodic adjustment of the price for waste collection services. As a private provider has strong incentives to cut quality to increase profits, the maintenance of service quality requires some sort of monitoring and incentive system.*

Since holding a subsequent tendering process takes time and is costly, a local government is exposed to the possibility of hold-up, where the chosen service provider is either unable or unwilling to fulfil the contract as agreed and seeks to renegotiate the terms and conditions. This possibility can be reduced by requiring the winning enterprise to post a bond or by retaining state ownership of a waste service provider who can step in to provide waste services in the event of the threat of hold-up.

The possibility of hold-up can also be reduced by allowing adjustments to the contractual terms and conditions in the light of developments, limiting the opportunities for either sizeable losses or excess profits on the part of the provider. The city of Phoenix, for example, links the price for waste collection services to an index of wage inflation in the region.

In the absence of incentives for the maintenance of quality, the chosen service provider will have strong incentive to increase profit by cutting quality. Maintaining incentives for quality requires some form of monitoring, either passive (waiting for customers to complain) or active (collecting information on service quality). The city of Phoenix, for example, employs inspectors who ensure that the private waste providers are meeting agreed quality standards. In addition, the city monitors the level and patterns of complaints that it receives from customers. The information collected from complaints and monitoring must translate into rewards or punishments on the service provider, such as sanctions for failure to meet established guidelines. In Phoenix, unacceptable levels of consumer satisfaction that go unremedied for two years may result in early termination of a contract on the basis of non-performance.

- (6) *Whether and how many customers pay for waste collection varies from city to city. While charging per unit of waste produced enhances demand for recycling, minimising packaging and reducing waste production, charging for waste collection may also enhance the incentives for illegal dumping of waste, raising the cost of enforcing environmental controls.*

Many municipalities do not charge households according to the volume of waste collected. Such households have weak incentives to minimise the volume of waste they produce or to demand substitutes for waste production, such as recycling. However, charging for waste creates incentives for households to substitute less desirable means of waste disposal, such as burning or illegal dumping. Some municipalities which charge for waste have found the need to strengthen enforcement of environmental controls.

- (7) *The market for waste services is relatively concentrated. Competition authorities have been active in controlling various kinds of anti-competitive behaviour including mergers, bid rigging, market division and other collusive agreements. In addition competition authorities have addressed cases involving anticompetitive restriction of access to waste disposal facilities.*

The market for waste collection services (whether for commercial or residential waste), is in most countries relatively concentrated. Many countries reported forms of horizontal anticompetitive behaviour such as bid rigging or market division agreements. Concerns have also been raised regarding the anticompetitive effects of contracts for the collection of commercial waste. In a US case, these contracts were longer than necessary and included automatic renewal clauses with high-liquidated damage provisions, raising barriers to entry.

Competition concerns were also raised regarding the market for waste disposal services. Environmental and other concerns are raising the barriers to new entry into waste disposal. Consolidation has also reduced the number of companies providing these services. Because it is costly to transport waste over large distances, there is a strong possibility that a company might enjoy a dominant position in waste disposal services in a region. Where the disposal company also provides collection services there arises a possibility of discrimination in access to the waste disposal facility. A few countries report intervening to protect competition in waste collection by ensuring non-discriminatory access to existing disposal facilities.

SYNTHESE

Les points qui se dégagent des communications écrites, de la note de référence et du débat sont les suivants :

- (1) *L'incitation des collectivités locales à organiser efficacement leurs activités d'achat et de régulation est souvent faible. Certains pays de l'OCDE ont imposé aux collectivités locales des obligations visant soit à améliorer directement l'efficacité de ces activités, soit à les inciter à plus d'efficacité.*

Si faible que soit l'influence d'une collectivité locale au regard de la dimension de l'économie nationale, l'impact global de l'ensemble des interventions des collectivités locales peut être considérable. Les recettes des collectivités locales représentent généralement, dans les pays de l'OCDE, entre cinq et 15 pour cent du PIB. L'incitation des collectivités locales à faire preuve d'efficacité en matière de passation des marchés et de régulation est liée à divers facteurs, notamment au niveau de contrainte budgétaire auquel elles sont soumises et à la capacité d'adaptation de la fiscalité locale aux décisions locales en matière de dépenses. Lorsque la contrainte budgétaire qui pèse sur la collectivité locale est peu rigoureuse, l'incitation à réduire au minimum les coûts des services offerts est faible. La contrainte budgétaire peut être atténuée par l'importance des transferts en provenance de l'administration centrale : plus ces transferts sont élevés, plus la motivation de la collectivité locale sera faible. Les collectivités locales peuvent souvent appliquer une stratégie consistant à supprimer, ou à menacer de supprimer, des services particulièrement sensibles sur le plan politique afin d'augmenter leurs chances de bénéficier de transferts additionnels de la part de l'administration centrale (ce qui atténuera encore la contrainte du budget).

Dans beaucoup de pays de l'OCDE, l'administration centrale impose aux collectivités locales des contraintes de diverses sortes afin d'améliorer l'efficacité des services qu'elles fournissent. Par exemple, aux Etats-Unis, les administrations locales sont souvent tenues de maintenir un budget équilibré, tandis qu'au Royaume-Uni elles ont l'obligation d'organiser des appels d'offres pour la fourniture des services locaux. L'Italie envisage actuellement d'adopter une loi qui rendrait obligatoire la procédure d'appels d'offres.

- (2) *Le secteur des services de déchets comporte deux volets : d'une part, la collecte des déchets et, de l'autre, leur traitement et leur élimination. En ce qui concerne la collecte, les possibilités de concurrence traditionnelle "sur le marché" dépendent des économies de densité. C'est dans le cas de la collecte régulière des déchets ménagers que ces économies sont les plus fortes (et les possibilités de concurrence les plus faibles). Peu de pays s'en remettent à la concurrence sur le marché pour la collecte des déchets ménagers. Pour les déchets industriels et commerciaux, cette concurrence interne au marché est à la fois possible et courante.*

En ce qui concerne la collecte des déchets, les possibilités de concurrence "sur le marché" dépendent des économies de densité. Comme dans beaucoup d'autres industries de réseau, c'est la collecte régulière des déchets ménagers dans les zones urbaines qui semble se prêter aux économies de densité les plus fortes. Peu de pays s'en remettent à la concurrence intérieure au

marché pour la fourniture de services de collecte aux petits producteurs de déchets, comme les ménages ou les commerçants dans les zones urbaines. Une exception importante est la Finlande, où la concurrence intra-marché a, en matière de collecte des déchets, une longue tradition. Cependant, une étude finlandaise récente a montré que dans les régions où ce type de concurrence est pratiqué, les coûts de collecte sont de 20 à 25 pour cent plus élevés que dans celles où existe un monopole local choisi par appel d'offres.

Les principaux problèmes de régulation qui se posent dans le secteur des déchets concernent l'organisation de la collecte des déchets des ménages et des petites entreprises. Comme dans le cas d'autres services non concurrentiels, les pouvoirs publics peuvent, pour assurer ce service, opter entre plusieurs solutions : monopole local soumis à réglementation, exploitation en régie directe, appel périodique à la concurrence pour l'attribution du marché. En outre, il faut décider qui – des clients ou de la collectivité locale – paiera le service, comment ils le paieront (que le montant soit fixe ou varié selon la quantité de déchets produite) et comment la qualité sera assurée. Dans la pratique, les collectivités locales des pays de l'OCDE offrent un éventail presque complet des différentes approches possibles.

- (3) *Les caractéristiques de la collecte des déchets font que celle-ci peut être assurée de façon efficace par le système de concurrence "pour le marché" que constitue l'appel d'offres. Les études économiques sur l'efficacité des différentes méthodes montrent que l'appel d'offres aboutit à des coûts plus faibles que la prestation directe. Cependant, pour que la méthode de l'appel d'offres soit efficace, il faut se montrer vigilant à l'égard d'un certain nombre de facteurs, comme le degré de concurrence caractérisant le processus de dépôt des soumissions, la neutralité concurrentielle entre soumissionnaires, la prévention des problèmes de "hold-up" et, le maintien, pendant toute la durée du contrat, des incitations nécessaires en matière d'investissements, de qualité et d'ajustement rationnel des prix.*

La concurrence "pour le marché" (sous la forme d'appels d'offres périodiques pour l'obtention du droit de fournir le service) est plus efficace qu'un monopole réglementé ou que la prestation en régie directe quand les conditions suivantes sont remplies : l'investissement irrécupérable requis est faible, d'autres entreprises sont à même d'évaluer les coûts de la fourniture du service, la qualité du service est facile à apprécier et il existe un nombre suffisant d'entreprises capables de participer à l'appel d'offres. La collecte des déchets ménagers remplit toutes ces conditions et peut donc être assurée de façon efficace par la méthode de l'appel d'offres. Il a été signalé dans presque toutes les communications que le recours à l'appel d'offres est courant et constitue dans la plupart des cas la principale méthode utilisée pour la fourniture des services relatifs aux déchets ménagers. Par exemple, plus des deux tiers des communes du Danemark, de Norvège et de Suède recourent à cette méthode pour choisir le prestataire des services d'enlèvement des ordures.

Il a été procédé dans plusieurs études concernant différents pays de l'OCDE à une comparaison entre les coûts de la collecte privée et de la collecte publique des déchets. Il en ressort que les coûts de la collecte privée (sur appel d'offres) sont inférieurs de 15 à 40 pour cent à ceux de la collecte publique. Selon une étude du Royaume-Uni, les écarts s'expliquent essentiellement par le fait que la productivité des exploitants privés est plus élevée que celle des entreprises publiques (et non pas simplement par des salaires plus bas).

L'efficacité de l'adjudication par appel d'offres dépend de l'attention portée à un certain nombre de facteurs, notamment le degré de concurrence caractérisant le processus de dépôt des soumissions, la neutralité concurrentielle entre les soumissionnaires, la prévention des problèmes de "hold-up" et, pendant toute la durée du contrat, les incitations à procéder aux investissements requis, à maintenir la qualité du service et à ajuster les prix rationnellement. Cela vaut aussi pour

la passation des marchés publics dans d'autres domaines. Dans beaucoup de pays, les procédures d'appel d'offres du secteur des déchets sont régies par les dispositions applicables à la passation des marchés publics en général (par exemple les règles de la CE et de l'OMC sur la passation des marchés).

- (4) *On peut améliorer la concurrence dans les appels d'offres, comme dans toutes les autres procédures de passation des marchés publics, en prêtant attention au processus de dépôt des soumissions, ainsi qu'à l'importance et à la durée des contrats proposés et au contenu du cahier des charges, et en veillant à ce que les candidats potentiels, notamment les entités locales publiques et les prestataires privés, se trouvent placés sur un pied d'égalité.*

Diverses pratiques sont de nature à améliorer le caractère concurrentiel de la participation aux appels d'offres. Les pratiques mentionnées dans les documents communiqués consistent notamment à accroître la transparence et la visibilité des procédures de dépôt des soumissions, à rechercher activement de nouvelles offres, à veiller à la clarté des conditions contractuelles ainsi que des conditions et critères d'attribution des contrats et à réprimer activement la concertation entre soumissionnaires et la corruption parmi les fonctionnaires locaux. En France, les plis contenant les offres sont ouverts par une commission indépendante afin de favoriser la transparence et d'éliminer le risque de collusion entre les soumissionnaires et les fonctionnaires locaux. Ainsi qu'il est exposé dans l'étude du CLP sur la passation des marchés, il peut y avoir un dilemme entre transparence et collusion : la publication des offres améliore la transparence mais risque de faciliter la collusion entre soumissionnaires.

Le territoire couvert par les contrats de collecte des déchets ne doit pas être plus étendu qu'il n'est nécessaire pour permettre des économies d'échelle, afin de ne pas dissuader les petites entreprises de soumissionner. Cela peut obliger à subdiviser une ville en plusieurs zones aux fins de la concession de la collecte des déchets. Des études de coûts effectuées aux Etats-Unis donnent à penser qu'au-delà de 50 000 habitants les possibilités d'économies d'échelle qu'offre une région géographique sont épuisées.

D'une manière générale, le contrat attribué doit être d'une durée suffisante pour assurer à l'entreprise adjudicataire une rentabilité satisfaisante de ses éventuels investissements irrécupérables. Pour la collecte des déchets, le montant des investissements à fonds perdus est relativement faible : la principale dépense d'équipement est celle des bennes à ordures, pour lesquelles il existe en général des possibilités de revente sur le marché de l'occasion. Le niveau de ces investissements est beaucoup plus élevé en ce qui concerne l'élimination des déchets, ce qui conduit à passer des contrats plus longs. Dans certains cas, une commune pourra souhaiter conserver la propriété de certains équipements durables (tels qu'une installation d'incinération) afin de réduire le niveau d'investissement requis, de réduire la durée du contrat et d'accroître le nombre des soumissionnaires potentiels. Dans tout système d'appel d'offres périodique, l'incitation à investir dans d'autres actifs (la formation du personnel, l'acquisition et le maintien d'une réputation d'efficacité ou l'innovation, par exemple) décroît à mesure que la date d'expiration du contrat approche.

Les soumissionnaires potentiels peuvent être dissuadés de participer à l'appel d'offres s'ils estiment qu'il n'y a pas neutralité concurrentielle, par exemple si les conditions fixées favorisent un fournisseur dont l'entreprise appartient à la collectivité locale. La crainte a été émise que les entreprises publiques locales ne soient pas soumises à la même discipline que les entreprises privées (soient à l'abri d'une faillite, par exemple) ou puissent faire subventionner les services de collecte ou d'élimination des déchets par d'autres postes de recettes publiques locales. Une méthode utilisée aux Etats-Unis consiste à faire certifier par la municipalité elle-même que l'offre de son propre prestataire est financièrement viable. Dans toute la mesure possible, les entités

publiques locales devraient être tenues d'opérer dans le cadre des mêmes structures juridiques que les entreprises du secteur privé, en tenant une comptabilité distincte, entièrement séparée de tout ce qui concerne la gestion du contrat, et en étant assujetties à tous les impôts et charges pertinents, y compris à l'obligation d'un taux approprié de rendement du capital.

- (5) *Comme dans toutes les adjudications sur appel d'offres, il existe un risque que le prestataire sélectionné n'essaie de renégocier les conditions et modalités du contrat pendant la durée de celui-ci. Ce risque, dit de "hold-up", peut être réduit si l'on exige de l'adjudicataire le dépôt d'un cautionnement ou si la collectivité locale se ménage la possibilité de fournir elle-même la prestation. Le risque peut aussi être réduit (de même que celui d'un surplus de bénéfices) par le moyen d'un mécanisme d'ajustement périodique du prix des services de collecte des déchets. Un prestataire privé sera fortement tenté de sacrifier la qualité au profit ; aussi un système de contrôle et d'incitation d'une sorte ou d'une autre est-il indispensable pour assurer le maintien de la qualité des services.*

Comme l'organisation d'un nouvel appel d'offres est un processus coûteux qui demande du temps, une collectivité locale est exposée au risque de "hold-up" lorsque l'adjudicataire ne peut plus, ou ne veut plus, exécuter le contrat selon les conditions et modalités convenues et cherche à renégocier celles-ci. Ce risque peut être réduit si le dépôt d'un cautionnement est exigé de l'entreprise adjudicataire ou si la collectivité locale demeure propriétaire d'une entreprise de services de déchets capable de prendre la relève en cas de menace de hold-up.

Il est aussi possible de réduire le risque de hold-up en autorisant l'ajustement des conditions et modalités contractuelles en fonction des circonstances, de manière à limiter la possibilité de pertes importantes ou de superbénéfices pour le prestataire des services. La municipalité de Phoenix, par exemple, lie le prix des services de collecte des déchets à un indice de l'inflation des salaires de la région.

En l'absence d'incitations à maintenir la qualité du service, le prestataire choisi sera fortement tenté d'accroître sa marge bénéficiaire au détriment de la qualité. Pour entretenir le souci de qualité, il est nécessaire de mettre en place une certaine forme de contrôle, soit passif (on attend que les clients se plaignent), soit actif (on recueille des informations sur la qualité du service). Ainsi, la ville de Phoenix emploie des inspecteurs qui s'assurent que les services fournis dans le secteur des déchets par des prestataires privés répondent bien aux normes de qualité convenues. En outre, la municipalité a institué un suivi de la fréquence et du type des réclamations qu'elle reçoit des clients. Les informations recueillies grâce à ces réclamations et à leur suivi doivent se traduire par des récompenses ou des sanctions à l'endroit du prestataire du service, notamment en cas de non-respect des directives établies. A Phoenix, si l'insatisfaction des consommateurs demeure pendant deux ans à un niveau inacceptable sans qu'il y soit porté remède, le contrat peut être résilié prématurément pour inexécution.

- (6) *La réponse à la question de savoir si ce sont les clients qui paient la collecte des déchets, et combien ils paient, varie selon la ville. La facturation par unité de déchets produite favorise la demande de recyclage, limite au minimum les emballages et réduit la production de déchets, mais la facturation de la collecte peut aussi être une incitation à la décharge sauvage et augmenter les coûts de protection de l'environnement.*

Dans beaucoup de communes, la facturation de la collecte des déchets ménagers ne se fait pas en fonction du volume de déchets collectés. Les ménages ne sont donc pas incités à limiter le volume des déchets qu'ils produisent ou à s'intéresser à des solutions de substitution comme le recyclage. Cependant, la facturation des services incite les ménages à rechercher des moyens peu souhaitables d'élimination des déchets, tels que le brûlage ou la décharge sauvage. Certaines

compagnies qui facturent la collecte des déchets se sont vues obligées d'appliquer plus strictement les règles de protection de l'environnement.

- (7) *Le marché des services de déchets est relativement concentré. Les autorités de la concurrence s'emploient activement à lutter contre divers comportements anticoncurrentiels, dont les fusions, le trucage des soumissions, le partage des marchés et d'autres formes de collusion. En outre, les autorités de la concurrence ont eu à connaître d'affaires de restriction anticoncurrentielle à l'accès aux décharges.*

Le marché des services de collecte des déchets (que ce soient les déchets commerciaux, ou les déchets ménagers) est dans la plupart des pays relativement concentrés. Beaucoup de pays ont signalé des pratiques anticoncurrentielles horizontales telles que le trucage des soumissions ou des accords de partage du marché. Des craintes ont également été exprimées au sujet des effets anticoncurrentiels de contrats de collecte des déchets. Dans une affaire instruite aux États-Unis, ces contrats commerciaux étaient d'une durée plus longue que nécessaire et contenaient des clauses de renouvellement automatique avec des dispositions exigeantes s'agissant des domaines qui constituaient des barrières à l'entrée de nouveaux opérateurs sur le marché.

On s'est aussi inquiété des entraves à la concurrence sur le marché des services d'évacuation des déchets. Des préoccupations environnementales et autres rendent plus difficile l'arrivée de nouveaux entrants sur ce marché. Des regroupements ont aussi réduit le nombre d'entreprises offrant ces services. Du fait du coût élevé du transport des déchets sur de longues distances, le risque de voir une société acquérir dans une région une position dominante pour les services d'évacuation des déchets est importante. Si cette société assure également des services de collecte, il peut y avoir discrimination dans l'accès à la décharge. Quelques pays signalent que les pouvoirs publics sont intervenus pour protéger la concurrence dans les services de collecte des déchets, en assurant un accès non discriminatoire aux décharges.

BACKGROUND NOTE

Introduction

In virtually all OECD countries, the business of regulating is carried out at several levels of government. Although CLP/W P2 has primarily focused on regulation implemented and enforced through national legislation and institutions, the basic machinery of government – legislation and the means for creating and enforcing it – occurs at both supra-national (such as the WTO or the EC) and sub-national (state, Länder or regional and local, town or city) levels. Each of these levels of government can create legislation, regulation and institutions, which have a profound effect on the operation of business. This note will focus on the regulatory activity of local governments. In many industries, such as the solid waste industry, the regulatory rules and institutions created at the local level have a much larger impact than national (or state) regulation.

The purpose of this paper is to introduce the study of local government regulation through a consideration of the role and special features of local government rules and institutions and through the study of a sector for which the role of local government is particularly important – the solid waste industry.

The key points of this paper are as follows:

- local government intervention has a direct impact in a number of economic activities. The range of possible local government interventions in economic activities is as large as the range of possible central government interventions. Although the impact of any one local government may be small relative to the size of the national economy, the collective impact of all local government intervention can be sizeable relative to the national economy;
- when there are several layers of government, the question arises as to the appropriate level at which to take specific regulatory interventions. This decision involves balancing of two forces – the desire for “subsidiarity” on the one hand, and the desire to avoid “spillover” effects on the other. Decisions that are appropriate for local government include those for which subsidiarity is most important and for which the spillover effects on other regions is negligible. In other decisions, the scope for local government action is limited by the legislative and regulatory decisions of higher governments;
- local governments often receive a proportion of their funding in transfers from higher levels of government. The discretion of local governments is typically constrained by legislative controls and conditions attached to such funds. These controls and conditions seek to offset the tendency for such funding to soften the budget constraint on local governments. In general, the higher the proportion of central government funding of local government, the weaker the credibility of the central government’s threat to punish overspending by withdrawing funds, so the weaker the incentives on the local government to control spending;
- local government, like central government, must make decisions regarding which services to provide itself, and which services to contract with the private sector to provide. Although many (and perhaps most) services will be most efficiently provided in the private sector,

some services, particularly those for which the quality of the service is difficult to contractually verify, will, under some limited circumstances, be more efficiently provided by the public sector. Other services are most efficiently provided by the private sector, but subject to regulation and/or regular tendering;

- the solid waste industry is composed of two major parts, relating to the collection of waste, on the one hand, and the disposal of waste on the other. Solid waste collection services are a form of transportation service, analogous to postal delivery. While the economies of density are limited for customers producing large quantities of waste, or waste requiring special handling (such as particularly timely disposal), for the majority of residential and small business customers, the economies of density are such that this service is most efficiently provided by a single firm;
- since competition "in-the-market" for solid waste collection for residential or small business customers is usually not possible, some form of local government intervention in this sector is required - either regulated monopoly or competitive tendering. Competitive tendering is more efficient when there are no substantial relationship-specific (sunk) investments and outside bidders can obtain good information about the costs of providing the service. These conditions apply in the solid waste collection industry. In many OECD countries, competitive tendering is the dominant form of regulation of solid waste services;
- solid waste is relatively expensive to transport long distances, limiting the geographic market for disposal facilities. Competition enforcement in the solid waste industry 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;
- competition may also be enhanced through attention to the tendering process itself, through decisions as to the region over which tenders will be granted, ensuring that the potential bidders are not excluded from the tender, by limiting the disclosure of information about the successful tender, ensuring that potential bidders have access to essential facilities and by ensuring competitive neutrality between public and private suppliers.

1. Local government's role in regulation

1.1 General features of local government

In OECD countries, the central government does not have a monopoly on legislation and regulation affecting business. In fact, in OECD countries government intervention in the economy regularly occurs at each of the four major layers of government - supra-national (such as the WTO or the EC), national (or "central"), regional (state, canton or länder) and local (municipal, town or city). Each of these levels of government creates legislation and institutions, which can have a profound effect on the operation of business.

The precise details regarding the structure of government in OECD countries - the number and nature of levels of government, the powers that are exercised at each level, the power to raise taxes and the financial and legal relationships between the layers of government - differ dramatically across OECD

countries.¹ Nevertheless, this paper identifies some broad common characteristics of the role of local (city, municipal or town) government in the economy.

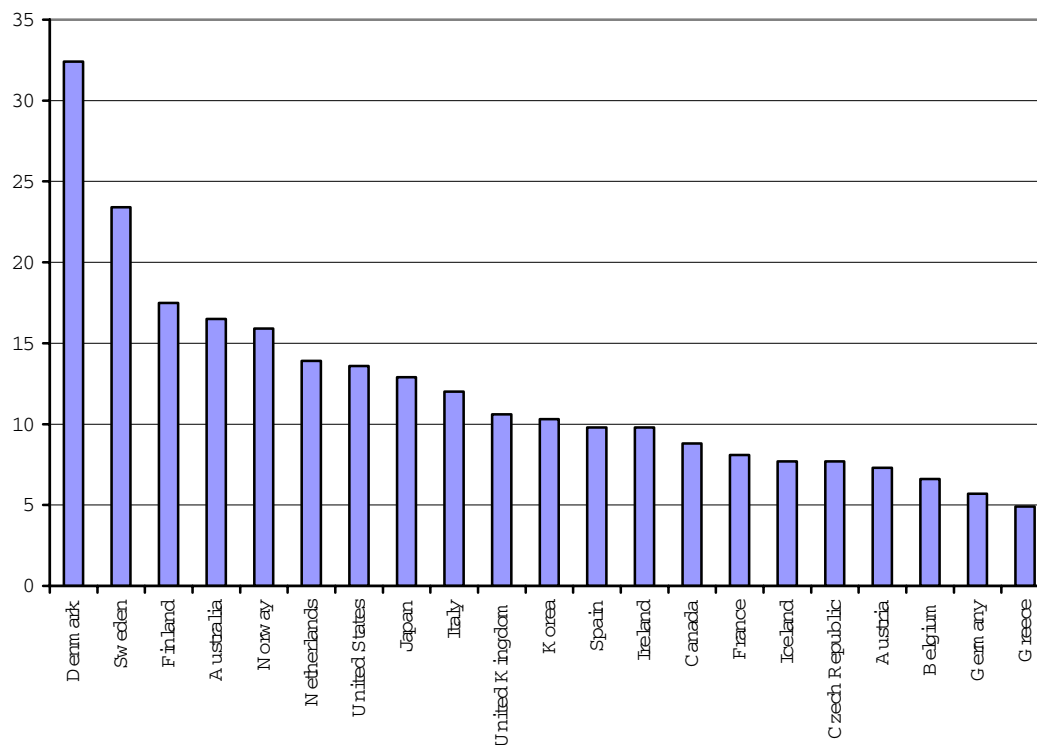
Broadly speaking, the regulatory issues faced by local government policy makers and the regulatory instruments available are the same as of central government policy makers. The range of possible local government interventions in economic activities is as wide as the range of possible central government interventions - taxes and subsidies, controls on licensing, entry and exit, controls on prices, output and quality of service, controls on forms of business organisation, controls on specific business activities, procurement, franchising and government ownership.

Although the activities of local government vary widely from country to country and from city to city, local government interventions are particularly important in the following economic activities:

- The Regulation and Provision of Local Public Goods, (i.e., services where the local government both ensures the provision and pays for the service) including local roads, police and fire services, public parks, street cleaning and lighting, flood and snow control.
- The Regulation and Provision of Local Monopoly Services, (i.e., services where the local government ensures the provision of the service by a single supplier) including solid waste collection and disposal, water and wastewater, public transport, (sometimes) local electricity, gas or cable television distribution and (rarely) local post or telecommunications distribution.
- The Regulation and Provision of Local Competitive Services, (i.e., services where the local government ensures the provision of some of the service and the service is provided by many competing firms) including (sometimes) public housing, public education, public health services, nursing homes, day care centers, recreational services, swimming pools and so on.

Although the impact of any one local government may be small relative to the size of the national economy, the collective impact of all local government intervention can be sizeable relative to the national economy. The following chart provides an indication of the relative size of the local government sector in OECD countries by presenting the magnitude of local government receipts to total GDP. This ratio is between 7.5 percent and 15 percent for most OECD countries. A clear exception is the Nordic countries for which the local government sector has revenues in the range 16-32 percent of GDP.

Figure 1: Local government receipts as a proportion of total GDP (1996)



1. Source : National Accounts. Countries omitted where information is not available.
 2. All data for 1996 except Spain, Italy, Greece, Ireland (1995) and the Czech Republic (1994)

1.2 The place of local government within the structure of government

What regulatory actions are best left to local government? More generally, what principles should guide decisions as to the level of government at which it is appropriate to carry out specific regulatory actions? Why isn't all regulation carried out by the central government? Alternatively, why isn't all regulation simply delegated to local government?

The appropriate level of government for any given government intervention depends on the balancing of two principles - the principle of "subsidiarity" on the one hand and the principle that decisions should be taken at a level of government high enough so as to prevent "spillover" or external effects on other regions.

The principle of subsidiarity may be summarised as the principle that decisions should be taken at as low a level of government as possible. This principle flows from the economic concept of the cost of collecting and transmitting information. If local populations differ in preferences, characteristics and resources and if communicating that information is costly, then decentralisation and delegation to local government is a mechanism for ensuring that local information is better used, so that local regulation better reflects local conditions and local public goods more closely match the preferences of the local population.

On the other hand, there are clear limits to decentralisation and delegation, arising from what may be called external or spillover effects between regions:

- individual regions are unlikely to take the efficient decisions when some of the costs fall on other regions, as might occur with some forms of pollution, or restrictions on trade or investments flows;
- similarly, regions are unlikely to take efficient decisions when some of the benefits fall on other regions. Exceptional investment in higher education, for example, might attract students from other regions who return immediately after graduating. Similarly, improvements in major arterial roads typically benefit producers and consumers in neighbouring regions. In most countries, local roading is the responsibility of local government, while major highways are the responsibility of central government;
- finally, economic regulation at one level of government may not be possible (or may not be efficient) for a natural monopoly firms whose minimum efficient scale is larger than the region covered by that level of government.²

The spillover problems are further heightened by the fact that at lower levels of government interest groups, by virtue of being larger relative to the size of the government are often more concentrated and more able to influence the policy-making process.

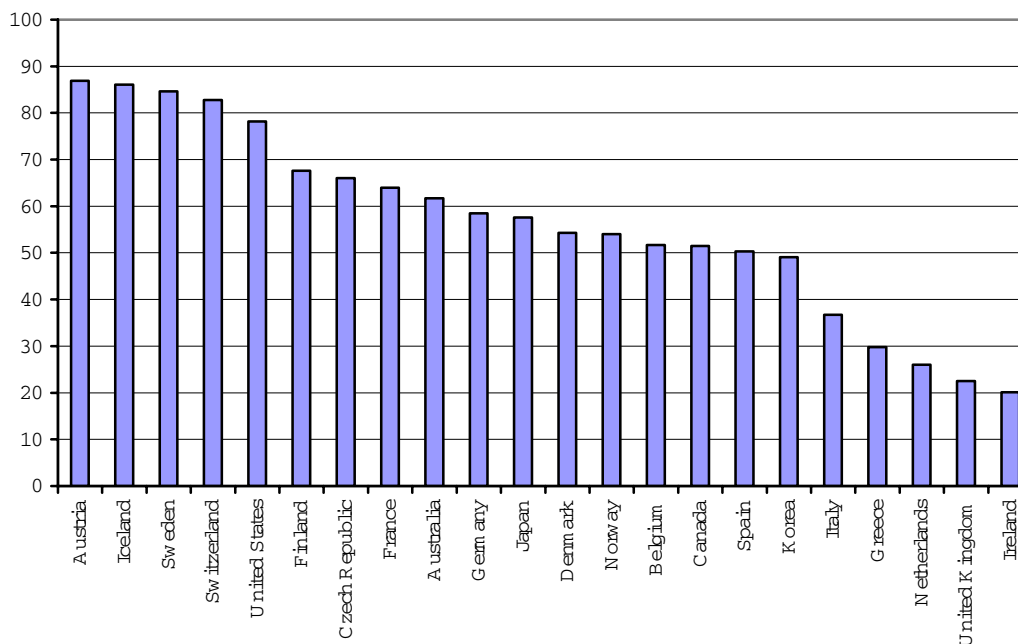
In the case of the solid waste industry, which we will consider below, the public good issues (e.g., public hygiene concerns) only arise at the local level, there are minor (if any) spillover effects with neighbouring regions and the efficient scale of solid waste collection firms is no larger than small municipalities. As a result, this industry is a candidate for regulation at the local level.

1.3 Central or state controls on local government policies

The effectiveness, efficiency and quality of local government regulation will depend upon both the ability of local government to implement high-quality regulation and their incentive to do so. The incentive on local governments to implement high-quality regulation depends in part, on budgetary factors, such as the incentive on the local government to minimise costs. A local government, which has little incentive to minimise costs, is unlikely to engage in efficient regulation of the sectors under its control. The incentives on local government to maintain effective regulation and to minimise costs depend, in turn, on the nature and the magnitude of funding received from other layers of government. In this section, therefore, we will briefly explore the nature of central government control on local government with a focus on the effect of inter-governmental transfers.

In almost all OECD countries (see Figure 2) local government receives some of its funding from higher levels of government. The extent to which local (and state) governments are financed from central government revenues varies significantly from country to country. The proportion of local government financing received from its own revenues (a measure of local government "autonomy") is set out in the following chart. The local governments in Austria, Iceland, Sweden, Switzerland and the US raise more than 75 percent of their own funds, compared with the local governments in Netherlands, Ireland and the United Kingdom, which raise less than a quarter of their own funds.

Figure 2: "Own receipts" at the local level as a percent of total local receipts (1996)



1. Source : National Accounts. Countries omitted where information is not available.
2. Total receipts minus transfers from other levels of government
3. All data for 1996 except Spain, Italy, Greece, Ireland (1995) and the Czech Republic (1994)

Central governments subsidise local government expenditure for several reasons, which will not be addressed in this paper. For example, certain forms of taxation are more efficiently administered and collected centrally. In addition, central government has a role in equalising expenditure across regions.

However, because of problems that higher levels of government face in committing to certain levels of funding, funding from higher levels of government has the effect of lessening the link between local spending and local taxes, softening the budget constraint of the local government. This, in turn, lessens the incentives on the local government to undertake measures to enhance efficiency and reduce expenditure. Central governments respond with a web of measures designed to enhance incentives for efficiency including direct legislative controls and carefully specified conditions on the use of intergovernmental transfers.

The effect of intergovernmental transfers on local government incentives is illustrated by the experience of Norway. In 1986 Norway attempted to improve the efficiency incentives on local government by replacing a web of regulations and specific (or "tied") grants to local government with a system of "block" grants. "The reform aimed to cut the link between local spending decisions and the level of intergovernmental transfers so that local authorities face the full opportunity cost of each activity".³ However, the reforms largely failed because, as explained below, the system did not eliminate the soft budget constraint of local governments. By 1996, key elements of the reform had been reversed. Although the block grant system was formally in place, new grants and regulations undermined the reform's rationale.

Carlsen concludes that the reform failed because local authorities face soft budget constraints:

"During the period covered by the study, central authorities repeatedly appropriated extra grants to the county in order to prevent cutbacks or stimulate particular activities. These interventions

encouraged the county to conduct an expansive fiscal policy. As new projects exhausted the county's financial capacity and threatened existing activities, the county targeted cutbacks at politically sensitive tasks in order to elicit additional grants. The county's policy triggered countervailing measures from the state. The government introduced new earmarked grants as well as direct spending regulations in order to force the county to reduce overall spending and adjust the budgetary mix".⁴

Importantly, a key ingredient in the failure of the Norwegian reforms was the inability of the central government to commit to no further central funding:

"Like several other public sector reforms of the seventies and the early eighties, the Norwegian block grant system was based on the assumption that the government would be willing to incur the political costs of enforcing the budget frames of the lower levels in the government hierarchy. This assumption turned out to be unrealistic. In each of the seven years covered by the study, the state provided supplementary grants as a consequence of crises. ... Because the general public believed that grants could be affected, county politicians had strong incentives to use spending decisions as strategic instruments to achieve additional grants. Otherwise they would have been considered personally responsible for the county's cutbacks".⁵

The role of credibility and commitment in softening local government budget constraints is discussed further in Box 1.

Box 1: The Problem of Commitment and the Soft Budget Constraint on Local Governments

In general, the higher the proportion of financing that local government receives from central government, the greater is both the incentive and ability of the central government to influence the regulatory decisions of the local government. However, there are some important caveats to this principle. The incentive schemes established by central government to influence local government decisions, like all incentive problems, must address the issue of credibility and commitment. Credibility issues arise in two respects - first, the schemes themselves must not call for action on the part of the central government that the central government cannot credibly commit to carry out *ex post*. Second, the central government must be able to credibly commit not to use any new information that comes available as part of the scheme.

For example, suppose an incentive scheme calls for the central government to withhold certain funds if the local government fails to comply with certain requirements. Local governments face two alternatives to central government funding - borrowing and local taxation. If the local government and the local voters believe that the central government will bail out the local government in the event of bankruptcy, there is little penalty associated with further borrowing, so little incentive to comply with the original requirement.

The central government might respond by limiting the indebtedness of the local government or imposing a mandate to prevent bailouts (as occurs in the US). A reduction in central government funding would then have to be met by a reduction in local government expenditure or an increase in local taxation. If the local authority believes that the central government cannot politically commit to a lower level of funding, the ensuing reduction in local government expenditure is likely to be targeted towards cutting those services which generate the greatest political impact for the central government - such as health, education or social services.

The central government might mandate minimum levels of such services in order to force the local government to use the alternative of raising taxes. However, for high levels of central government funding, even a small reduction in central government funds would lead to a very large increase in local taxes. For example, if the central government funds 90 percent of the revenues of the local government, a reduction of five percent, to 85 percent would lead to an increase in local taxation revenues from ten percent to 15 percent - i.e., an increase of 50 percent in local taxes. Such large changes in taxes are unlikely to be politically viable. As a result the threat to cut central government funds is not credible and the incentives to comply with the original requirement are weak.⁶

Finally, suppose that as a result of an incentive scheme, the local government succeeds in reducing its costs. If the central government cannot credibly commit to not cut the local authority's funding (now that it has lower costs), the local government will believe that its cost-cutting efforts will be "rewarded" by a lower allocation in the future – the incentive to cut costs in the first place will be diminished. This is known as the "ratchet effect" and is a problem common to all incentive contracting arrangements.

A solution to these difficulties is to enhance the proportion of local government funding that is received from local taxation (by expanding the range of local taxes or delegating authority over the level and collection of certain local taxes). This reduces the amount of funding to which the central government can attach conditions, but also enhances the credibility of the threat to withdraw funding if the local government does not carry out those conditions.

It is common for higher levels of government to seek to control the decisions of the local government, through both legislative requirements and through conditions attached to funding. Carlsen notes:

"Surveys of central-local relations show that central regulation of local spending decisions is widespread. Specific [i.e., conditioned] grants constitute a significant part of overall intergovernmental transfers in most industrialised countries. ... The centre also controls local spending decisions through a range of statutory and administrative regulations, including minimum standards and direct interventions in local policy processes".⁷

For example, some US states do not allow their counties to engage in short-term borrowing; impose debt limits; mandate a balanced budget; or do not allow a state to bailout county finances. These restraints are designed to harden the budget constraint of the local government. Not surprisingly, on the whole, "harder budget constraints on counties are associated with a higher likelihood of contracting out public services".⁸

Another form of legislative control on local authority regulation is a requirement for competitive tendering. In 1988 the UK central government placed local authorities under a duty to carry out competitive tendering for a number of activities or services, including waste collection, street cleaning, cleaning of buildings, vehicles maintenance, grounds maintenance and catering services.⁹ A bill is currently before the Italian Parliament, which would impose a similar contracting-out requirement on Italian local bodies.

2. Promoting competition in the solid waste industry

Having examined some issues relating to the role of local government in regulating local economic activity, we turn now to a specific sector in which local government plays an important role in influencing the nature of economic activity – the solid waste sector.

2.1 The nature of the solid waste industry

2.1.1 The demand for solid waste collection and disposal

Households and businesses produce solid waste as an undesired by-product of consumption and production. The demand for waste services derives from the demand by producers and consumers to have

this waste taken away and disposed of in a legal manner. There are two major components of the waste services industry – waste collection and waste disposal. Waste collection services are little more than a form of delivery or transportation service, from the customer's property to the disposal site. At the disposal site the waste may be sorted or otherwise processed before being burned in an incinerator or dumped in a landfill.

The primary substitutes for waste services are forms of self-handling, such as household burning of refuse, small-scale commercial incinerators, self-transport of waste to the disposal site and/or commercial recycling policies.

2.1.2 *The cost characteristics of solid waste collection*

Solid waste collection exhibits a similar cost structure to many other "network" or utility industries, such as postal delivery, electricity, gas or cable television distribution. The marginal cost of collecting waste from an additional house is small when the house is already passed by a waste-collection vehicle, provided the additional waste collected is within the capacity of the vehicle. In addition, there are significant economies of density, provided the collection frequency is at sufficiently spaced intervals that a waste is collected from virtually every house on each collection round.

The presence of economies of density suggests that it might not be possible to sustain conventional in-the-market competition in solid waste collection for residences and small businesses.¹⁰ This is confirmed by empirical research. A study by Stevens finds that in cities, which allow in-the-market competition in the US, costs are 26-48 percent higher than in an equivalent market with a regulated private monopoly. She notes "these findings can be attributed to billing expenses and extra costs due to non-exclusivity within a market area borne by a firm in a competitive arrangements".¹¹ The costs were also found to be higher in those Finnish cities, which have adopted in-the-market competition (see Box 2).

Economies of density do not arise in the provision of collection services to large producers of waste (producers which regularly generate full truckloads of waste), for the collection of unusual or exceptional waste where timeliness is valued, or for the collection of waste requiring special handling. These services can therefore be supplied competitively.

Between the two extreme cases – residential customers who produce small quantities of waste and industrial customers who produce large quantities of waste – there is a continuum of small and medium-sized enterprises who produce quantities of waste for which it is not possible to delay collection until a full truck load of waste has accumulated. In this market, competition is likely to be limited and imperfect.¹²

Although there are clear economies of density, the economies of scale in waste collection are small and linked to the fixed minimum efficient size of garbage trucks. Studies show that there are economies of scale in waste collection associated with the increasing utilisation of these trucks, up to a city size of around 50 000 inhabitants. For larger cities, cost increases proportionally to the number of inhabitants.¹³

There is a clear and important analogy between waste collection and postal delivery. Like postal delivery, waste collection is a form of transportation service. Like postal delivery, waste collection involves the delivery of items of different sizes and shapes, with different timeliness and handling requirements. In postal delivery, the economies of density are the strongest for the door-to-door delivery of letters at intervals sufficient to ensure that deliveries are made to the majority of houses. Similarly, economies of density in waste delivery are strongest for the door-to-door collection of waste at intervals sufficient to ensure that waste is collected from the majority of houses. Where timeliness is of particular

importance, (i.e., where the willingness to pay for timeliness exceeds the cost savings attributable to economies of density, as in the case of express mail), postal delivery can be supplied competitively. Similarly, in the case of waste that must be cleared in a short time frame or large or exceptional quantities, economies of density are unimportant. These services can also be supplied competitively.

Once waste has been collected, it is expensive to transport by modes other than bulk transport (e.g., rail or barge). Geographic markets for waste disposal is therefore often limited in scope, with limited competition between disposal facilities. The high cost of obtaining permission to open new landfills or incinerators further enhances economies of scale and raises barriers to entry in the waste disposal sector. The Canadian Bureau of Competition notes:

"The establishment, operation and expansion of landfill sites is fraught with complex, costly, and lengthy regulatory approvals and controls. The fundamental requirement of environmental probity of any suggested site largely confines the choice of likely locations to a finite handful respecting the collection area that it must support. Thus the governmental and political barriers to entry to the disposal market are very high. Other than municipal operations, it is unusual for landfill sites to be operated on a non-integrated basis. Entry or expansion then is unlikely to be timely or sufficient to prevent harm to competition".¹⁴

2.1.3 The organisation of the solid waste industry

There are a variety of approaches to the organisation and regulation of the solid waste industry.¹⁵ These approaches can be represented as a combination of one choice from each of four basic dimensions:

- (a) the nature of the "in the market" competition that is permitted;
- (b) the nature of any "for the market" competition (competitive tendering);
- (c) the source of the revenues that fund the service; and
- (d) the nature of any price and quality regulation.

The set of possible approaches to the organisation of the solid waste industry can also be represented as the set of combinations found by making one choice from each line in the following table:

Table 1: Possible approaches to organisation of solid waste industry

Dimension	Possible Approaches		
Competition in the market	No competition permitted (exclusive franchise)	Some competition permitted for some classes of customers	Unrestricted entry for service of all customers
Competition for-the-market	Permanent (i.e., long-lived) franchises	Permanent franchises for some classes of customers	Regularly tendered franchises
Sources of Revenue	Funding entirely provided by the government	Funding provided by both the government and users	Funding entirely provided by users and consumers
Price Regulation	All prices controlled	Prices to certain classes of users uncontrolled	All prices uncontrolled

The first dimension relates to the nature of competition in the market. Is only a single firm allowed to provide services, a restricted number of firms, or an unlimited number of firms? In principle, the choice might be different for different classes of customers. For example, competition might be significantly restricted for residential customers, while full-unrestricted competition is allowed for commercial waste collection. Different US cities have chosen different approaches:

"In cities in Oregon such as Eugene, or in unincorporated areas of Los Angeles County, ... collectors are required only to obtain a license to operate. No limits are set on the number of licenses issued, nor are prices or service specifications publicly controlled. ... In some cities, such as Los Angeles and Washington, D.C., commercial collection is freely competitive while residential collection is not. ... Frequently, franchises to private collectors are granted on an exclusive basis. Under this system, other private firms are barred from operating in an area where an exclusively franchised firm holds a certificate".¹⁶

The second dimension relates to the nature of competition for the market. In those cases where competition in the market is strictly limited (e.g., to a single firm), is that firm selected through a competitive bidding process, or does the incumbent firm have security in its position? The US City of Seattle, for example, tenders for waste collection services for a five-year period:

"Seattle ... contracts the northern half of the city to one firm and the southern half to another. Contract specifications are drawn up by the city ... and are let out to bid on a five-year basis. Revenues are collected by the city and distributed to the contractors according to the population-based formula specified in the contract".¹⁷

The third dimension relates to the source of revenues. Is the waste collection and disposal service funded through public revenues (i.e., taxes), or through user or service charges, or some combination of both? The level of public funding will, of course, affect the level of charges to businesses and households. As discussed later, higher charges provide incentives to economise on waste production, recycle and to engage in self-handling. Higher charges also induce households to dump waste illegally, raising health and public nuisance problems. Higher charges may raise costs of environmental protection and costs in forcing individuals to have their waste collected and disposed of legally.

The final dimension relates to the nature of price and quality regulation. In those cases where customers are charged for waste collection and disposal services, how (if at all) are the prices regulated? How is service quality assured?

One further, common, approach to the provision of waste services deserves mention, although it does not amount to a distinct dimension in its own right. In practice, many cities provide waste services through the local government itself (or, equivalently, through a government-owned firm). This firm may or may not face private competition in the market, and may or may not be required to tender against outside private firms. In addition, the government-owned firm may or may not receive revenue from customers and may or may not be subject to explicit price controls. A special case is that case of the government-owned firm with an exclusive, unlimited franchise, fully supported by tax revenues.

A 1976 survey in the US showed that 80 percent of US households received service under one of the following three structures (i) a public monopoly (under which a government-owned agency has an exclusive right to collect waste with funds paid by the local government); (ii) a private monopoly (under which a private firm, has an exclusive right to collect waste, with funds paid by the local government); and (iii) competition (with free entry and exit into waste collection services). A further 15 percent of residents transported their own refuse to disposal sites.¹⁸

2.2 *The role of competition in solid waste collection*

Having set out the basic characteristics of the industry and the various approaches to regulation, we turn now to an analysis of the appropriate role for competition. As the above analysis suggests, the appropriate role for competition differs between the different markets. Competition is more likely to be sustainable for large waste producers.

2.2.1 *Competition in the market*

Given the economies of density identified above, competition may not be efficient for residential and small business customers. Nevertheless, some US and Finnish cities have adopted a system allowing competition in the market. The situation in Finland is described in Box 2.

For large producers of waste, conventional in-the-market competition remains possible. As in other industries, competition for these customers provides incentives to minimise cost and to enhance innovation.

In those cases where the local government provides some or all of the funds for the waste collection services, in-the-market competition for large waste producers will not be possible unless rival competitor firms have access to funding on an equivalent basis to the incumbent firm. This is achieved in a variety of ways; all of which are equivalent to the issuing of "vouchers" which, are used by firms to pay for waste collection services.

Box 2 : Competition in-the-market for Residential Waste Collection in Finland¹⁹

Finland is one of relatively few countries to have a system of competition in the market for residential waste collection. 61 percent of the municipalities in Finland (covering 42 percent of the population) have adopted a system whereby each household is obligated to contract individually with a waste collection company for waste collection and disposal services. In addition, housing co-operatives can tender privately for waste collection services. The role of the local authority is limited to a form of regulation - the local authority decides what types of waste are to be encompassed by the system, what maximum prices the largest companies can charge and in what regions companies are obliged to offer their services.

On average there are 2.4 collection and transport companies serving each municipality, with as many as 13 in some cases. In 1997 the Finnish Competition Authority examined the competitive conditions in these markets and found that in municipalities with weak competition the market price is equal to the maximum price stipulated by the local authority, while in municipalities with effective competition, the price was lower.

In recent times several local authorities have chosen to switch to competitive tendering organised by municipalities. There are several reasons for this change. The first is that there are costs associated with enforcing the requirement on households to purchase waste collection services. If a household simply refuses to pay, the waste collection company may cancel the contract and refuse to collect the household's waste, but the local authority remains responsible for ensuring that the waste is collected.

Second, consistent with the theories of economies of density discussed elsewhere in this paper; studies have shown that prices for waste collection seem to be lower for municipal waste collection in Finland than for those municipalities, which have competition in the market. The 1997 survey of the Association of Municipalities in Finland showed that the price for municipal collection of waste was, on average 20-25 percent lower than those regions, which rely on competition in the market. The results of this survey are questioned by private operators in Finland.

2.2.2 Competition for the market

For the residential and small business customers where in-the-market competition is not possible, the incumbent firm will be able to exercise market power. Some form of regulation is essential. The most important question regarding the form of this regulation is whether to establish a permanent franchise (essentially a "normal" regulated monopoly) or whether to hold periodic competitive tendering for the right to service the market.²⁰

As set out in Box 3, competitive tendering is not appropriate for all services. Competitive tendering has significant advantages - the tendering process reveals key information about the costs of providing the underlying service that are very hard to obtain through conventional regulation. Competitive tendering also has certain disadvantages. In fact, competitive tendering will not be appropriate for services:

- where there is a substantial sunk investment requirement (or equivalently where the value of the investment of the incumbent firm cannot be objectively verified ex post);
- where each tender is idiosyncratic and the incumbent firm is likely to have significantly better information about the costs of providing the service than are potential entrants;
- where some dimensions of the requisite service quality cannot be objectively verified and so cannot be specified contractually and/or aspects of the requisite service quality are politically sensitive so that small reductions in quality are politically unacceptable; and
- where there is unlikely to be adequate competition in the tendering process.

The problems of competitive tendering have been summarised as follows:

"First, effective competition in the tendering process may not emerge. Sunk costs incurred in bidding or asymmetries in information between incumbents and entrants may discourage bidding. Second, once the contract is awarded the operator may act opportunistically to increase profits by failing to fulfil his obligations. For example, the contractor may try to renegotiate the contract terms in his favour. The operator also has an incentive to reduce costs by reducing service standards if he can do so without being detected. Such opportunistic behaviour can be held in check by having tightly specified contracts that leave little ambiguity in the standards of service required and, coupled with this, monitoring and enforcement of the contract during its lifetime".²¹

Finally, it is worth recalling the following points:

- first, competitive tendering is not a substitute for on-going regulation. At the least, on-going regulation will be required to ensure that contractually promised quality standards are met. In addition it is common in all but the shortest tenders to allow the incumbent firm to adjust its prices according to movement in underlying costs. The longer the term of the tender, the more similar this process becomes to conventional regulation;
- second, as with all forms of government procurement, careful attention needs to be paid to the tendering process to ensure that the market of potential bidders is as large as possible and to prevent collusion and bid-rigging. This is discussed further later in this paper;

- third, EC procurement rules require competitive tendering in certain circumstances. Specifically when services with a value above a certain threshold are purchased by public authorities those services must be purchased through a competitive tender.

Is competitive tendering appropriate for waste collection services? First, there is little or no sunk investment in the case of waste collection. There are no long-lived assets in waste collection and there is a ready second-hand market for the only assets of any importance (garbage trucks). There may be some investment by a firm in good customer relations, but to an extent this can be contractually verified. Second, waste collection is a sufficiently homogeneous service that potential bidders could, in principle, gain a good understanding of the costs involved in waste collection by direct experience in other city markets. The incumbent's information advantage is therefore likely to be weak. Third, in the case of waste collection the basic service quality parameters (frequency of collection, services provided, levels of customer complaints) can be sufficiently well specified to allow effective quality regulation.²² On balance, we can conclude that waste collection services are a good candidate for competitive tendering:

"The characteristics of refuse collection indicate that [none] of these potential problems is likely to be significant. The sunk costs of entering the tendering process are likely to be low whilst asymmetries in information between incumbent and entrant are unlikely to be large. A contract can be specified for refuse collection in which the expected outputs are measurable and in which monitoring of compliance is comparatively straightforward. The scope for unconstrained opportunistic behaviour by contractors is thus not large, provided that sanctions can be applied if there is a failure to comply, as is the case when contracts are subject to periodic re-tendering. Both these factors suggest *a priori* that refuse collection is a service where tendering is particularly likely to be effective".²³

In fact, competitive tendering for waste collection services is widespread in many OECD countries. In Denmark, for example, 85 percent of local authorities rely on private companies for waste collection and disposal (up from 27 percent in 1991). In Norway, 73 percent of municipalities make use of private companies for waste collection and disposal. In Sweden, the proportion is 63 percent.²⁴

In a study of US cities Nelson (1997) finds that 83 percent of US cities used private providers for disposal of hazardous materials, 72 percent for solid waste disposal, 69 percent for commercial waste collection and 44 percent for residential waste collection.²⁵

Box 3: The Pros and Cons of Competitive Tendering

Periodic competitive tendering has both advantages and disadvantages. The advantages are that competitive tendering substantially reduces the information disadvantage of the regulator by revealing, through the bidding process, key information about the true costs of providing the tendered service. As a result, price regulation under competitive tendering can, in principle, be more efficient. The disadvantages stem from what economists call "hidden information", and "hidden action" problems (also known as "moral hazard" and "adverse selection" problems).

The hidden action problem can be explained as follows - if the successful franchisee must make investments whose value is contingent on the renewal of the franchise, and if the regulator cannot perfectly observe the actions of the incumbent franchisee, the incumbent will have little incentive to make such investments as the end of the franchise period approaches. This is one reason why franchises are rare (and when they exist, they are for very long periods) in local telecommunications services or local electricity distribution. In each case, the investment in maintenance of the network is very hard to observe, giving rise to the real possibility that the incumbent would allow the network to deteriorate as the end of the franchise period approaches.

The hidden information problem arises when at the time of renewal of the contract the incumbent franchisee may have superior information about the value of the contract and the value of any relationship-specific investments it has made (such as the level of maintenance of any long-lived assets). Recognising this information asymmetry, rival bidders are likely to realise that given the incumbent's superior knowledge, out-bidding the incumbent is likely to lead to a loss. As a result, rival bidders are likely to be deterred.

A further disadvantage with competitive tendering is the possibility for "hold up" - the possibility that after the contract has been tendered, the contract will not be easily enforced, providing an opportunity for the successful bidder to threaten to withhold services or to lower quality in an attempt to extract better contract terms and conditions. The contract would not be easily enforceable if the successful tenderer (or its owners) held few assets or was judgment proof (i.e., too poor to pay the damages associated with breach of contract).

Faced with the threat to withdraw service from a judgment proof operator, the local authority has two choices - to re-tender the contract or to renegotiate with the incumbent firm. There are two reasons why the local authority might choose to renegotiate rather than simply re-tender. First, the cost of an interruption of service might quickly become very large. An accumulated waste quickly becomes a public nuisance and a health hazard. Second, competitive tendering is not costless. The regulator must put significant care into specifying the terms and conditions of the services required and the details of the tender process. If the combined costs of the interruption in service and the costs of the tender itself amount to, say, \$5 million, the operator could, after obtaining the franchise, seek a renegotiation, knowing that the local authority would allow up to \$5 million in concessions rather than repeat the entire tender process. Indeed, anticipating this, rival bidders may overbid by up to \$5 million, fully expecting to extract concessions *ex post*.

This effect can be offset by requiring successful bidders to post a bond of \$5 million, which is foregone in the event of non-performance or unsatisfactory performance before the normal end of the life of the contract,²⁶ or offset by taking into account a firm's reputation at the time the successful tenderer is chosen. A firm is less likely to breach its contract terms if it considers this will threaten its opportunity to win tenders in the same or other regions in the future.

As with conventional regulation, it is not possible to ensure that quality is maintained in a competitive tendering process without explicit quality-assurance regulation. Nelson (1997) emphasises that some services have a quality dimension (which he calls "political sensitivity") which is difficult to incorporate into a contract or to monitor once the contract is negotiated. As discussed in Shleifer (1998), where quality is not easily observable, competitive tendering will not be possible, and in-house provision of these services is essential.

2.2.3 Cost-efficiencies of competitive tendering in solid waste services

Several studies have attempted to measure the efficiency gains from competitive tendering in solid waste collection. Table 2 summarises the results of these studies. It is worth noting here the following:

- in the US, Savas (1977) surveys 2052 cities covering one third of the US population and finds that collection costs were 20 percent higher, on average, when city rather than private contractors were used for residential waste collection;
- in Canada, McDavid (1985) finds that collection by city-owned enterprises was 40 percent more expensive than private residential waste collection. Private collection crews were 95 percent more productive due to the use of bigger capacity vehicles with smaller crews, more use of efficiency bonuses and lower wages;
- in Switzerland, in a survey of 103 Swiss cities in 1970, covering half the Swiss population, residential refuse collection by private contractors was found to be on average 20 percent cheaper than public collection;²⁷
- in the United Kingdom, in the years before the introduction of compulsory competitive tendering in 1988, Domberger et al (1986) find that waste collection costs are lower by 22 percent in those local authorities where private contracting has taken place. They also find that costs are lower by 17 percent in those cases where the contract was awarded to the local-government owned or "in house" waste services provider, demonstrating that it is the effect of competition, rather than the ownership effect of privatisation which was important in achieving these initial costs savings;²⁸
- in Denmark, surveys show that in 1990-1991, those Danish municipalities that made use of competitive tendering experienced an average cost saving of ten percent;
- in Norway, a study by the competition authority found that the costs were the lowest (NOK 596.5) for those municipalities, which had held a tender, open to all companies. The costs were significantly higher for those municipalities which had restricted the number of companies invited to participate in the tender or had used procurement after negotiations (NOK 658.5 and 649.4, respectively).

Table 2: Summary of cost savings from private contracting for refuses collection

Authors	Country	Date	Reported Savings
Savas and Stevens	USA	1975	Municipal collection 29-37 percent more expensive
Pommerehne and Frey	Switzerland	1977	Private contract provision some 20 percent cheaper
Hamada and Aoki	Japan	1981	Municipal collection 124 percent more expensive
McDavid	Canada	1984	Public collection 40-50 percent more costly
Domberger et al	UK	1986	Competitive tendering reduces costs by around 20 percent with no evidence that this is at the expense of quality of service

Source: Parker (1990), Table 1, p.660.

Critics of competitive tendering have argued that these cost savings arise from reductions in workers' wages and/or reduction in service quality. A survey by the Norwegian competition authority suggests that quality had not been significantly affected at least in competitive tendering in Norway. 39 percent of the municipalities surveyed said that quality had increased and 52 percent said that quality had stayed the same with competitive tendering. Only eight percent of the municipalities surveyed said that quality had deteriorated.

An UK study²⁹ attempted to identify more closely the source of the underlying cost savings of competitive tendering. It was found that in the case where a contract is competitively tendered to an outside private contractor, three-quarters of the 22 percent cost savings identified can be attributed to improvements in technical efficiency (i.e., more efficient use of workers and capital equipment) rather than lower input prices. Interestingly, in the case where a contract was let to an in-house government-owned provider, only two-fifths of the 17 percent cost savings could be attributable to improvements in technical efficiency. Cubbin et al (1987) note:

"Some commentators have asserted that the savings are largely the result of pecuniary losses of those in employment through lower wages and fringe benefits. Our results do not support that view. They indicate that for those authorities with private contractors, the bulk of the savings can be attributed to improvements in technical efficiency - which is physical productivity of both men and vehicles. Only a small residual remains that can be attributed to other, pecuniary factors. Paradoxically, for those authorities that retained an in-house team, technical efficiency improvements accounted for only about 40 percent of the cost savings. The remaining 60 percent may be due to significant manpower reductions, leading to much lower man-vehicle ratios. ... Alternatively, the in-house teams may be less efficient than private contractors and may reduce their employees' rates of pay in order to remain competitive. Although both factors would be consistent with the findings we do not have any direct evidence of the latter".³⁰

2.2.4 *The efficient price and revenue structure*

Although larger commercial producers of waste may be charged per unit of weight or volume of the waste that they produce, it appears that most local authorities in OECD countries do not charge residential or small business producers of waste by weight or volume of waste produced. Instead, the local authority directly pays the waste collection provider from public funds. The marginal charge for producing extra waste is zero. Is this the optimal structure of prices?

Putting aside any externalities, for the moment, the principles governing the optimal structure of prices in this, or any other industry, are well known. Under an optimal pricing structure, consumers would pay a marginal price equal to the marginal cost of collecting an additional unit of waste. Due to the economies of density, the revenue from the marginal component alone is unlikely to be sufficient to cover total costs. The remainder of the costs could be recovered through a fixed charge on the consumer or (largely equivalently) through general tax revenue.³¹

There are however certain negative externalities associated with waste collection and disposal. Landfills impose aesthetic and health costs on neighbours and incinerators generate air pollution and produce hazardous residue. These negative externalities raise the total or "social" cost of disposal. If waste producers do not face these costs they may have incentives to produce too much waste. Kinnaman and Fullerton (1997) summarise the situation in the US as follows:

"Most communities in the United States pay for municipal solid waste services using general revenues or monthly fees that do not vary per unit of garbage collected at the curb. Thus households think that more garbage is free. This public provision might be warranted if the service were non-excludable, but providers can indeed extract a price per unit of garbage collected. An increasing number of communities have begun to sell special stickers or tags that must be attached to any bag of garbage at the curb - or else it will not be collected. This local policy innovation can have several beneficial effects. The price per bag of garbage can help reduce household generation of garbage that must be put in a landfill, help raise revenue, alleviate budget problems, and allow for property tax reductions. It provides incentives for recycling, composting, and even for source reduction - demanding less packaging at stores"³².

In practice, there are difficulties associated with unit pricing of waste. In particular, depending on the level of the charges, charging for waste may induce households to engage in activities which are inefficient or positively harmful. For example, waste collection charges based on volume may induce households to expend effort compacting their waste, when this is more efficiently carried out by a large compactor.³³ Charging on the basis of weight, rather than the number of bags, is administratively more complex and is not feasible in practice.

More importantly, charging for waste may induce households to dump their waste illegally, on back roads or vacant lots. Fullerton and Kinnaman (1996) estimate the reduction of garbage in response to a user fee and find evidence that illegal dumping may account for one-third of the reduction. Of the 1422 households surveyed by Reschovsky and Stone (1994), 20 percent admitted to burning their own garbage in response to a user fee and 51 percent said they thought that illegal dumping had increased. Fullerton and Kinnaman (1995) show that when illegal dumping is a problem, the optimal collection fee may be close to zero.³⁴ In essence, when illegal dumping is costly to prevent, dumping represents a form of externality, which can be reduced by subsidising (rather than raising) disposal prices.

In any case, the effect on waste volumes that arises from not charging for waste collection may be small. In a 1997 study Fullerton and Kinnaman compare 100 cities that use garbage pricing with more than 800 that do not. That study concludes that households are relatively unresponsive to user charges - on average a ten percent increase in sticker prices cuts quantity by only 0.3 percent.³⁵

If charging for waste collection increases incentives for illegal dumping, is there some pricing mechanism, which can achieve the efficient outcome without relying on waste collection charges? In principle, it may be possible to provide the same incentive to reduce waste through a tax on packaging, combined with a subsidy payment for recycling. An example of this system is the common deposit-refund system on recyclable beverage containers.³⁶

2.3 Competition issues in the solid waste industry

Having examined the role for competition in the waste management industry, we now examine the role of competition authorities in addressing competition issues in the waste industry. We will focus particularly on competition enforcement and the role of competition authorities in assisting the design of competitive tendering processes.

2.3.1 Conventional competition enforcement in the waste industry

The above analysis has highlighted that many parts of the solid waste industry will not sustain high levels of competition and some parts of the industry will not sustain competition at all. Competition is

likely to be limited in the markets for waste disposal and waste collection from small and medium-sized enterprises. In these markets, active competition enforcement is necessary to sustain competition. Recent competition cases in the waste management industry have involved concerns about concentration (in both the collection and disposal sectors) and access to essential facilities. In both cases the competition authorities imposed conditions which relieved the competitive impact.

- In the US, the DOJ recently challenged a proposed merger between Waste Management Inc. (the largest waste collection and disposal firm in the US) and Eastern Environmental Services, which provides waste collection and disposal services in New York, New Jersey, Pennsylvania, Delaware and Florida. According to the DOJ, the proposed merger would substantially lessen competition for waste collection or waste disposal services in nine markets, including the disposal of New York City's residential waste following the closure of the city's only landfill in 2001. In many of these markets, the combination of Waste Management and Eastern would have left only two major competitors. The DOJ announced a settlement with these companies in January 1999 in which the companies agreed to divest waste collection and/or disposal facilities in New York and several other cities.³⁷
- In Canada, in a case involving the acquisition by Canadian Waste Services, Inc. of assets of WMI Waste Management of Canada, Inc., in Edmonton, Alberta, the Canadian Competition Bureau required the divestiture of certain collection routes and equipment serving the small- and medium-sized enterprises market together with the divestiture of a waste transfer station. In addition, the Competition Bureau required that a named competitor be given cost-based access to one of the landfill sites involved in the merger.

Another competition concern relates to the effect of contractual arrangements on barriers to entry. Barriers to new entry in the competitive segments of the waste collection industry can be raised using various contractual arrangements, such as long-term contracts and requirements for several months notice of termination of the contract - this limits the rate at which contracts can be lost to competitors. In addition, entry barriers may be raised with price-matching clauses - allowing the incumbent firm to match any outside offer. Such price-matching clauses have been found to be anti-competitive in other industries.

2.3.2 *Enhancing competition in tendering processes*

The efficiency and competitiveness of competitive tendering can be enhanced through careful attention to the tendering processes. In particular, attention should be paid to:

2.3.2.1 The specification of the services to be provided and the selection of firms eligible to bid

The geographic region over which collection services are to be provided should be neither too small nor too large. The region should be large enough to allow successful firms to exploit economies of scale and density. Otherwise, firms serving neighbouring regions would have a competitive advantage, as they would be the only firms able to exploit economies of density. As mentioned earlier, cost studies suggest that collection economies are exhausted at a region size of 50 000 inhabitants.

Neither should the geographic region be so large as to limit the number of firms, which will be in a position to provide the services requested. Where the size of the city or district is much larger than the minimum efficient scale of collection, consideration should be given to breaking up the region into several smaller pieces and tendering each piece separately. This allows for performance comparisons between the firms serving the different regions, reduces the disruption

associated with loss of service from a single firm and enhances the likelihood that several firms will be in a position to compete when the time comes for re-tendering. In Denmark the third largest municipality (Odense) split its geographic area into four parts and invited separate tenders for each of the four regions. As a tool for securing adequate competition in the future, the Swedish city Uppsala divided its area into sub-regions and organised tenders for each region sequentially with one tender coming up for renewal each year.

The tendering processes should not limit the number or nature of the firms, which are eligible to compete with requirements such as restrictions on foreign or out-of-region ownership.

2.3.2.2 The disclosure of information about bids

As discussed in the CLP roundtable on procurement, tendering for municipal services may be prone to collusion – it is likely that the same few firms will meet each other repeatedly in many different markets over time and are likely to develop explicit or implicit policies to lessen competition between them. The tendering processes should be careful not to aggravate a tendency towards collusion.

Successful collusion requires the ability to detect and punish deviations from the cartel agreement. Collusion will therefore be facilitated by policies, which require the use of public auctions or the disclosure of all of the bids submitted in a secret bidding process. Even disclosure of the winning bids alone may allow a cartel to detect deviations from their agreement. Although laws requiring disclosure in public tendering may rule out this possibility in many countries, from the competition perspective it is preferable therefore to use sealed bid auctions, without disclosing the results. Concerns about political favouritism could be met by the establishment of an independent agency (such as the competition authority) with responsibility for overseeing all public tenders and with access to all of the bids.

2.3.2.3 Competition enforcement – Access to essential facilities on a non-discriminatory basis

Competition in the tendering processes is enhanced by conventional competition enforcement, including ensuring access to essential facilities. In some regions, competition in disposal facilities might be strictly limited or non-existent. In these cases, firms, which do not own disposal facilities, will be at a competitive disadvantage in the tendering process, limiting competition in the waste collection tenders. In these cases competition can be enhanced by ensuring that potential collection firms are guaranteed access to disposal facilities on non-discriminatory grounds if they are successful in tendering. Access by a rival to a disposal site was imposed as a condition of a merger in the Canadian case mentioned above. An alternative and preferable solution is to separate ownership of disposal and collection facilities and/or to prevent owners of disposal facilities from participating in tenders for collection.

2.3.2.4 Ensuring competitive neutrality

In many cases, a division or subsidiary of the local government itself is in a position to provide the services, which are being purchased by tender. Should local-government-owned enterprises be allowed to participate in competitive tenders? The answer depends upon whether or not the local government is able to establish its own subsidiary on an equal footing with private sector companies.

"Governments and their agencies operate in environments which confer on them a number of advantages and disadvantages relative to the external suppliers of services. For example,

government agencies are often exempted from government taxes and charges. Public ownership may provide effective immunity from bankruptcy, but may also bring with it more onerous accountability or employment obligations".³⁸

Competitive neutrality is ensured when public and private sector suppliers face identical regulatory, legal, financial and administrative arrangements. In many countries, public suppliers are required to operate under the same legal structures as private sector firms ("corporatisation"). At the least, public suppliers should operate as commercially autonomous units, with separate accounts, formally separated from all aspects of contract management and liable for all relevant taxes and charges including an appropriate rate of return on capital.³⁹

3. Conclusion

Local governments, no less than national or state governments, can have a significant impact on the economy. However, local governments do not necessarily face incentives to implement efficient regulation and in some cases, central government legislation limits their ability to do so. Local government incentives for efficiency seem to be weaker the smaller the level of their revenue that local governments raise themselves.

One sector in which local government activity is particularly important is the solid waste management sector. Like postal delivery, solid waste collection exhibits economies of density. Conventional competition in the market for residential solid waste collection is likely to be strictly limited. As a result, most local governments either provide this service themselves or contract with private providers. Theoretical considerations show and empirical studies confirm that solid waste collection is a service, which is likely to be more efficiently provided by the private sector. The limited scope for competition in many parts of the solid waste industry suggest a role for active competition enforcement and oversight of the competitive tendering process to ensure the sustainability of competition.

NOTES

- 1 The OECD publication "Managing Across Levels of Government" (1997) surveys and describes this diversity.
- 2 Carlsen notes: "The existence of externalities provides a rationale for central [control of local government]. Communities have incentives to spend too little on services that produce benefit spillovers or attract poor households and too much on services that attract firms and wealthy taxpayers". Carlsen (1995), p.44.
- 3 Carlsen (1995), p.44.
- 4 Carlsen (1995), p.44.
- 5 Carlsen (1995), p.56.
- 6 This argument is made with respect to the withdrawal of central funds from a specific or individual local government. It is true that a general reduction in central government funding to all local governments (leading to a rise in local taxation) could be completely offset by a reduction in central taxation, so that on balance individual taxpayers are no worse off.
- 7 Carlsen (1995), p.43-44.
- 8 Lopez-de-Silanes, Shleifer and Vishny (1997), p.459.
- 9 See Domberger et al (1986), p.70. The abolition of Compulsory Competitive Tendering, as it was known, was announced in 1998.
- 10 Although competition may be able to be sustained at the boundary between the areas served by each firm and competition may be possible if two or more companies provided sufficiently differentiated services.
- 11 Stevens (1978), p.445.
- 12 In one Canadian case these customers were found to be served using a different technology (front-end loading trucks) than either residential or industrial customers and were held to constitute a distinct market. The Canadian Competition Bureau identified four distinct product markets in non-hazardous solid waste collection: "(a) the commercial lift-on-board service, also known as front-end service, involves the collection of containers of waste from front-end trucks from customers who generate a significant quantity of solid waste and are often restaurants, offices, and small commercial establishments; (b) the industrial market, also known as roll-off service, is required by industrial customers who generate large amounts of waste, which is often not compactible. The large containers used to collect this waste are loaded onto flat-bed trucks and taken to dry disposal sites; (c) the residential market involving the collection of small quantities of waste from individual residences and apartments pursuant to contracts with cities, towns and municipalities. Contracts are generally awarded on the basis of tenders; (d) the recycling market involving the collection of recyclable solid waste from residences and apartments. Like residential service, this service is provided under contracts with cities, towns and municipalities, a significant portion of which are awarded on the basis of tenders". Canadian Competition Tribunal, in the matter of an acquisition by Canadian Waste Services Inc., of certain non-hazardous solid waste management assets of W M I Waste Management of Canada, Inc. in Edmonton, Alberta. CT-98/01

- 13 See Stevens (1978).
- 14 Canadian Competition Tribunal, in the matter of an acquisition by Canadian Waste Services Inc., of certain non-hazardous solid waste management assets of W M I Waste Management of Canada, Inc. in Edmonton, Alberta. CT-98/01
- 15 "In the array of public services, refuse collection displays perhaps the greatest array of organisational practices". Young (1974), p.45.
- 16 Young (1974), p.45.
- 17 Young (1974), p.46.
- 18 See Stevens (1978).
- 19 This information is taken from a 1998 study by the Nordic competition authorities "Exposing Local Services To Competition" (Konkurransutsetting av Kommunal Virksomhet, 1 August 1998).
- 20 The Australian Industry Commission has prepared a very detailed study on the use of competitive tendering. See Industry Commission (1996).
- 21 Domberger et al (1986), p.72.
- 22 Young notes: "In summary, a workable contract system for refuse collection would entail a carefully constructed set of contract specifications to attract a sufficient number of competent bidders; a performance bond requirement on collection firms; a division of the governmental jurisdiction into a number of contract areas, each large enough to economically support a single collector; ... [and] a governmental capability to monitor contract compliance. Existing contract systems do not always measure up to these requirements. But contracting seems to be the one system for fully private collection which can maintain the proper efficiency incentives and avoid the dis-economies of open competition". Young (1974), p.60.
- 23 Domberger et al (1986), p.73.
- 24 This information is taken from a 1998 study by the Nordic competition authorities "Exposing Local Services To Competition" (Konkurransutsetting av Kommunal Virksomhet, 1 August 1998).
- 25 Nelson (1997), Table III, p.92.
- 26 One problem with performance bonds is that it exposes the successful firm to risk that it will not be able to perform for reasons outside its control. If the bidding firms are risk averse, their risk exposure may be reduced (at the cost of increased possibility for hold up) by lowering the size of the bond or by shortening the length of the contract.
- 27 Pommeröhne and Frey (1977). Parker (1990) also cites studies by Hirsch (1965), Pier et al (1974), Kitchen (1976), Edwards and Stevens (1978) and Bennett and Johnson (1979). See also the survey by Domberger and Jensen (1997).

- 28 For a criticism of this paper see Ganley and Grahil (1988) and the subsequent reply by Domberger et al (1988).
- 29 Cubbin et al (1987).
- 30 Cubbin et al (1987), p 53-54. The importance of ownership as a long term factor in efficiency was highlighted by a further study several years later by Szymanski (1996). This study found that the initial cost reductions enjoyed when a contract for waste collection was competitively tendered did not last when the contract was let to an in-house provider. The research found that in the 3rd, 4th and 5th years of a five-year tender, the costs of an in-house provider were not significantly different incurred in the year before competitive tendering was introduced.
- 31 Strictly speaking, if the general taxation mechanisms are distortionary (as virtually all are) then there is a shadow cost associated with raising tax revenue. The marginal price for waste collection should, in this case, be raised above marginal cost to the point where the distortion from raising an extra \$one in the waste market due to the price above marginal cost matches the distortion caused by raising an extra \$one from general taxes.
- 32 Kinman and Fullerton (1997), p.1. The authors identify 148 communities that have implemented curbside recycling and charge a price per bag.
- 33 Fullerton and Kinman (1996) find that in response to a collection charge the number of bags collected dropped by 34 percent, but the weight only dropped by 14 percent, suggesting that households were stuffing 37 percent more in each bag.
- 34 Provided, of course, that the negative externality from illegal dumping is greater than that from legal disposal.
- 35 Fullerton and Kinman (1997).
- 36 See Fullerton and Wu (1998).
- 37 Pittsburg, Bethlehem / Allentown, Chambersburg-Carlisle and Scranton, Pennsylvania, Miami-Ft Lauderdale and suburban Tampa, Florida.
- 38 Industry Commission (1996), p.34.
- 39 See Industry Commission (1996), recommendations 12-21.

REFERENCES

- BENNETT, J.T. and M.H. JOHNSON, (1979), "Public versus private provision of collective goods and services: garbage collection revisited", *Public Choice*, 34, 55-63
- CARLSEN, Fredrik, (1995), "Why is Central Regulation of Local Spending Decisions So Pervasive? Evidence From a Case Study", *Public Budgeting and Finance*, 15 (1), spring 1995, 43-57
- CUBBIN, John, Simon DOMBERGER and Shirley MEADOWCROFT, (1987), "Competitive tendering and refuse collection: identifying the sources of efficiency gains", *Fiscal Studies*, 8 (3), August 1987, 49
- DOMBERGER, S., S.A. MEADOWCROFT and D.J. THOMPSON, (1986), "Competitive Tendering and Efficiency: The Case of Refuse Collection", *Fiscal Studies*, 7 (4), 1986, 69-87
- DOMBERGER, Simon and Paul JENSEN, (1997), "Contracting Out by the Public Sector: Theory, Evidence and Prospects", *Oxford Review of Economic Policy*, 13 (4), 1997
- DOMBERGER, Simon, Shirley MEADOWCROFT and David THOMPSON, (1988), "Competition and efficiency in refuse collection: a reply", *Fiscal Studies*, 9 (1), February 1988, 86
- EDWARDS, F.R. and B.J. STEVENS, (1978), "The provision of municipal sanitation services by private firms", *The Journal of Industrial Economics*, 27, 133-147
- FULLERTON, Don and Thomas C. KINNAMAN, (1995), "Garbage, Recycling and Illicit Burning or Dumping", *Journal of Environmental Economics and Management* 29, July 1995, 78-91
- FULLERTON, Don and Thomas C. KINNAMAN, (1997), "Garbage and Recycling in Communities With Curbside Recycling and Unit-Based Pricing", *NBER Working Paper Series*, No. 6021, April 1997
- FULLERTON, Don and Wenbo WU (1998), "Policies for Green Design", *Journal of Environmental Economics and Management*, 36 (2), September 1998, 131-148
- GANLEY, Joe and John GRAHL, (1988), "Competition and efficiency in refuse collection: a critical comment", *Fiscal Studies*, 9 (1), February 1988, 80
- HIRSCH, W.Z., (1965), "Cost functions of the urban government service: refuse collection", *Review of Economics and Statistics*, 47, 87-92
- Industry Commission, (1996), *Competitive Tendering and Contracting By Public Sector Agencies*, Report No. 48, 24 January 1996
- KITCHEN, H.M., (1976), "A statistical estimation of an operating cost function for municipal refuse collection", *Public Finance Quarterly*, 4, 56-76
- LOPEZ-DE-SILANES, Florencio, Andrei SHLEIFER and Robert W. VISHNY, (1997), "Privatisation in the United States", *Rand Journal of Economics*, 28 (3), autumn 1997, 447-471
- MCDONALD, J.C., (1985), "The Canadian experience with privatising residential solid waste collection services", *Public Administration Review*, 45, 602-608

- NELSON, Michael A., (1997), "Municipal Government Approaches to Service Delivery: An Analysis From A Transactions Cost Perspective", *Economic Inquiry*, 35, January 1997, 82-96
- OECD, (1997), *Managing Across Levels of Government*
- PARKER, David, (1990), "The 1988 Local Government Act and Compulsory Competitive Tendering", *Urban Studies*, 27 (5), 1990, 653-668
- PIER, W. J., R. B. Vernon and J. H. Hicks, (1974), "An empirical comparison of government and private production efficiency", *National Tax Journal*, 27, 653-656
- POMMEREHNE, W. M. and B. S. Frey, (1977), "Public versus private production efficiency in Switzerland: A theoretical and empirical comparison", *Urban Affairs Annual Review*, 12, 221-241
- RESCHOVSKY, James D. and Sarah E. Stone, (1994), "Market Incentives to Encourage Household Waste Recycling: Paying for What you Throw Away", *Journal of Policy Analysis and Management*, 13 (1), winter 1994, 120-139
- SAVAS, E. S., (1977), "An Empirical Study of Competition In Municipal Service Delivery", *Public Administration Review*, November/December 1977, 717-724
- SHLEIFER, Andrei, (1998), "State versus Private Ownership", *Journal of Economic Perspectives*, 12 (4), fall 1998, 133
- STEVENS, Barbara J., (1978), "Scale, Market Structure, and the Cost of Refuse Collection", *Review of Economics and Statistics*, 60 (3), August 1978, 438
- SZYMANSKI, Stefan, (1996), "The impact of compulsory competitive tendering on refuse collection services", *Fiscal Studies*, 17 (3), August 1996, 1-20
- YOUNG, Dennis R., (1974), "The Economic Organisation of Refuse Collection", *Public Finance Quarterly*, 2 (1), January 1974, 43

NOTE DE REFERENCE

Introduction

Dans presque tous les pays de l'OCDE, la réglementation intervient à plusieurs niveaux de gouvernement. Bien que le groupe de travail n°2 du Comité du droit et de la politique de la concurrence se soit axé sur la réglementation mise en œuvre par la législation et les institutions nationales, la machine gouvernementale – à savoir la législation et les moyens de création et d'application de cette législation – se manifeste tant aux niveaux supranational (telles l'OMC et l'Union européenne) qu'infra-national (Etats, Länder, ou régional et local, villes ou communes). Chacun de ces niveaux de gouvernement a le pouvoir de créer des lois, des réglementations et des institutions qui conditionnent de manière significative l'exploitation d'une entreprise. La présente note se concentre sur l'activité des collectivités locales en matière de réglementation. Dans beaucoup de secteurs, comme celui des déchets solides, les réglementations et institutions créées au niveau local ont une influence bien plus grande que la réglementation nationale (ou des Etats).

L'objet du présent document est de présenter l'étude relative à la réglementation des collectivités locales par un examen du rôle et des caractéristiques des règles et institutions de ces mêmes collectivités tout comme une étude du secteur pour lequel le rôle des collectivités locales est primordial – à savoir le secteur des déchets solides.

Voici les points clé du présent document :

- l'intervention des collectivités locales a un effet direct sur de nombreuses activités. L'éventail des interventions possibles de ces dernières dans les activités économiques est aussi vaste que celui de l'administration centrale. Bien que l'influence de toute autorité locale soit faible par rapport à la dimension de l'économie nationale, l'effet cumulé de l'ensemble des interventions des collectivités locales peut être considérable par rapport à l'économie nationale,
- lorsqu'il existe plusieurs niveaux d'administration, il s'agit de savoir quel est le niveau qui convient le mieux pour recourir ponctuellement à des interventions réglementaires. Une telle décision passe par l'équilibre de deux forces – souhait de "subsidiarité", c'est-à-dire réduction au niveau le plus immédiat, d'une part, et souhait d'éviter les effets de "retombée" de l'autre. Les décisions qui conviennent aux collectivités locales comportent celles pour qui la subsidiarité est primordiale et dont les effets de retombée sur d'autres régions est négligeable. Dans d'autres décisions, en revanche, la portée de l'action des collectivités locales est limitée par des décisions législatives et réglementaires des niveaux d'administration plus élevés,
- les collectivités locales reçoivent souvent une part de leur financement sous forme de transferts provenant de niveaux supérieurs d'administration. L'autonomie des collectivités locales est généralement limitée par les contrôles législatifs et les conditions attachées à ce financement. Ces contrôles et conditions visent à contenir la tendance d'un tel financement à assouplir les contraintes budgétaires que subissent les collectivités locales. En général, plus la part du financement que l'administration centrale octroie aux collectivités locales est

élevée, plus faible est la crédibilité d'une menace de sanction de dépenses par un retrait de fonds dont userait l'administration centrale, et, par conséquent, plus faibles sont les incitations à contrôler les dépenses,

- à l'instar de l'administration centrale, les collectivités locales doivent prendre des décisions pour choisir les services dont elles veulent se doter et notamment les services qu'elles souhaitent obtenir du secteur privé. En effet, certains services, en particulier ceux dont la qualité est difficile à vérifier contractuellement, et dans certaines conditions limitées, se prêtent davantage au secteur public. Par ailleurs, d'autres services relèvent plutôt du secteur privé quoiqu'ils soient assujettis à des réglementations ou à des appels d'offre réglementaires,
- le secteur des déchets solides comporte deux grandes branches, la collecte des déchets, d'une part, et leur évacuation, d'autre part. Les services de collecte des déchets solides s'apparentent aux services de transport, semblables eux-mêmes à la distribution du courrier. Les économies de densité sont, certes, limitées pour les clients produisant de grandes quantités de déchets ou des déchets nécessitant une manipulation spécifique (comme l'évacuation à un moment bien précis), pour la majorité des particuliers et des petites entreprises, les économies de densité sont telles qu'il est préférable que cette prestation soit assurée par une seule et même entreprise,
- étant donné qu'il n'y a généralement pas de possibilité de concurrence "sur le marché" dans le secteur de la collecte des déchets des particuliers ou des petites entreprises, une certaine forme d'intervention des collectivités locales s'impose dans ce secteur - soit sous forme de monopole réglementé, soit par un appel d'offres. L'appel d'offres est plus efficace quand il n'y a pas de gros investissements irrécupérables concernant les rapports entre collectivités locales et soumissionnaires, et quand les soumissionnaires extérieurs peuvent obtenir une information de bonne qualité sur le coût de prestation du service. Ces conditions s'appliquent à la collecte des déchets solides. Dans beaucoup de pays de l'OCDE, l'appel d'offres est la forme prédominante de réglementation des services relatifs aux déchets solides,
- les déchets solides reviennent assez chers à transporter sur de longues distances, ce qui limite le marché géographique des installations d'évacuation. La réglementation en matière de concurrence dans ce secteur devrait veiller à garantir que les fusions et rapprochements horizontaux ne limitent pas la concurrence dans le processus d'adjudication pour les collectes ou les installations d'évacuation disponibles. Par ailleurs, elle devrait aussi veiller à ce que les fusions et rapprochements verticaux n'empêchent pas la concurrence en autorisant une entreprise qui occupe une position dominante à restreindre ou à empêcher la concurrence sur l'autre marché,
- la concurrence peut être aussi renforcée en portant une attention particulière à un processus d'appel d'offres proprement dit, par des décisions concernant la région où ces mêmes appels d'offre peuvent être octroyés, en garantissant que les soumissionnaires potentiels ne seraient pas exclus de l'offre, en limitant la divulgation d'information si une offre aboutit, en veillant à ce que les soumissionnaires potentiels aient accès aux installations essentielles et, enfin, en assurant une neutralité dans la concurrence entre fournisseurs publics et privés.

1. Rôle des collectivités locales dans la réglementation

1.1 Caractéristiques générales des collectivités locales

Dans les pays de l'OCDE, l'administration centrale n'a pas le monopole en matière de législation et de réglementation concernant les entreprises. En fait, dans les pays de l'OCDE, l'intervention de l'Etat dans l'économie intervient régulièrement à chacun des grands niveaux d'administration - supranational (comme l'OMC ou l'Union européenne), national (ou "central"), régional (Etats, cantons ou Länder) et local (municipal, commune ou ville). Chacun de ces niveaux d'administration crée des lois et des institutions qui peuvent avoir une influence très forte sur l'exploitation d'une entreprise.

Les détails précis concernant la structure des gouvernements des pays de l'OCDE - nombre et nature des niveaux de gouvernement, pouvoirs qui sont exercés à chaque niveau, pouvoir de percevoir des impôts ainsi que les rapports financiers et juridiques qui existent entre les niveaux d'administration - diffèrent de manière spectaculaire entre les pays de l'OCDE.¹ Néanmoins, le présent document identifie certaines grandes caractéristiques du rôle des collectivités locales (villes, municipalités ou communes) dans l'économie.

En règle générale, les questions réglementaires que rencontrent les décideurs des collectivités locales et les instruments réglementaires disponibles sont les mêmes que celles auxquelles sont confrontés les décideurs de l'administration centrale. L'éventail d'interventions possibles des collectivités locales dans les activités économiques est aussi vaste que celui dont dispose l'administration centrale - impôts et subventions, entrées et sorties des intervenants, contrôle des biens, qualité des biens et services fournis, contrôle des formes d'organisation des entreprises, contrôle d'activités spécifiques, marchés publics, attribution de franchises, sans oublier les questions de propriété.

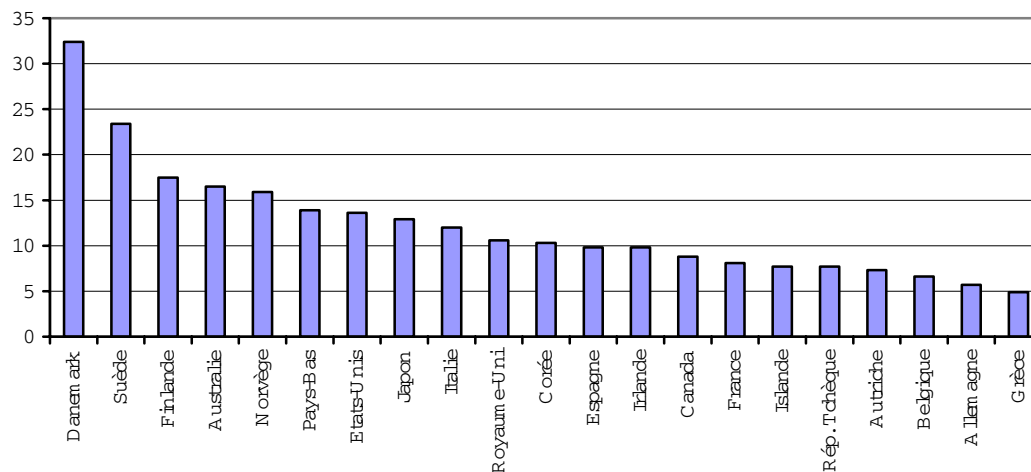
Bien que les activités des collectivités locales varient beaucoup d'un pays à l'autre et d'une ville à l'autre, l'intervention de ces dernières est particulièrement importante dans les activités économiques suivantes :

- réglementation et Fourniture de Biens Publics Locaux (services où les collectivités locales garantissent tant la prestation que le paiement du même service), dont le réseau routier local, la police et les sapeurs-pompiers, les jardins publics, la voirie et l'éclairage public, la lutte contre les inondations et l'enneigement,
- réglementation et Prestation des Services Locaux à caractère monopolistique (services où les collectivités locales garantissent la prestation du service par un seul fournisseur), dont la collecte et l'évacuation des déchets solides, eau et eaux usées, transports en commun, (parfois) électricité locale, distribution de gaz ou télévision par câble et (rarement) services postaux ou télécommunications,
- réglementation et Prestation des Services Concurrentiels Locaux (services où la collectivité locale garantit la prestation d'une partie du service dont la globalité est fournie par un nombre important d'entreprises concurrentes), dont (parfois) logements publics, éducation publique, santé publique, maisons de retraite, crèches, services de loisirs, piscines, etc.

Bien que l'influence d'une collectivité locale puisse être limitée par rapport à la taille de l'économie nationale, l'influence cumulée de l'ensemble de l'intervention des collectivités locales peut être considérable dans l'économie nationale. La figure qui suit donne une indication de la taille relative du secteur des collectivités locales dans les pays de l'OCDE en présentant l'ampleur des recettes de ces

dernières par rapport à l'ensemble du PIB. Ce rapport se situe entre 7,5 pour cent et 15 pour cent pour la plupart des pays de l'OCDE, la seule exception flagrante étant les pays nordiques pour lequel le secteur des collectivités locales enregistre des recettes de l'ordre de 16 à 32 pour cent du PIB.

Figure 1 : Recettes des collectivités locales en proportion de l'ensemble du PIB (1996)



1. Source : Comptes nationaux. Les pays non mentionnés sont ceux pour lesquels l'information n'est pas disponible.
 2. Toutes les informations pour 1996, à l'exception de l'Espagne, l'Italie, la Grèce, l'Irlande (1995) et la République Tchèque (1994).

1.2 Place des collectivités locales dans la structure gouvernementale

Quelles sont les actions réglementaires qui relèvent, de préférence, des collectivités locales ? En règle générale, quels sont les principes qui devraient guider les décisions concernant le choix du niveau d'administration approprié pour mener à bien des actions réglementaires spécifiques ? Pourquoi l'ensemble de la réglementation n'est-il pas assuré par l'administration centrale ? A l'inverse, pourquoi toute la réglementation n'est-elle pas simplement déléguée aux collectivités locales ?

Le niveau approprié d'administration pour toute intervention émanant de l'autorité publique dépend de l'équilibre de deux principes - principe de "subsidiarité", d'une part, et principe selon lequel les décisions devraient être prises à un niveau d'administration assez élevé pour éviter des effets de "retombée" ou extérieurs sur d'autres régions.

Le principe de subsidiarité peut être résumé comme le principe selon lequel les décisions devraient être prises à un niveau d'administration aussi bas que possible. Ce principe découle du concept économique du coût de saisie et de transmission de l'information. Si les populations locales diffèrent dans leurs préférences, leurs caractéristiques et leurs ressources et si la communication de l'information est coûteuse, la décentralisation et la délégation aux collectivités locales est un mécanisme qui garantit un meilleur usage de l'information locale, de sorte que la réglementation locale reflète mieux les conditions locales et les biens publics locaux concordent davantage avec les préférences de la population concernée.

Notons, par ailleurs, que la décentralisation et la délégation ont leurs limites en raison de ce que l'on peut appeler les effets externes ou de retombée entre régions :

- chaque région prise isolément a peu de chances de prendre les bonnes décisions quand certains coûts se répercutent sur d'autres régions, comme ce peut être le cas avec certaines formes de pollution, voire avec des restrictions liées aux échanges ou aux flux d'investissement ;
- de même, les régions ont peu de chances de prendre les bonnes décisions quand certains avantages se répercutent sur d'autres régions. Ainsi, des investissements exceptionnels réalisés dans l'enseignement supérieur peuvent attirer des étudiants d'autres régions qui retournent chez eux dès qu'ils ont obtenu leur diplôme. D'autre part les améliorations apportées aux grands axes routiers profitent généralement aux producteurs et consommateurs des régions voisines. Dans la plupart des pays, le réseau routier local est du ressort des collectivités locales, tandis que les grands axes autoroutiers relèvent de l'administration centrale ;
- enfin, la réglementation économique à un niveau d'administration donné n'est sans doute pas possible (ni probablement efficiente) pour une société qui détient un monopole naturel et dont l'échelle d'efficacité est supérieure à la région couverte par ce niveau d'administration.²

Les problèmes de retombée sont accentués par le fait qu'à des niveaux inférieurs de gouvernement, les groupes d'intérêt, du fait de leur dimension supérieure à celle de la collectivité locale concernée, sont souvent plus concentrés et plus à même d'influencer le processus décisionnel.

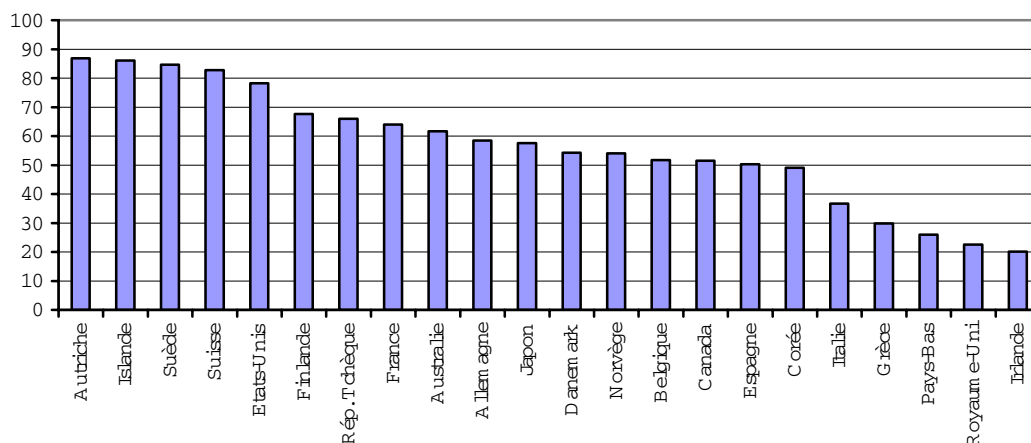
Dans le cas du secteur des déchets solides que nous examinerons ci-après, les questions intéressant les biens publics (comme l'hygiène publique) ne se posent qu'au niveau local, si bien que les effets de retombée éventuels sur d'autres régions sont mineurs et l'échelle d'efficacité des entreprises de collecte des déchets solides n'est pas plus grande que celle des petites municipalités. Par conséquent, ce secteur se prête à une réglementation au niveau local.

1.3 Contrôles de l'administration centrale ou des états sur les politiques menées par les collectivités locales

L'efficacité, l'efficience et la qualité de la réglementation des collectivités locales dépendent à la fois de la capacité des collectivités locales à mettre en œuvre une réglementation de grande qualité et de leurs motivations à le faire. La volonté des collectivités locales à mettre en œuvre une réglementation de haute qualité est fonction, en partie, de facteurs budgétaires, comme les incitations apportées aux collectivités locales pour réduire les coûts au maximum. Une collectivité locale qui est peu incitée à réduire les coûts au maximum a peu de chances de se lancer dans une réglementation efficace des secteurs placés sous sa responsabilité. Or, les incitations apportées aux collectivités locales pour maintenir une réglementation efficace et réduire les coûts au maximum dépendent à leur tour de la nature et de l'ampleur du financement provenant d'autres niveaux d'administration. Aussi avons-nous l'intention, dans cette section, d'explorer brièvement la nature du contrôle de l'administration centrale sur les collectivités locales en nous axant plus particulièrement sur l'effet des transferts intergouvernementaux.

Dans presque tous les pays de l'OCDE (voir Figure 2), les collectivités locales reçoivent une partie de leur financement de niveaux supérieurs d'administration. La part d'un tel financement varie beaucoup d'un pays à l'autre. La part de l'auto-financement des collectivités locales, soit une mesure de l'"autonomie" de ces dernières, est énoncée dans la figure qui suit. Les collectivités locales en Autriche, Islande, Suède, Suisse et aux Etats-Unis lèvent plus de 75 pour cent de leurs propres fonds, contrairement aux Pays-Bas, en Irlande et au Royaume-Uni dont l'autonomie financière est inférieure à un quart de leurs ressources.

Figure 2 : "Recettes propres" au niveau local en pourcentage de l'ensemble des recettes locales (1996)



1. Source : Comptes nationaux. Les pays non mentionnés sont ceux pour lesquels l'information n'était pas disponible.

2. Ensemble des recettes moins les transferts provenant d'autres niveaux d'administration.

3. Toutes les données pour 1996 à l'exception de l'Espagne, de l'Italie, de la Grèce, de l'Irlande (1995) et de la République Tchèque (1994)

Les administrations centrales subventionnent les dépenses des collectivités locales pour plusieurs raisons que nous n'aborderons pas dans le présent document. Ainsi, la gestion et la collecte de certaines formes d'impôts s'accroissent de l'intervention de l'administration centrale. En outre, cette dernière joue un rôle dans la péréquation des dépenses entre régions.

Cependant, étant donné les problèmes que les niveaux supérieurs d'administration peuvent rencontrer lorsqu'ils délèguent certains niveaux de financement, le fait de laisser ce financement sous la responsabilité d'un niveau supérieur d'administration a pour effet d'amincir le lien qui existe entre les dépenses et les impôts locaux, atténuant, de ce fait, les contraintes budgétaires des collectivités locales. Ces effets, réduisent, à leur tour, la motivation des collectivités locales pour prendre des mesures destinées à accroître l'efficacité et à réduire les dépenses. Les administrations centrales réagissent par des paquets de mesures conçues pour renforcer cette motivation, à savoir les contrôles législatifs directs et la spécification de conditions précises pour l'usage des transferts entre différents niveaux administratifs.

L'effet des transferts entre différents niveaux d'administration sur la motivation des collectivités locales est illustré par l'expérience de la Norvège. En 1986, la Norvège a essayé d'améliorer le système d'incitations destinées aux collectivités locales en remplaçant un réseau de réglementations et de dons spécifiques (ou "liés") par un système de dotations globales. " Cette réforme a pour but de rompre le lien entre les décisions de dépenses locales et le niveau des transferts entre différents niveaux administratifs, de sorte que les collectivités locales soient mises face au coût d'opportunité de chaque activité ".³ Cependant, ces réformes se sont soldées par un échec car, comme nous l'expliquons ci-après, un tel système n'a pas éliminé l'atténuation des contraintes budgétaires auxquelles sont confrontées les collectivités locales. En 1996, les éléments clés de cette réforme ont été inversés. Bien que le système de dotations forfaitaires ait été officiellement mis en place, de nouvelles attributions et réglementations ont sapé la justification d'une telle réforme.

Carlsen conclut que la réforme a échoué parce que les collectivités locales sont confrontées à des obligations budgétaires peu contraignantes :

"Pendant la période couverte par la présente étude, les collectivités centrales ont affecté, à plusieurs reprises, des attributions supplémentaires à la collectivité locale concernée afin d'éviter des coupes budgétaires ou de stimuler des activités particulières. Ces interventions ont encouragé la région à mener une politique budgétaire expansionniste. Au fur et à mesure que de nouveaux projets épuisaient les capacités financières locales et menaçaient les activités existantes, la collectivité locale fixait des coupes pour des projets politiquement sensibles afin de déclencher l'attribution de subventions supplémentaires. Cette politique locale a entraîné des contre-mesures de la part de l'état, qui a introduit de nouvelles attributions affectées à un emploi déterminé, ainsi qu'un contrôle administratif direct des afin de forcer le pouvoir local à réduire les dépenses totales et à ajuster le dosage budgétaire."⁴

Signalons que la raison essentielle de l'échec des réformes norvégiennes est due à l'incapacité de l'administration centrale de respecter son engagement de ne pas allouer de nouveaux financements :

"Comme plusieurs autres réformes du secteur public des années soixante-dix et du début des années quatre-vingts, le système norvégien de dotations globales reposait sur l'hypothèse selon laquelle le gouvernement devrait être prêt à encourir le coût politique de la mise en place des structures budgétaires des niveaux inférieurs de la hiérarchie administrative. Cette hypothèse s'est révélée irréaliste. Pour chacune des sept années couvertes par l'étude, l'état a dû fournir des attributions supplémentaires à la suite des différentes crises survenues... Dans la mesure où le grand public estimait que des attributions pouvaient être affectées, les politiciens locaux avaient toutes les raisons d'utiliser la stratégie des décisions budgétaires pour obtenir des dons supplémentaires. Dans le cas contraire, ces derniers auraient été considérés personnellement responsables des coupes budgétaires effectuées au niveau local."⁵

Le rôle de la crédibilité et de la volonté d'atténuer les contraintes budgétaires des collectivités locales est abordé plus loin dans l'encadré n° 1.

Encadré n° 1 : problèmes liés à l'engagement de l'administration centrale et au faible poids des contraintes budgétaires sur les collectivités locales

En général, plus la participation de l'administration centrale dans le financement des ressources de la collectivité locale est élevée, plus grande est sa motivation et sa capacité à exercer une influence sur les décisions prises au niveau local en matière de réglementation. Cependant, ce principe subit des exceptions notables. Les systèmes d'incitation mis en place par l'administration centrale pour influencer le mécanisme décisionnel local, comme tous les schémas incitatifs, doivent tenir compte de la question de la crédibilité et de l'engagement. Les problèmes de crédibilité se posent à deux égards : premièrement, les schémas incitatifs ne devraient pas comporter la perspective d'actions dont il est prévu qu'elles devront être menées par l'administration centrale et que cette dernière ne pourrait pas s'engager de manière crédible à réaliser *a posteriori*. Deuxièmement, l'administration centrale doit être capable de s'engager de manière crédible à ne pas faire usage des informations nouvelles apportées dans le cadre du schéma incitatif.

Supposons par exemple qu'un système incitatif ait prévu le blocage de certains fonds par l'administration centrale dans le cas où la collectivité locale ne se conformerait pas à certaines exigences. Les collectivités locales disposent alors de deux alternatives à ce financement central, qui sont l'emprunt et la fiscalité locale. Si la collectivité locale et les électeurs concernés savent que l'état apportera une aide financière en cas de faillite, le fait de continuer à s'endetter reste lié à un sentiment d'im punité élevé, avec pour conséquence peu de motivation pour se conformer à l'exigence initiale.

L'administration centrale peut réagir à cela en limitant l'endettement de la collectivité locale ou en imposant une règle empêchant toute aide financière (comme c'est le cas aux USA). Mais la diminution de la part de l'administration centrale dans le financement des ressources se traduirait par une réduction des dépenses publiques au niveau local ou par une augmentation de la fiscalité locale. Si la collectivité locale estime que l'administration centrale ne peut pas, d'un point de vue politique, s'engager à diminuer son niveau de participation, la réduction des dépenses publiques au niveau local qui découlera de ce constat aura tendance à s'effectuer par la suppression des services générant l'impact politique le plus élevé pour l'administration centrale, comme par exemple la santé, l'éducation ou les prestations sociales.

Dans ce domaine, l'administration centrale peut imposer des minima de prestations afin de forcer la collectivité locale à recourir à la solution de l'augmentation de la fiscalité locale. Cependant, lorsque la part de l'administration centrale dans le financement est élevée, une réduction, si minime soit-elle, de cette participation entraîne une augmentation très importante de la fiscalité. En prenant un exemple dans lequel l'administration centrale fournit 90 pour cent des moyens de la collectivité locale, le fait de réduire de cinq pour cent de cette participation et donc de la faire passer à 85 pour cent nécessiterait une augmentation des revenus liés à la fiscalité locale de dix pour cent à 15 pour cent, soit une progression de 50 pour cent des taxes locales. Or, il est peu probable, d'un point de vue politique, que l'on puisse appliquer des variations fiscales d'une telle ampleur. En conséquence, la menace de voir l'administration centrale retirer sa participation financière n'est pas crédible et les incitations à se conformer à l'exigence initiale sont faibles⁶.

Supposons enfin que la collectivité locale parvienne à réduire ses dépenses en conséquence de la mise en place d'un système incitatif. Si l'administration centrale n'est pas en mesure de s'engager de manière crédible à *ne pas* réduire sa participation dans le financement de cette collectivité locale, cette dernière va adopter le raisonnement consistant à penser que ses efforts de réduction des dépenses publiques seront dans le futur "récompensés" par une diminution des ressources qu'elle reçoit, avec pour conséquence supplémentaire un affaiblissement de la motivation à s'attaquer en premier lieu à la réduction des dépenses. Ce phénomène, connu sous la dénomination d'"effet de cliquet", accom pagne tous les systèmes contractuels d'incitation.

Une solution possible à ces problèmes consiste à augmenter la part des recettes locales provenant de la fiscalité locale (en étendant le champ d'application de cette fiscalité ou par délégation d'autorité pour ce qui concerne le niveau de certaines taxes locales et de leur collecte) : une telle mesure a pour effet de réduire la proportion de participation financière que l'administration centrale peut soumettre à conditions, mais aussi de renforcer la crédibilité de la menace de suppression de l'aide financière si la collectivité locale ne se soumet pas à ces conditions.

Il est fréquent que l'échelon administratif supérieur cherche à exercer un contrôle sur le processus de décision de la collectivité locale, tant par la législation que par le fait de soumettre l'attribution de ressources à conditions. Carlsen note que :

"l'étude des relations entre administration centrale et collectivité locale montre que le contrôle par l'administration centrale des décisions locales en matière de financement est une pratique largement répandue. Les allocations spécifiques (c'est-à-dire soumises à conditions) représentent une proportion significative de l'ensemble des transferts de crédit effectués entre différents niveaux d'administration dans la plupart des pays industrialisés. ... L'administration centrale contrôle également les processus de décision en matière de dépenses publiques locales via toute une gamme de règlements et dispositions administratives, qui comprennent des minima imposés et des interventions directes dans lesdits processus".⁷

Citons quelques exemples de ce que certains états des Etats-Unis ne permettent pas ou imposent à leurs collectivités locales : interdiction de s'engager dans des emprunts à court terme, plafonds d'endettement, exigence de budget équilibré, interdiction de recevoir une aide financière de l'Etat. Ces restrictions sont pensées pour renforcer la contrainte budgétaire pesant sur les collectivités locales, et il n'est pas surprenant que, dans l'ensemble, "le renforcement des contraintes budgétaires auxquelles sont soumises les collectivités locales aille de pair avec une plus forte probabilité d'externalisation des services publics".⁸

Un autre moyen dont dispose l'administration centrale pour influencer au niveau législatif sur la réglementation locale se manifeste par l'obligation de recourir à l'appel d'offres ouvert. En 1988, l'administration centrale britannique a pris la décision d'obliger les collectivités locales à mettre en place un processus d'appel d'offres pour un certain nombre d'activités ou de services comprenant notamment la collecte des déchets, le nettoyage de la voirie et des bâtiments publics, l'entretien des flottes de véhicules, des parcs et espaces verts ainsi que la fourniture de repas.⁹ Le parlement italien examine actuellement une loi visant à imposer la même obligation aux collectivités locales italiennes.

2. Promouvoir la concurrence dans l'industrie des déchets

Après avoir présenté un certain nombre de points ayant trait à la place que prend la collectivité locale dans la régulation de l'activité économique au niveau local, nous allons maintenant aborder un secteur spécifique dans lequel la collectivité locale joue un rôle important par l'influence qu'elle exerce sur la nature de l'activité économique, à savoir le secteur de la collecte et de l'évacuation des déchets solides.

2.1 Nature de l'industrie des déchets solides

2.1.1 Demande en collecte et évacuation des déchets

Les ménages et les entreprises produisent des déchets solides qui apparaissent comme des sous-produits non désirés de la consommation et de la production. La demande en services liés à cette production de déchets résulte de la demande exprimée par les producteurs et les consommateurs de voir ces déchets enlevés et évacués conformément à la réglementation. Le secteur de l'industrie des déchets peut être divisé en deux grandes composantes : la collecte et l'évacuation. La collecte s'apparente à quelques détails près à un service de livraison ou de transport, du lieu de résidence du client au site d'élimination. Une fois arrivée à ce site, les déchets peuvent être triés ou traités de toute autre manière avant d'être incinérés ou stockés dans un site d'enfouissement.

Les premières formes d'actions en matière de services liés aux déchets se manifestent sous la forme de traitement autonome comme l'incinération à domicile, l'incinération commerciale à petite échelle, le transport individuel de déchets vers la décharge et/ou les actions commerciales de recyclage.

2.1.2 *Caractéristiques des coûts liés à la collecte des déchets*

La collecte des déchets présente une structure de coûts semblable à celle de nombreux autres "réseaux" ou secteurs de services destinés au public comme la distribution du courrier, la fourniture d'électricité, de gaz ou d'émissions de télévision par le câble. Le coût marginal de la collecte de déchets à partir d'un foyer supplémentaire est faible lorsque ce foyer a déjà fait l'objet d'une collecte par véhicule spécialisé, à condition que la collecte supplémentaire reste dans les limites de la capacité du véhicule utilisé. De plus, un tel système autorise des économies de densité significatives, à condition que la fréquence des collectes survienne à intervalles suffisamment espacés pour que la collecte touche pratiquement chaque foyer pendant la durée de la même tournée.

La présence d'économies de densité permet de penser qu'il ne serait pas possible de maintenir les conditions d'une concurrence traditionnelle intra-marché dans le secteur de la collecte de déchets pour les ménages et les petites entreprises.¹⁰ Cette hypothèse est confirmée par la recherche sur le terrain. Une étude menée par Stevens constate que dans les communes américaines ayant autorisé la concurrence sur le marché, les coûts sont de 26 à 48 pour cent plus élevés que dans un marché équivalent dominé par un monopole privé placé sous contrôle du pouvoir public. Stevens note également que "ce constat peut être attribué aux frais de facturation et autres charges relatives à la non-exclusivité dans un secteur donné du marché qui sont supportés par une entreprise dans un contexte d'accords concurrentiels".¹¹

Aucune économie de densité ne se manifeste dans la fourniture de services de collecte aux grands producteurs de déchets (ceux qui génèrent régulièrement de pleins camions de déchets), pour la collecte de déchets inhabituels ou exceptionnels dans le cadre de laquelle le facteur temps est pris en compte ou pour celle de déchets nécessitant une manipulation spéciale. Ces services peuvent donc être fournis dans un cadre concurrentiel.

Entre ces deux extrêmes – les ménages qui ne produisent que de faibles volumes de déchets et les industriels qui les génèrent en très grandes quantités –, on dénombre un univers de petites et moyennes entreprises produisant une quantité de déchets ne permettant pas d'attendre qu'une benne de taille ordinaire soit remplie pour être collectée. Dans ce type de marché, la concurrence ne peut qu'être limitée et imparfaite.¹²

Malgré la présence évidente d'économies de densité, les économies d'échelle pouvant être obtenues dans la collecte de déchets sont peu importantes et dépendent étroitement du niveau minimum d'efficacité des camions-bennes, qui reste invariable. Des études ont montré que des économies d'échelle sont possibles dans ce secteur en augmentant le nombre des véhicules utilisés, pour des villes d'environ 50 000 habitants au maximum. Pour des agglomérations plus grandes, les coûts augmentent proportionnellement au nombre d'habitants.¹³

La collecte de déchets présente à de nombreux égards des analogies frappantes avec la distribution du courrier : comme cette dernière activité, elle représente une forme de service de transport ; comme pour le courrier, la collecte de déchets implique la livraison d'objets de tailles et de formes différentes soumises à des degrés d'urgence et à des contraintes de manipulation également différentes. Dans la distribution du courrier, c'est dans la distribution de lettres au porte-à-porte et à intervalles suffisants pour assurer une distribution à la majorité des foyers que les économies de densité sont les plus significatives. De même, on obtient les économies de densité les plus fortes dans la collecte de déchets au

porte-à-porte à des intervalles suffisants pour garantir que la collecte touche la majorité des foyers concernés. Lorsque le facteur temps revêt une importance particulière (c'est-à-dire lorsque la volonté de payer pour l'urgence l'emporte sur le gain résultant des économies de densité, comme c'est le cas pour le courrier urgent), la distribution du courrier peut s'effectuer dans un cadre concurrentiel. Dans une même logique, dans le cas de déchets devant être évacués dans un délai court ou dans le cas de quantités importantes ou exceptionnelles de déchets, les économies de densité sont négligeables. Ce type de service peut lui aussi être apporté dans un cadre concurrentiel.

Les déchets, une fois collectés, reviennent cher à transporter autrement qu'en très grandes quantités (par chemin de fer ou transport fluvial). Par conséquent, la portée géographique des marchés de la collecte des déchets est souvent limitée, comme l'est la concurrence entre opérateurs d'installations d'évacuation. Les coûts élevés liés à l'obtention d'autorisations d'ouverture de nouveaux sites d'enfouissement ou d'incinération augmentent encore les économies d'échelle et constituent des obstacles pour les candidats à l'entrée sur ce marché. Le Bureau de la politique de concurrence note que :

"la création, l'exploitation et l'extension de sites d'enfouissement sont entravées par la complexité, le coût et la longueur de la procédure d'approbation et de contrôle réglementaire. Étant donné que l'exigence première à laquelle doit répondre tout site proposé est l'absence d'atteinte à l'environnement, le choix des lieux d'implantation est extrêmement limité par rapport à la zone de collecte qu'ils doivent desservir. C'est pourquoi les obstacles administratifs et politiques à l'entrée sur le marché de l'évacuation des déchets sont si difficiles à surmonter. Il est rare que les sites d'enfouissement soient exploités de manière non intégrée, sauf s'il s'agit d'un service géré par une municipalité. En conséquence, il est peu probable que l'entrée d'un nouvel opérateur ou l'extension d'un site existant intervienne en temps opportun ou suffise pour prévenir la distorsion de la concurrence".¹⁴

2.1.3 Organisation de l'industrie des déchets solides

Il existe différentes approches visant à résoudre les problèmes liés à l'organisation et la réglementation du secteur des déchets¹⁵. Ces approches peuvent être décrites sous la forme de l'un ou l'autre des éléments contenus dans les quatre grands groupes ci-dessous :

- (a) la nature de la concurrence "sur le marché" autorisée ;
- (b) la nature de la concurrence "pour le marché" (appel d'offres) ;
- (c) la provenance des ressources permettant de financer le service ; et
- (d) la nature du contrôle (quel qu'il soit) en matière de prix et de qualité du service.

Les différentes pratiques en matière d'organisation du secteur des déchets peuvent être également représentées comme un ensemble de combinaisons composées de l'un ou l'autre des éléments fournis dans le tableau ci-dessous :

Tableau 1 : différentes méthodes d'organisation de l'industrie des déchets

Groupe	Approche possible		
Concurrence "sur le marché"	Pas de concurrence autorisée (franchise exclusive)	Un certain niveau de concurrence autorisé / pour certains clients	Pas de restriction aux postulants pour tous les types de clients
Concurrence "pour le marché"	Franchises permanentes (sur longues périodes)	Franchises permanentes pour certaines catégories de clients	Franchises remises régulièrement sur le marché
Origine du financement	Financement entièrement apporté par la collectivité locale	Financement apporté à la fois par la collectivité locale et par l'utilisateur	Financement entièrement apporté par l'utilisateur et le consommateur
Contrôle des prix	Tous les prix sont contrôlés	Les prix relatifs à certaines catégories d'utilisateurs restent non contrôlés	Aucun contrôle des prix

Le premier groupe porte sur la nature de la concurrence qui s'exerce à l'intérieur du marché. Le service est-il apporté par une seule entreprise, un nombre défini d'entreprises ou un nombre d'entreprises illimité ? En principe, le choix varie différent selon les différentes catégories de clients. La concurrence peut par exemple être significativement restreinte pour la clientèle de particuliers, alors que l'on autorisera une concurrence sans restriction pour la collecte des déchets industriels. Aux Etats-Unis, les solutions retenues diffèrent d'une ville à l'autre :

"Dans certaines communes de l'Etat d'Oregon comme Eugene, ou dans certains districts ne relevant pas de l'autorité de la région urbaine de Los Angeles, ... les entreprises chargées de la collecte ne sont soumises qu'à l'obtention d'un agrément. Le pouvoir public n'impose aucune limite au nombre d'agréments qu'il délivre ; de même, ni les prix ni les services ne font l'objet de spécifications préalables. ... Dans certaines villes, comme Los Angeles ou Washington, D.C., la collecte des déchets industriels est soumise au libre jeu de la concurrence alors que celle des déchets des particuliers ne l'est pas. ... Il est fréquent que des entreprises de collecte privées obtiennent des franchises sur une base d'exclusivité. Un tel système interdit à d'autres intervenants privés toute possibilité d'opérer sur une zone dans laquelle une entreprise en franchise d'exclusivité détient déjà un agrément."¹⁶

Le deuxième groupe porte sur la nature de la concurrence qui s'exerce sur le marché. Dans les cas de figure où la concurrence sur le marché est strictement limitée (par exemple à une entreprise unique), la question se pose de savoir si cette entreprise est choisie par le biais d'un processus d'appel d'offres régulier, ou bien si elle est fermement installée dans cette position. Pour citer un exemple, la ville de Seattle (USA) organise des appels d'offres pour des périodes de cinq ans :

"Seattle.... attribue la moitié Nord de la ville à une entreprise et la partie sud à une autre. Les termes des contrats sont établis par la ville... et la période du marché est fixée à cinq ans. Les

ressources sont collectées par la ville et distribuées aux entreprises en fonction d'une formule basée sur la population et précisée dans le contrat."¹⁷

Le troisième groupe concerne la provenance des ressources. La collecte des déchets et les services liés à leur évacuation sont-ils financés par des ressources publiques (impôts), ou par facturation aux utilisateurs, ou par une combinaison de ces deux systèmes ? Le niveau de la part du financement public aura évidemment une influence sur l'importance de la part du service qui est facturée aux entreprises et aux particuliers. Comme on le verra plus loin, des charges importantes pesant sur l'utilisateur peuvent l'amener à réduire sa production de déchets, à mettre en place des politiques de recyclage et gérer ses déchets de manière autonome. De même, si le coût de la collecte et de l'évacuation des déchets est élevée, les particuliers peuvent être tentés de se débarrasser de leurs déchets de manière illégale, avec pour conséquence une augmentation des problèmes de pollution et de santé publique. Enfin, des charges élevées peuvent faire grimper le coût de la protection environnementale ainsi que le prix à payer pour obliger les particuliers à faire collecter et traiter leurs déchets dans un cadre légal.

Le dernier groupe porte sur la nature des contrôles effectués en matière de prix et de qualité du service. Dans le cas où se seraient les clients qui payent la collecte et l'évacuation des déchets, comment le prix de ce service (à condition qu'il y en ait un) est-il contrôlé ? De même, comment la qualité du service est-elle garantie ?

Une autre approche communément utilisée dans la fourniture de services dans le secteur des déchets doit être mentionnée, même si elle ne peut être considérée comme un groupe à elle seule. On constate dans la pratique que de nombreuses villes fournissent des services en matière de collecte de déchets par l'intermédiaire de la collectivité locale elle-même (ou, ce qui revient au même, par l'intermédiaire d'une entreprise publique). Cette entreprise est susceptible d'être confrontée à des concurrents privés sur le marché, de même qu'elle peut être amenée à participer à des appels d'offres face à des organisations relevant du privé. Il peut arriver également que l'entreprise publique tire ses ressources des clients et soit soumise à un contrôle effectif de ses prix. Constitue un cas particulier l'entreprise publique disposant d'une franchise totale et exclusive, entièrement financée par des ressources de nature fiscale.

Une étude conduite en 1976 aux Etats-Unis a montré que 80 pour cent des ménages américains bénéficiaient de services apportés dans le cadre de l'une des trois structures suivantes, à savoir (i) un monopole public (dans le cadre duquel une émancipation de la collectivité locale dispose du droit exclusif de collecter les déchets à l'aide de ressources fournies par les autorités) ; (ii) un monopole privé (dans le cadre duquel une entreprise privée dispose du droit exclusif de collecter les déchets à l'aide de ressources fournies par les autorités) ; et (iii) un cadre concurrentiel (entrée et sortie libres dans le secteur des services de collecte des déchets). L'étude a également mis en évidence le fait que 15 pour cent des résidents se débarrassent eux-mêmes leurs déchets en les amenant à des sites prévus à cet effet.¹⁸

2.2 *Le rôle de la concurrence dans la collecte des déchets*

Après avoir exposé les grands principes régissant le secteur ainsi que différents moyens employés pour le réguler, nous allons maintenant concentrer notre propos sur l'analyse du rôle que doit jouer la concurrence dans ce secteur. Comme les observations précédentes le suggèrent, ce rôle sera différent selon les marchés. On peut observer en premier lieu que la concurrence s'exercera plus facilement en présence d'entités produisant de grandes quantités de déchets.

2.2.1 Concurrence sur le marché

Compte-tenu des économies de densité identifiées plus haut dans cette étude, la concurrence peut se révéler inefficace dans le cas où la clientèle se composerait de particuliers et de petites entreprises. Cependant, certaines villes des Etats-Unis et de la Finlande ont adopté un système autorisant la concurrence sur ce type de marché. La situation prévalant en Finlande est décrite dans l'encadré n°2.

En présence de gros producteurs de déchets, il est toujours possible d'avoir un système de concurrence traditionnel sur le marché. Comme dans d'autres secteurs de l'économie, la concurrence devient un facteur de baisses de coûts et de promotion de l'innovation technique.

Dans le cas où la collectivité locale finance tout ou partie des services relatifs à la collecte des déchets, une concurrence sur le marché serait impossible dans le secteur des gros producteurs de déchets tant que les entreprises rivales ont accès au même financement que celui dont bénéficie l'entreprise titulaire du marché.

Encadré n° 2 : concurrence sur le marché – Collecte des déchets des particuliers en Finlande¹⁹

La Finlande fait partie des - relativement - rares pays à avoir un système de concurrence sur le marché pour la collecte des déchets des particuliers. 61 pour cent des communes finlandaises (couvrant 42 pour cent de la population) ont adopté un système dans lequel chaque ménage est obligé de conclure individuellement un contrat avec une entreprise de collecte et d'évacuation des déchets. Les copropriétés ont également la possibilité de procéder à des appels d'offres pour ce type de services. Le rôle de la collectivité locale se limite à exercer une forme donnée de contrôle, qui consiste à fixer la nature des déchets concernés par ce système, les prix que les grandes entreprises sont autorisées à pratiquer et à indiquer les régions dans lesquelles les entreprises doivent proposer leurs services.

On dénombre en moyenne deux, quatre entreprises de collecte et de transport de déchets par commune, avec un pic à 13 dans certains cas. En 1997, les autorités finlandaises chargées du contrôle de la concurrence se sont livrées à une étude des conditions dans lesquelles la concurrence s'exerçait sur ces marchés, et ont constaté que là où la concurrence était peu active, les prix du marché se situaient au niveau du maximum stipulé par les collectivités locales, alors que ces prix étaient plus bas dans les communes où le libre jeu de la concurrence s'exerçait pleinement.

Certaines collectivités locales ont récemment décidé de se tourner vers un système d'enchères géré par la commune. Plusieurs raisons expliquent ce changement. La première réside dans le coût associé aux mesures visant à faire appliquer l'obligation imposée aux particuliers de contracter des services. Si un ménage refuse de payer, l'entreprise peut résilier le contrat et refuser d'enlever les déchets; Mais la responsabilité de la collectivité locale vis-à-vis de l'enlèvement des déchets demeure.

Deuxièmement, dans la ligne des économies de densité abordées par ailleurs dans le présent document, des études ont montré que les prix de la collecte des déchets en Finlande semblaient plus bas dans les communes qui assurent elles-mêmes ce service que dans celles qui pratiquent la concurrence sur le marché. L'étude menée en 1997 par la Kommunförbundet (association de communes) en Finlande a montré que le prix de la collecte des déchets par la commune était en moyenne de 20 à 25 pour cent plus bas que dans les régions pratiquant la concurrence sur le marché. Il va sans dire que les résultats de cette étude sont contestés par les opérateurs privés opérant en Finlande.

2.2.2 Concurrence pour le marché

Dans le cas d'une clientèle composée de particuliers et de petites entreprises pour laquelle la concurrence sur le marché est impraticable, l'entreprise titulaire sera en mesure d'exercer un certain pouvoir

sur le marché. Dans ce cas précis, une forme ou une autre de contrôle devient nécessaire. La question la plus importante concernant ce type de contrôle consiste à savoir s'il faut s'en tenir à un système de franchise permanente (essentiellement sous la forme d'un monopole "normalement" contrôlé), ou procéder à des appels d'offres à intervalles réguliers pour l'attribution du droit à opérer sur le marché.²⁰

Comme on peut le voir dans l'encart n°3, le système de l'appel d'offres ne convient pas à tous les types de services. S'il comporte des avantages indéniables – il révèle notamment en matière de coûts sous-jacents des données essentielles qui sont très difficiles à obtenir dans le cadre d'un contrôle traditionnel, il n'est pas exempt d'inconvénients, et, dans la pratique, ne convient pas aux catégories de services ci-dessous :

- lorsque les investissements irrécupérables sont importants (ou, ce qui revient au même, lorsque la valeur de l'investissement de l'entreprise titulaire ne peut pas être vérifiée objectivement *a posteriori*) ;
- lorsque chaque adjudication est particulière et que l'entreprise titulaire est susceptible de disposer de données sur les coûts liés à la fourniture de ces services sensiblement meilleures que celles dont disposent les candidats potentiels ;
- lorsque certains aspects du pré requis en matière qualité de service ne peuvent pas être vérifiés en toute objectivité et ne peuvent donc pas être spécifiés contractuellement, ou lorsque il s'agit d'aspects politiquement "sensibles" au point qu'une réduction de la qualité du service, minimale soit-elle, est inacceptable d'un point de vue politique ; et
- lorsque le processus d'appel d'offres semble ne pas faire l'objet de la concurrence voulue.

Les problèmes liés au système de l'adjudication peuvent être résumés comme suit :

"Le premier problème réside dans l'absence possible de concurrence réelle dans le processus de mise en concurrence. Les frais irrécupérables liés à la soumission des offres ainsi que le déficit d'information dont souffrent les postulants par rapport aux titulaires sont des facteurs susceptibles de décourager les candidats potentiels. Deuxièmement, une fois le contrat signé, l'opérateur peut saisir toutes les occasions d'augmenter ses profits en ne respectant pas ses obligations. L'opérateur peut ainsi tenter de renégocier le contrat en sa faveur. Il est également tenté de réduire ses coûts en diminuant le niveau de ses prestations s'il peut le faire sans être repéré. Ce type de comportement opportuniste peut être tenu en échec avec des contrats rédigés avec précision, laissant peu de flou quant au niveau de service requis et, parallèlement, des moyens permettant d'assurer le contrôle et l'exécution de ces contrats pendant leur durée de validité.²¹

Enfin, un rappel des points suivants s'impose :

- primo, le système de l'appel d'offres ne peut se substituer à une régulation permanente, dont le rôle minimum est de vérifier que les standards de qualité promis contractuellement sont bien respectés. D'autre part, il est habituel dans tous les systèmes d'adjudication (sauf les plus courts) d'autoriser l'entreprise titulaire d'ajuster ses prix en fonction de l'évolution des coûts sous-jacents. Plus la procédure de soumission est longue, plus elle s'apparente à une régulation en bonne et due forme ;
- secundo, comme dans toutes les autres formes de passation de marchés, une attention particulière doit être dévolue au processus d'appel d'offres afin de s'assurer que le marché des

candidats potentiels est aussi étendu que possible, et d'éviter toute collusion ou manipulation. Cet aspect est abordé plus loin dans le présent document ;

- tertio, les règles européennes en matière de passation de marchés exigent dans un certain nombre de cas qu'il y ait appel d'offres, notamment lorsque la valeur des services achetés par les autorités dépasse un certain seuil.

Le système de l'appel d'offre convient-il au secteur de la collecte des déchets ? On peut remarquer premièrement que ce secteur génère peu ou pas d'investissements irrécupérables. Les immobilisations à long terme sont inexistantes en raison d'un marché de l'occasion pour les seuls actifs d'une certaine importance comme les bennes mécaniques. Certaines entreprises effectuent un certain volume d'investissements destinés à entretenir les relations avec leur clientèle, mais il s'agit là de données pouvant dans une certaine mesure être vérifiées contractuellement. Deuxièmement, les services liés à la collecte des déchets sont suffisamment homogènes pour que les candidats potentiels soient en principe en mesure d'acquérir une bonne compréhension des coûts liés à cette activité par le biais de leurs expériences sur d'autres marchés. Par conséquent l'avantage dont dispose le titulaire en matière d'information est potentiellement faible. Troisièmement, dans le secteur d'activité qui nous intéresse, les paramètres fondamentaux applicables à la qualité du service (fréquence de collecte, services, indice de satisfaction de la clientèle) peuvent être spécifiés de manière suffisamment précise pour permettre un contrôle effectif de la qualité.²² Pour finir, il est possible d'affirmer que le secteur de la collecte des déchets se prête bien au système de l'adjudication :

"Les caractéristiques de l'activité de collecte des déchets montrent qu'(aucun) de ces problèmes potentiels ne sont susceptibles de devenir significatif. Les coûts irrécupérables liés au processus de soumission seront vraisemblablement bas, alors que la différence d'information entre titulaire et postulant ne devrait pas être importante. Il est possible d'établir un contrat permettant une évaluation des volumes traités et dans lequel le contrôle et le respect des obligations sont relativement simples. La marge de manœuvre de comportements opportunistes incontrôlés n'est donc pas très large, à condition que des sanctions puissent être appliquées en cas de défaut, comme c'est le cas lorsque les contrats font l'objet d'une remise en concurrence périodique. Ces facteurs permettent de penser *a priori* que l'industrie de la collecte des déchets représente un secteur de services dans lequel la concurrence a toutes les chances de pouvoir jouer librement."²³

En réalité, le recours à l'appel d'offres est un système largement répandu au sein de nombreux pays de l'OCDE. Au Danemark, par exemple, 85 pour cent des collectivités locales font actuellement appel à des entreprises privées pour la collecte et l'évacuation des déchets (contre 27 pour cent en 1991), de même qu'en Norvège, 73 pour cent des municipalités ont recours au privé pour ce type de services. Cette proportion est de 63 pour cent en Suède.²⁴

Dans une étude portant sur un certain nombre de villes américaines, Nelson (1977) constate que les pourcentages de communes américaines qui font appel à des fournisseurs de services privés sont de 83 pour cent pour l'enlèvement de produits dangereux, 73 pour cent pour les déchets solides, 69 pour cent pour les déchets industriels et 44 pour cent pour le marché des particuliers.²⁵

Encadré n° 3 : avantages et inconvénients du système de l'adjudication par appel d'offres

Le fait de procéder régulièrement à la remise en concurrence des marchés publics comporte des avantages et des inconvénients. Parmi les avantages, on note la possibilité pour l'autorité de régulation de réduire de manière significative son handicap sur le plan de l'information, la procédure d'adjudication ayant pour effet de mettre à jour des informations clés sur les véritables coûts liés à la fourniture du service concerné. En conséquence, on considère que le contrôle des prix est en principe plus efficace dans le cadre d'un tel système. Les inconvénients résident dans ce que les économistes dénomment les problèmes de "rétention d'information" et d'"opérations occultes" (des questions également abordées sous l'aspect "risque moral" et "sélection négative").

La question des opérations occultes peut donner lieu à l'explication suivante : si le nouveau franchisé doit effectuer des investissements dont la valeur dépend du renouvellement de sa franchise, et si l'autorité de régulation n'est pas en mesure de surveiller avec efficacité l'action du franchisé titulaire, ce dernier sera peu incité à effectuer de tels investissements au fur et à mesure qu'il se rapproche de la fin de son contrat. C'est une des raisons pour lesquelles les franchises sont rares (et lorsqu'elles existent, c'est pour de très longues durées) dans le secteur des services des télécommunications ou de la distribution d'énergie au niveau local. Dans chacun de ces cas, les investissements effectués dans l'entretien du réseau sont très difficiles à surveiller, avec un risque réel que le titulaire du marché laisse le réseau se détériorer au fur et à mesure que la fin de son agrément approche.

Les problèmes de rétention d'information surviennent lorsque, au moment du renouvellement du contrat, le titulaire est susceptible de disposer d'informations de meilleure qualité quant à la valeur du contrat et à celle de tout investissement qu'il a pu effectuer en relation directe avec sa relation contractuelle (par exemple, le niveau d'entretien des équipements à durée de vie longue). Conscients de ce décalage, les candidats potentiels vont avoir tendance à penser que, compte tenu du niveau supérieur d'information dont dispose le titulaire, leur lutte contre ce dernier risque de se traduire par une perte financière, avec par conséquent le risque de décourager toute concurrence dans l'appel d'offres.

Un des autres inconvénients du système de l'adjudication réside dans la possibilité de "confiscation", en d'autres termes l'éventualité que le contrat se révèle difficile à exécuter après son adjudication, fournissant au gagnant une occasion de menacer de retirer ses prestations ou d'en réduire la qualité dans le but d'obtenir de meilleures conditions. Le contrat n'est pas facile à faire appliquer si le gagnant du marché (ou ses propriétaires) dispose de peu de capital ou s'il est à l'abri de toute condamnation (c'est-à-dire trop pauvre pour payer les dommages-intérêts résultant de la rupture des obligations contractuelles).

Face à la menace de voir un tel opérateur retirer ses services, les collectivités locales peuvent recourir à deux alternatives : remettre le contrat en concurrence ou renégocier avec le titulaire. La raison pour laquelle la collectivité locale peut être tentée de renégocier plutôt que de remettre simplement le contrat sur le marché est de deux ordres : primo, les coûts associés à une interruption de service peuvent se révéler très importants - l'accumulation de déchets représente rapidement une nuisance publique et un risque sanitaire ; secundo, les coûts liés à une procédure d'appel d'offres ne sont pas négligeables. L'autorité de contrôle doit consacrer un soin tout particulier à la spécification des conditions dans lesquelles les services requis devront être apportés ainsi qu'aux modalités détaillées de la procédure de soumission. Si le coût cumulé de l'interruption de service et de la procédure d'appel d'offres à proprement parler atteint disons 5 millions de \$ (soit env. 30 millions de francs), l'opérateur sera susceptible, après avoir obtenu la franchise, de chercher à renégocier les conditions du contrat, étant donné qu'il sait que les pouvoirs publics seront prêts à faire des concessions à hauteur de 5 millions de \$ plutôt que de reprendre à zéro tout le processus d'attribution du marché. Les autres candidats, anticipant sur cette évolution, sont d'ailleurs susceptibles de surenchérir de 5 millions avec l'espoir ferme d'obtenir des concessions *a posteriori*.

Cet effet secondaire peut être combattu en exigeant du candidat qui l'emporte le dépôt d'une garantie du même montant, dont il est entendu qu'elle sera perdue en cas d'inexécution totale ou partielle des obligations contractuelles avant l'expiration normale du contrat,²⁶ ou encore compensé par la prise en considération de la réputation de l'entreprise au moment du choix du gagnant. Une entreprise sera moins tentée de violer ses obligations contractuelles si elle estime que cela va obérer ses chances futures d'emporter d'autres marchés dans la même région ou ailleurs.

...

Comme c'est le cas dans le cadre des moyens de contrôle traditionnels, il n'est pas possible de s'assurer de la qualité du service lors d'une procédure d'appel d'offres. Nelson (1997) souligne que certains services sont caractérisés par une dimension qualitative (qu'il qualifie de "politiquement sensible") difficile à incorporer dans un contrat ou à contrôler une fois le contrat négocié. Comme l'observe Shleifer (1998), lorsqu'il est difficile de surveiller la qualité, la passation de marchés par appel d'offres devient impossible, et il est dès lors impératif que le ou les services concernés soit fournis en interne.

2.2.3 Rapport coût-efficacité du système de l'adjudication pour la fourniture de services dans le secteur des déchets solides

Plusieurs études ont tenté de démontrer le gain d'efficacité obtenu en introduisant la mise en concurrence pour l'attribution de marchés de services dans le secteur de la collecte des déchets. On peut en tirer les observations suivantes :

- aux Etats-Unis, Savas (1977), après avoir examiné 2 052 villes couvrant un tiers de la population américaine, constate que les coûts de collecte sont en moyenne 20 pour cent plus élevés lorsque ce sont les communes qui assurent elles-mêmes l'enlèvement des déchets des particuliers au lieu de le confier à des entreprises privées ;
- au Canada, McDavid (1985) constate que les coûts liés à la collecte des déchets des particuliers, lorsqu'elle est effectuée par des entreprises contrôlées par la commune, sont 40 pour cent plus élevés que lorsque le service est assuré par des entités privées. La productivité des équipes de collecte des entreprises privées est supérieure de 95 pour cent grâce à l'utilisation de véhicules de plus grande capacité, la mise en place d'équipes plus réduites, et le recours accru aux primes d'efficacité et à une politique de salaires moins élevés ;
- en Suisse, une étude réalisée en 1970 et portant sur 103 villes de la Confédération Helvétique, a montré que le coût de la collecte des déchets des particuliers effectuée par des entreprises privées était inférieur de 20 pour cent en moyenne par rapport à la collecte effectuée par une entreprise publique ;²⁷
- au Royaume-Uni, dans la période qui a précédé l'introduction de l'obligation de recourir à l'adjudication, Domberger et al (1986) ont constaté que le coût de la collecte des déchets était inférieur de 22 pour cent là où les communes contractaient avec des entreprises privées. Ils ont également constaté que les coûts sont plus bas de 17 pour cent dans les cas où le contrat a été attribué à l'entreprise dépendant de la collectivité locale ou au prestataire de services "maison", ce qui démontre que c'est la concurrence plutôt que l'effet de propriété résultant de la privatisation qui a été déterminant dans ces économies ;²⁸
- au Danemark, des études montrent qu'en 1990-91, les communes danoises qui pratiquaient la mise en concurrence obtenaient des économies évaluées en moyenne à dix pour cent ;
- en Norvège, une étude réalisée par l'autorité de régulation de la concurrence a constaté que les coûts les plus bas (NOK 596,5) étaient obtenus par les communes ayant ouvert la procédure de soumission à tous les types d'entreprises. En revanche, les coûts étaient significativement plus élevés dans les communes ayant limité le nombre des entreprises invitées à soumissionner ou qui avaient fait précéder la procédure d'adjudication par des négociations préliminaires (respectivement NOK 658,5 et 649,4).

Tableau 2 : Economies obtenues grâce à la sous-traitance au privé des services liés à la collecte des déchets

Auteurs	Pays	Date	Economies constatées
Savas & Stevens	USA	1975	Collecte par la commune de 29 à 37% plus chère
Pommerehne & Frey	Suisse	1977	Sous-traitance au privé = économie d'environ 20%
Hamada & Aoki	Japan	1981	Collecte par la commune 124% plus chère
McDavid	Canada	1984	Collecte publique de 40-50% plus chère
Domberger et al	United Kingdom	1986	La mise en concurrence amène une réduction des coûts d'environ 20% sans preuve évidente que l'économie se fera aux dépens de la qualité du service

Source : Parker (1990), Tableau 1, p. 660.

Les détracteurs du système de l'adjudication fondent leur critique sur le fait que ces économies sont obtenues au prix d'une réduction de la rémunération des ouvriers et/ou d'une qualité du service moindre. Une étude réalisée en Norvège par l'autorité de régulation de la concurrence permet de penser que la qualité n'a pas été significativement détériorée, du moins dans la procédure d'adjudication utilisée en Norvège. 39 pour cent des communes étudiées déclarent que la qualité du service a progressé contre 52 pour cent qui affirment que cette qualité n'a pas évolué avec l'introduction de la mise en concurrence. Huit pour cent d'entre elles seulement affirment avoir constaté une baisse de la qualité.

Une étude²⁹ réalisée au Royaume-Uni a tenté d'identifier plus précisément l'origine des économies sous-jacentes au processus de mise en concurrence. Il a été constaté dans le cas d'un contrat faisant l'objet d'un appel d'offres auprès d'un sous-traitant privé extérieur, que les trois-quarts des 22 pour cent d'économies identifiés découlent plus de l'amélioration de l'efficacité sur le plan technique (en d'autres termes une utilisation plus efficace de la main d'œuvre et des investissements en équipements) que de prix de départ plus bas. Il est intéressant de remarquer que dans le cas d'un contrat attribué à une entreprise dépendant de la collectivité locale, deux cinquièmes seulement des 17 pour cent économisés ont pu être attribués à une amélioration de l'efficacité technique. Cubbin et al. (1987) soulignent que :

"Certains observateurs ont affirmé que les économies sont en grande partie dues à la perte de revenu des employés en raison du bas niveau des salaires et des avantages sociaux pratiqués. Nos résultats ne nous permettent pas de souscrire à ce point de vue. Nous constatons que pour les communes faisant appel à des entreprises privées, la majeure partie des économies peut être attribuée à des améliorations obtenues dans le domaine de l'efficacité technique, en d'autres termes à la productivité matérielle des hommes et des véhicules. Seule une proportion marginale de ces économies peut être attribuée à d'autres facteurs d'ordre pécunier. Il est étonnant de constater que, pour les communes ayant conservé des équipes "maison", les améliorations en matière d'efficacité technique ne représentent qu'environ 40 pour cent des économies réalisées. Les 60 pour cent restants peuvent être dus à des réductions significatives d'effectifs ayant pour conséquences des ratios homme-véhicule beaucoup plus bas. ;... Inversement, les équipes "maison" peuvent se révéler moins efficaces que leurs homologues du privé et réduire leurs niveaux de salaires afin de rester concurrentiels. Bien que ces deux facteurs présentent une bonne cohérence par rapport aux conclusions de l'étude, nous n'avons pas de preuve directe du bien-fondé du dernier cité."³⁰

2.2.4 Une structure de tarifs et de revenus efficaces

Si les gros producteurs de déchets payent leur collecte sur la base d'unités de poids ou de volume, il apparaît dans la plupart des collectivités locales des pays de l'OCDE que ce service n'est pas facturé de la même manière aux particuliers et aux petites entreprises. Au lieu de cela, la collectivité locale rémunère directement le fournisseur de services avec des fonds publics. Le montant marginal facturé pour tout dépassement de la quantité de déchets produite est égal à zéro. La question se pose alors de savoir si cette structure tarifaire est optimale.

hormis quelques cas isolés, on connaît bien les principes qui gouvernent actuellement la structure optimale des prix, dans ce secteur comme dans n'importe quelle autre branche de l'économie. En présence d'une structure tarifaire optimale, les consommateurs paient un prix marginal égal au coût marginal de la collecte d'une unité supplémentaire de déchets. En raison des économies de densité, le rapport du seul consommateur marginal ne sera probablement pas suffisant pour couvrir la totalité des coûts. Le coût résiduel pourrait être récupéré par le biais d'un droit fixe appliqué au consommateur ou (ce qui est pratiquement équivalent) par la fiscalité générale sur les revenus.³¹

On dénombre cependant un certain nombre d'éléments extérieurs négatifs associés à la collecte et à l'évacuation des déchets : les décharges se traduisent par un coût esthétique et sanitaire sur le voisinage ; quant aux incinérateurs, ils génèrent une pollution atmosphérique et des résidus dangereux. Ces facteurs extérieurs ont pour effet d'augmenter le coût total ou "social" de l'évacuation des déchets. Ne pas mettre les producteurs de déchets face à ces coûts serait pour eux une incitation à en produire de trop grandes quantités. Kinnaman et Fullerton (1997) résument la situation aux Etats-Unis de la manière suivante :

"Aux Etats-Unis, la plupart des communes financent les services liés à la collecte des déchets par le biais de ressources générales ou mensuelles qui ne présentent pas de variation par unité de déchets collectée sur le trottoir, amenant ainsi les usagers à penser que tout surcroît de déchets à enlever le sera de manière gratuite. Ce type de prestation publique pourrait perdurer sous sa forme actuelle si la partie service qu'elle contient en était indissociable ; mais les fournisseurs de services sont capables de donner un prix par unité de déchets collectée. Un nombre toujours croissant de communes ont ainsi commencé à vendre des autocollants ou des marques devant être fixés sur les sacs de déchets déposés sur le trottoir, sous peine de ne pas être ramassés. Ce genre d'innovation peut avoir un certain nombre d'effets positifs. Le prix du marquage par sac peut inciter les ménages à produire les déchets destinés aux décharges en moins grande quantité, participer à l'augmentation des ressources, réduire les problèmes de budget et faire baisser la fiscalité foncière. Une telle démarche apporte également une motivation pour envisager le recyclage et le compostage, voire une réduction à la source sous la forme d'une demande pour moins d'emballage."³²

La pratique montre que faire payer un droit pour la collecte des déchets à l'unité ne va pas sans difficultés. Ces difficultés dépendent notamment du niveau de la facturation ; faire payer la collecte des déchets peut par exemple inciter certains ménages à recourir à des pratiques inefficaces, voire dangereuses. Pour ne citer qu'un exemple, la facturation de la collecte des déchets sur la base du volume peut avoir pour effet d'inciter les ménages à cesser tout effort pour compacter leurs déchets lorsque cela est fait de manière plus efficace par un broyeur de grande taille.³³ Faire payer la collecte sur la base du poids plutôt que du nombre de sacs est plus compliqué sur le plan administratif et se révèle en réalité impraticable.

Plus important, la facturation de la collecte des déchets risque d'inciter les ménages à se débarrasser de leurs déchets de manière illégale, dans des endroits isolés ou sur des terrains vagues. Fullerton et Kinnaman (1996) ont estimé quel était le pourcentage de diminution des déchets déposés pour enlèvement résultant de la mise en place d'une facturation, et ont trouvé la preuve que la décharge sauvage

peut représenter un tiers de cette diminution. Des 1 422 ménages étudiés par Reschovsky et Stone (1994), 20 pour cent admettent s'être mis à brûler leurs déchets en réaction à la mise en place d'un droit, et 51 pour cent déclarent penser que le phénomène de décharge sauvage avait progressé. Fullerton et Kinnaman (1995) montrent que lorsque la décharge sauvage devient un problème, le droit optimal en matière de collecte de déchets se rapproche de zéro.³⁴ Pour résumer, lorsque le coût de la prévention de la décharge sauvage est élevé, ce phénomène représente un type de facteur externe dont l'importance peut être réduite en subventionnant les prix plutôt qu'en les augmentant.

En tout état de cause, ne pas faire payer de droit sur la collecte des déchets n'aura que peu d'effet sur les volumes collectés. Dans une étude réalisée en 1997, Fullerton et Kinnaman comparent 100 villes ayant mis en place une facturation de la collecte des déchets avec 800 autres ne l'ayant pas fait. L'étude conclut que les ménages réagissent peu à la mise en place de droits – en moyenne, dix pour cent d'augmentation des prix des autocollants se traduit par une baisse des quantités de 0,3 pour cent seulement.³⁵

Si le fait de faire payer la collecte des déchets augmente la tentation de décharge sauvage, la question reste de savoir s'il existe un mécanisme de fixation des prix capables de solutionner le problème sans faire appel à la mise en place de droits. Il serait en principe possible de fournir la même incitation pour réduire le volume des déchets par une taxe sur l'emballage, combinée avec le paiement d'une subvention pour le recyclage. Un exemple d'un tel système est la pratique bien connue de la consigne récupérable pour les emballages de boissons recyclables.³⁶

2.3 *Aspects de la concurrence dans le secteur de la collecte des déchets solides*

Avant examiné le rôle de la concurrence dans l'industrie de l'évacuation des déchets, nous allons maintenant nous pencher sur le rôle des autorités de régulation de la concurrence et leur travail dans ce domaine. Nous mettrons particulièrement l'accent sur les mesures prises pour faire respecter la concurrence et sur la participation et l'aide des autorités dans la conception des appels d'offres.

2.3.1 *Respect de la concurrence traditionnelle dans le secteur de la collecte des déchets*

L'analyse ci-dessus a permis de mettre en lumière le fait que de nombreux secteurs de l'industrie des déchets solides ne soient pas soumis à un niveau élevé de concurrence et que certains secteurs ne connaîtront pas de concurrence du tout. La concurrence risque d'être limitée sur les marchés de la collecte et de l'évacuation des déchets des petites et moyennes entreprises. Sur ces marchés, en effet, la concurrence ne peut être maintenue qu'au prix d'actions spécifiques pour la faire appliquer. Certaines affaires ont soulevé des interrogations sur les phénomènes de concentration (tant dans le secteur de la collecte que de l'évacuation des déchets) et sur l'accès aux équipements indispensables. Dans les deux cas, les autorités de régulation de la concurrence ont imposé des conditions qui atténuent l'impact sur la concurrence.

- Aux Etats-Unis, le District of Jersey a récemment contesté une proposition de fusion entre Waste Management Inc. (la plus importante entreprise de collecte et d'élimination de déchets des Etats-Unis) et Eastern Environmental Services, qui fournit ce même type de services dans les états de New York, New Jersey, Pennsylvanie, Delaware et Floride. Selon le DoJ, cette fusion aurait pour effet une réduction considérable de la concurrence en matière de collecte et d'évacuation des déchets sur neuf marchés, y compris celui des particuliers du secteur de New York City à la suite de la fermeture de la seule décharge programmée pour 2001. Pour beaucoup de ces marchés, le rapprochement entre Waste Management et Eastern se serait traduit par une concurrence réduite à deux grands opérateurs seulement. Le DoJ a annoncé

une décision pour janvier 1999 sous la forme d'un accord dans le cadre duquel les deux entreprises acceptent de renoncer aux installations de collecte et de traitement des déchets à New York et dans plusieurs autres villes.³⁷

- Au Canada, dans un litige portant sur l'acquisition par Canadian Waste Services, Inc. des actifs de W M I Waste Management of Canada, Inc., à Edmonton (Alberta), le Bureau de la Politique de Concurrence a requis le retrait de certains circuits de collecte et d'équipements assurant la desserte du marché des petites et moyennes entreprises en même temps que la renonciation à une station de traitement de déchets. Le BPC a également demandé qu'un concurrent désigné bénéficie de l'accès (payant) à l'un des sites d'enfouissement concernés par la fusion.

Une autre préoccupation en matière de concurrence concerne les obstacles que le cadre contractuel constitue pour l'entrée de nouveaux opérateurs sur le marché. Il est en effet possible d'empêcher l'arrivée de nouveaux intervenants sur les compartiments concurrentiels du secteur de la collecte des déchets par le biais de différents régimes contractuels comme les contrats à long terme et les préavis de résiliation de plusieurs mois – de telles dispositions ont pour effet de limiter le rythme auquel les contrats sont susceptibles d'être perdus au profit de la concurrence. Il est également possible de bloquer toute entrée sur le marché au moyen de clauses d'ajustement des prix, permettant au titulaire de contrer toute forme d'offre extérieure. Le secteur des déchets n'est pas le seul dans lequel on constate que ce type de clauses va à l'encontre du libre jeu de la concurrence.

2.3.2 Amélioration de la concurrence dans les processus d'adjudication

L'efficacité et la compétitivité des systèmes de mise en concurrence peuvent être améliorées en portant une attention accrue aux processus d'appel d'offres eux-mêmes, et en particulier aux points développés ci-après :

2.3.2.1 Spécifications des services à fournir et sélection des entreprises autorisées à soumissionner

La région géographique devant être couverte ne doit être ni trop réduite ni trop étendue. Elle doit être suffisamment vaste pour permettre aux entreprises obtenant les marchés d'exploiter des économies d'échelle et de densité. S'il en va autrement, les entreprises desservant des régions voisines bénéficieront d'un avantage sur le plan de la concurrence, en ce sens qu'elles seront seules à pouvoir exploiter des économies de densité. Comme nous l'avons déjà indiqué plus haut, les études de coûts permettent de penser que la limite des économies en matière de collecte se situe à environ 50 000 habitants.

D'autre part, la région géographique ne doit pas non plus être vaste au point de limiter le nombre des entreprises capables de fournir le niveau de service requis. Lorsque la taille de la ville ou de la région administrative est beaucoup plus importante que le niveau minimum efficace de collecte, il faut envisager de ventiler la région en plusieurs sous-régions de moindre importance et de procéder à des appels d'offres pour chacune d'entre elles. Un tel système permet de comparer l'efficacité des entreprises desservant différentes régions, de réduire les dysfonctionnements liés à l'absence de service en cas d'interruption d'activité d'une entreprise unique, et d'améliorer la probabilité de voir plusieurs entreprises entrer en compétition lorsque le marché est remis en concurrence. Au Danemark, la troisième plus grande commune du pays (Odense) a divisé sa région géographique en quatre zones et a procédé à des appels d'offres différents pour chacune d'entre elles. Dans l'optique de garantir une concurrence digne de ce nom à l'avenir, la ville suédoise d'Uppsala a divisé le territoire dont elle a la charge en plusieurs

sous-régions et a organisé pour chacune d'entre elles des procédures de soumission qui sont organisées successivement région après région au fur et à mesure que les contrats arrivent à expiration.

Les processus d'adjudication ne doivent pas limiter le nombre ni le type des entreprises autorisées à participer en raison de leur appartenance à des groupes extra territoriaux ou extra régionaux.

2.3.2.2 Divulgence des informations relatives aux appels d'offres

Ainsi que l'ont abordé les participants à la session du CLP sur les passations de marchés, les systèmes utilisés pour l'adjudication des services communaux peuvent donner lieu à collusion : il est probable qu'à force de se retrouver systématiquement à quelques uns sur de nombreux marchés différents, les opérateurs seront tentés de développer – explicitement ou implicitement – des politiques conduisant à terme à une diminution de la concurrence entre eux. Les processus d'appels d'offres devraient par conséquent être conçus avec à l'esprit la préoccupation de ne pas amplifier la tendance à la collusion.

Pour exister, la collusion passe par la capacité de détecter et sanctionner tout écart par rapport aux règles communes de l'entente. Il sera par conséquent plus facile d'avoir des cas de collusion dans le cadre de politiques imposant le recours à l'adjudication publique ou l'obligation de divulgation de toutes les offres soumises dans le cadre d'un processus d'appel d'offres confidentiel. Le fait de divulguer les informations contenues dans l'offre gagnante peut à lui seul permettre à une entente de repérer n'importe quel écart par rapport à la règle fixée en son sein. Bien que la législation imposant la divulgation des informations contenues dans les appels d'offres écarte cette possibilité dans de nombreux pays, il est préférable du point de vue de la concurrence d'employer le système de l'offre confidentielle et de ne pas divulguer les informations. Une réponse pourrait être apportée aux préoccupations relatives au favoritisme politique sous la forme d'une autorité indépendante (comme par exemple l'autorité de régulation de la concurrence) chargée de superviser l'ensemble des procédures de passation des marchés publics et pourvue d'un droit d'accès à toute offre, quelle qu'en soit la nature.

2.3.2.3 Mise en application de la concurrence – Accès non discriminatoire aux équipements de base

L'application des règles générales de concurrence permet de renforcer la concurrence au sein des processus d'appels d'offres, et d'assurer l'accès aux équipements indispensables. Dans certaines régions, il peut arriver que la concurrence relative aux équipements d'évacuation des déchets soit très limitée, voire inexistante. Dans ce cas, les entreprises qui ne disposent pas de leurs propres installations seront désavantagées dans le processus de mise en concurrence en ce sens qu'elles devront limiter leur offre à la collecte. Dans le litige canadien évoqué plus haut, la fusion n'a été autorisée que sous réserve d'autoriser les concurrents éventuels à accéder à la décharge. Une solution préférable consiste à ce que les installations de collecte et d'évacuation ne soient pas la propriété d'une seule et même entreprise, et/ou à empêcher les propriétaires d'installations d'évacuation de déchets de participer à des appels d'offres relatifs aux services de collecte.

2.3.2.4 Garantir la neutralité de la concurrence

Dans de nombreux cas de figure, c'est une émanation de la collectivité locale elle-même qui est en mesure de fournir les services qui sont achetés par voie d'appel d'offres. La question qui se pose alors est celle de savoir si des entreprises publiques dépendant de la collectivité locale doivent être autorisées à participer aux procédures de passation des marchés. La réponse dépend de la capacité de la collectivité locale de pourvoir sa filiale des moyens nécessaires pour qu'elle soit sur un pied d'égalité par rapport aux entreprises du secteur privé.

"Les pouvoirs publics et leurs agences opèrent dans des environnements qui leur donnent un certain nombre d'avantages et d'inconvénients par rapport aux fournisseurs de services privés. Ainsi, les agences publiques sont souvent exemptées de taxes et autres droits locaux. Le fait d'appartenir à une entité publique peut conférer une immunité totale face au risque de faillite, mais peut comporter des obligations plus lourdes en matière de comptabilité ou d'emploi."³⁸

La neutralité concurrentielle est garantie lorsque les candidats du privé comme du public se retrouvent face à des cadres réglementaire, juridique, financier et administratif équivalents. Dans de nombreux pays, les opérateurs publics sont tenus de respecter les mêmes structures juridiques que les entreprises du privé (phénomène décrit sous la dénomination de "corporatisation"). Un minimum consisterait à ce que les opérateurs publics fonctionnent comme des entités autonomes sur le plan commercial, avec des comptes propres, une gestion nettement séparée du volet contractuel, et un assujettissement à l'ensemble des taxes et droits applicables y compris un ratio de retour sur fonds propres approprié à la nature de l'entreprise.³⁹

3. Conclusion

Les collectivités locales, pas plus que les gouvernements ou les états, ne peuvent exercer d'influence significative sur l'économie. À l'inverse, il apparaît que ces collectivités locales ne sont pas nécessairement soumises à des facteurs qui les inciteraient à mettre en œuvre des systèmes de contrôle efficaces, et que, dans certains cas, c'est la législation votée par l'administration centrale qui limite leur aptitude à ce type d'actions. La faiblesse des facteurs susceptibles d'inciter les collectivités locales à plus d'efficacité semble aller de pair avec le niveau de ressources que ces derniers sont en mesure de collecter par leurs propres moyens.

C'est dans le secteur de la gestion des déchets solides que l'action des collectivités locales est particulièrement importante. D'autre part, comme pour la distribution du courrier, la collecte des déchets fait apparaître des économies de densité. Par ailleurs, il y a peu de chances pour que se développe une concurrence sur le marché de type traditionnel dans le secteur de la collecte des déchets des particuliers. En conséquence, les collectivités locales optent soit pour une fourniture de ces services par leurs propres moyens, soit pour leur sous-traitance à un fournisseur privé. La théorie montre et les études sur le terrain confirment que la collecte des déchets solides fait partie des services qui ont toutes les chances d'être exécutés avec plus d'efficacité par des entreprises du secteur privé. Le peu de place réservé à la concurrence dans de nombreux compartiments de ce secteur permet de penser qu'il y a une action à mener pour la mise en œuvre d'une concurrence active et la supervision des processus d'appels d'offres afin de garantir dans le temps le libre jeu de cette même concurrence.

NOTES

- 1 La publication de l'OCDE intitulée "La Gestion Publique à travers les Différents Niveaux d'Administration" (1997).
- 2 Carlsen note : "L'existence de facteurs extérieurs fournit une justification au contrôle central (des collectivités locales). Les collectivités sont incitées à dépenser trop peu dans les services qui produisent des "retombées" profitables ou qui attirent des ménages pauvres et à dépenser trop dans des services qui attirent des entreprises et des contribuables riches." Carlsen (1995), p. 44.
- 3 Carlsen (1995), p. 44.
- 4 Carlsen (1995), p. 44.
- 5 Carlsen (1995), p. 56.
- 6 Cet argument est utilisé dans le cadre de la suppression des fonds alloués par l'administration centrale aux différentes collectivités locales. Il est exact qu'une réduction générale de la participation de l'administration centrale qui toucherait toutes les collectivités locales d'un même pays (et qui se traduirait par une augmentation de la fiscalité locale) pourrait être totalement compensée par une réduction de la fiscalité centrale, de sorte qu'au final, les contribuables ne seraient pas davantage pénalisés.
- 7 Carlsen (1995), p. 43-44
- 8 Lopez-de-Silanes, Shleifer & Vishny (1997), p. 459
- 9 Voir Domberger et al (1986), p. 70. La suppression de l'obligation de procéder par appel d'offres ("Compulsory Tendering"), a été annoncée pour 1998.
- 10 Bien que la concurrence puisse exister à la frontière des zones desservies par chacun des opérateurs et que cette même concurrence puisse être possible si deux entreprises ou plus fournissent des services suffisamment différenciés.
- 11 Stevens (1978), p. 445
- 12 In one Canadian case these customers were found to be served using a different technology (front-end loading trucks) than either residential or industrial customers and were held to constitute a distinct market. The Canadian Competition Bureau identified four distinct product markets in non-hazardous solid waste collection: "(a) the commercial lift-on-board service, also known as front-end service, involves the collection of containers of waste from front-end trucks from customers who generate a significant quantity of solid waste and are often restaurants, offices, and small commercial establishments; (b) the industrial market, also known as roll-off service, is required by industrial customers who generate large amounts of waste, which is often not compactible. The large containers used to collect this waste are loaded onto flat-bed trucks and taken to dry disposal sites; (c) the residential market involving the collection of small quantities of waste from individual residences and apartments pursuant to contracts with cities, towns and municipalities. Contracts are generally awarded on the basis of tenders; (d) the recycling market involving the collection of recyclable solid waste from residences and apartments. Like residential service, this service is provided under contracts with cities, towns and municipalities, a significant portion of which are awarded on the basis of tenders". Canadian Competition Tribunal, in the matter of an acquisition by Canadian Waste Services Inc., of certain

non-hazardous solid waste management assets of W M I Waste Management of Canada, Inc. in Edmonton, Alberta. CT-98/01

- 13 Voir Stevens (1978).
- 14 Cf. tribunal canadien de la concurrence, affaire portant sur l'acquisition par Canadian Waste Services Inc. de certains équipements d'élimination de déchets solides non-dangereux à W M I Waste Management of Canada, Inc. à Edmonton, Alberta. CT-98/01
- 15 "Dans l'univers des services publics, c'est probablement la collecte des déchets qui présente la plus grande diversité de pratiques dans son organisation".
- 16 Young (1974), p.45
- 17 Young (1974), p.46
- 18 Cf Stevens (1978)
- 19 Ces informations sont tirées d'une étude effectuée en 1998 par les autorités responsables de la concurrence dans les pays du Nord et présentée sous le titre "Exposing Local Services to Competition" (Introduction de la concurrence dans les services locaux - Konkursutsetting av Kommunalvirksomhet, 1er août 1998)
- 20 La Commission Australienne de l'Industrie a préparé une étude très détaillée sur l'utilisation de l'adjudication. Voir Industry Commission (1996).
- 21 Domberger et al (1986), p. 72
- 22 Young note : "En résumé, pour être viable, un système contractuel de collecte des déchets devrait englober un ensemble de dispositions et de spécifications élaborées avec soin pour attirer un nombre suffisant de candidats compétents : l'exigence de références pour les entreprises de collecte, la ventilation de la juridiction locale en différentes zones contractuelles, dont chacune d'entre elles serait suffisamment vaste pour que la présence d'une seule entreprise de collecte soit supportable sur le plan économique, ... (et) la capacité des autorités à vérifier le respect des dispositions contractuelles. Les systèmes existants ne répondent pas toujours à ces exigences. Mais l'établissement d'une relation contractuelle semble être le seul système de collecte privée capable de préserver une réelle incitation à l'efficacité et d'éviter les contre-économies de la libre concurrence. Young (1974), p. 60.
- 23 Domberger et al (1986), p. 73
- 24 Données tirées d'une étude effectuée en 1998 par les autorités responsables de la concurrence dans les pays du Nord et présentée sous le titre "Exposing Local Services to Competition" (Introduction de la concurrence dans les services locaux - Konkursutsetting av Kommunalvirksomhet, 1er août 1998)
- 25 Nelson (1997), Tableau III, p. 92
- 26 Un des problèmes liés au dépôt de garantie pour bonne exécution réside dans le risque que court le gagnant du marché de ne pas être en mesure de remplir ses obligations pour des raisons indépendantes de sa volonté. Si les entreprises qui soumissionnent ne souhaitent pas prendre ce

risque, leur vulnérabilité peut être diminuée (moyennant une augmentation du risque de "confiscation") en réduisant le montant du dépôt de garantie ou en raccourcissant la durée du contrat.

- 27 Pommeroy & Frey (1977). Parker (1990) cite également des études réalisées par Hirsch (1965), Pier et al (1974), Kitchin (1976), Edwards & Stevens (1978) et Bennett & Johnson (1979). Voir également l'étude réalisée par Domberger & Jensen (1997).
- 28 Pour une critique de ce rapport, voir Ganley & Grahl (1988) et la réponse de Domberger et al (1988).
- 29 Cubbin et al (1987)
- 30 Cubbin et al (1987), p. 53-54. L'importance de la notion de propriété comme facteur d'efficacité à long terme a été mise en évidence par une autre étude réalisée quelques années après par Szymanski (1966). Cette étude constate que les baisses de coûts enregistrées immédiatement après l'attribution d'un contrat par adjudication ne durent pas lorsque celui-ci est attribué à un fournisseur de service "maison". L'étude constate que dans les troisième, quatrième et cinquième années d'un marché de cinq ans, les coûts d'un fournisseur "maison" n'étaient pas très différents par rapport à ceux de l'année précédant l'introduction de la procédure de mise en concurrence du marché.
- 31 Pour être précis, si les mécanismes généraux d'imposition font l'objet de distorsions (et c'est le cas pour la quasi-totalité d'entre eux), on est alors en présence d'un coût fantôme lié à l'augmentation de l'impôt sur le revenu. Le prix marginal de la collecte des déchets devrait dans ce cas être porté au-dessus du coût marginal jusqu'à ce que la distorsion causée par le prélèvement de un dollar supplémentaire sur le marché des déchets en raison d'un prix se situant au-dessus du coût marginal compense la distorsion causée par un dollar d'augmentation de l'impôt sur le revenu.
- 32 Kinnaman & Fullerton (1997), p1. Les auteurs identifient 148 communes ayant mis en place une politique de recyclage des déchets ménagers et facturant la collecte sur la base du sac enlevé.
- 33 Fullerton & Kinnaman (1996) constatent qu'en réaction à la facturation de la collecte, le nombre de sacs a chuté de 34 pour cent, mais que le poids n'a diminué que de 14 pour cent seulement, suggérant ainsi que les ménages mettaient 37 pour cent de plus de déchets dans leurs sacs.
- 34 A condition bien entendu que le facteur négatif résultant de la décharge sauvage soit plus important que celui qui découle de l'enlèvement légal.
- 35 Fullerton & Kinnaman (1997)
- 36 Cf. Fullerton & Wu (1998)
- 37 Pittsburg, Bethlehem / Allentown, Chambersburg-Carlisle et Scranton, Pennsylvanie, Miami-Fort Lauderdale et la banlieue de Tampa, Floride.
- 38 Commission sur l'Industrie (1996), p. 34
- 39 Voir Commission sur l'Industrie (1996), recommandations 12 à 21.

REFERENCES

- BENNETT, J.T. et M. H. JOHNSON, (1979), "Public versus private provision of collective goods and services: garbage collection revisited", *Public Choice*, 34, 55-63
- CARLSEN, Fredrik, (1995), "Why is Central Regulation of Local Spending Decisions So Pervasive? Evidence From a Case Study", *Public Budgeting and Finance*, 15 (1), printemps 1995, 43-57
- CUBBIN, John, Simon DOMBERGER et Shirley MEADOWCROFT, (1987), "Competitive tendering and refuse collection: identifying the sources of efficiency gains", *Fiscal Studies*, 8 (3), août 1987, 49
- DOMBERGER, S., S.A. MEADOWCROFT et D.J. THOMPSON, (1986), "Competitive Tendering and Efficiency: The Case of Refuse Collection", *Fiscal Studies*, 7 (4), 1986, 69-87
- DOMBERGER, Simon et Paul JENSEN, (1997), "Contracting Out by the Public Sector: Theory, Evidence and Prospects", *Oxford Review of Economic Policy*, 13 (4), 1997
- DOMBERGER, Simon, Shirley MEADOWCROFT et David THOMPSON, (1988), "Competition and efficiency in refuse collection: a reply", *Fiscal Studies*, 9 (1), février 1988, 86
- EDWARDS, F.R. et B.J. STEVENS, (1978), "The provision of municipal sanitation services by private firms", *The Journal of Industrial Economics*, 27, 133-147
- FULLERTON, Don et Thomas C. KINNAMAN, (1995), "Garbage, Recycling and Illicit Burning or Dumping", *Journal of Environmental Economics and Management* 29, juillet 1995, 78-91
- FULLERTON, Don et Thomas C. KINNAMAN, (1997), "Garbage and Recycling In Communities With Curbside Recycling and Unit-Based Pricing", *NBER Working Paper Series*, No. 6021, avril 1997
- FULLERTON, Don et Wenbo WU (1998), "Policies for Green Design", *Journal of Environmental Economics and Management*, 36 (2), septembre 1998, 131-148
- GANLEY, Joe et John GRAHL, (1988), "Competition and efficiency in refuse collection: a critical comment", *Fiscal Studies*, 9 (1), février 1988, 80
- HIRSCH, W. Z., (1965), "Cost functions of the urban government service: refuse collection", *Review of Economics and Statistics*, 47, 87-92
- Industry Commission, (1996), *Competitive Tendering and Contracting By Public Sector Agencies*, Rapport No. 48, 24 janvier 1996
- KITCHEN, H.M., (1976), "A statistical estimation of an operating cost function for municipal refuse collection", *Public Finance Quarterly*, 4, 56-76
- LOPEZ-DE-SILANES, Florencio, Andrei SHLEIFER et Robert W. VISHNY, (1997), "Privatization in the United States", *Rand Journal of Economics*, 28 (3), automne 1997, 447-471
- MCDAVID, J.C., (1985), "The Canadian experience with privatising residential solid waste collection services", *Public Administration Review*, 45, 602-608
- NELSON, Michael A., (1997), "Municipal Government Approaches to Service Delivery: An Analysis From A Transactions Cost Perspective", *Economic Inquiry*, 35, janvier 1997, 82-96

- OECD , (1997), *La Gestion Publique à travers les Différents Niveaux d'Administration*
- PARKER , David, (1990), "The 1988 Local Government Act and Compulsory Competitive Tendering", *Urban Studies*, 27 (5), 1990, 653-668
- PIER , W J., R B. VERNON et JH. HICKS, (1974), "An empirical comparison of government and private production efficiency", *National Tax Journal*, 27, 653-656
- POMMEREHNE, W M. et B.S. FREY, (1977), "Public versus private production efficiency in Switzerland: A theoretical and empirical comparison", *Urban Affairs Annual Review*, 12, 221-241
- RESCHOVSKY , James D. et Sarah E. STONE, (1994), "Market Incentives to Encourage Household Waste Recycling: Paying for What you Throw Away", *Journal of Policy Analysis and Management*, 13 (1), hiver 1994, 120-139
- SAVAS, E.S., (1977), "An Empirical Study of Competition In Municipal Service Delivery", *Public Administration Review*, novembre/décembre 1977, 717-724
- SHLEIFER, Andrei, (1998), "State versus Private Ownership", *Journal of Economic Perspectives*, 12 (4), automne 1998, 133
- STEVENS, Barbara J., (1978), "Scale, Market Structure, and the Cost of Refuse Collection", *Review of Economics and Statistics*, 60 (3), août 1978, 438
- SZYMANSKI, Stefan, (1996), "The impact of compulsory competitive tendering on refuse collection services", *Fiscal Studies*, 17 (3), août 1996, 1-20
- YOUNG, Dennis R., (1974), "The Economic Organisation of Refuse Collection", *Public Finance Quarterly*, 2 (1), janvier 1974, 43

QUESTIONNAIRE SUBMITTED BY THE SECRETARIAT

A study on local services and waste management faces two problems at the outset. The first is in defining what is meant by "local government". The IMF identifies four levels of government: (1) central government; (2) state, provincial, or regional governments, when they exist in a country; (3) local governments including municipalities, school boards, etc.; and (4) any supranational authorities exercising taxation and governmental expenditure functions within the national territory. The IMF goes on to define local governments as "governmental units exercising an independent competence in the various urban and/or rural jurisdictions of a country's territory".¹ For the purposes of this roundtable, we will focus on the level of government with responsibility for solid waste management, which is usually the local government.

The second potential problem is that there are potentially many hundreds (or thousands) of such governments within each member country. How can the practices of these hundreds of governments be surveyed, aggregated or summarised so as to present a meaningful picture at the national level? It is suggested that country submissions focus on specific representative cases (including, perhaps, the government of the largest city) as a way to limit the amount of information to be collected and reported. Virtually every OECD country has a national association of local governments, which is likely to be a useful source for this information.²

In some countries it appears that a distinction is made between the market for household waste collection and commercial or business waste collection, with a different regulatory regime for each. Where this is the case, your responses to the questions below may need to differentiate between these two markets. Most of these questions address competition in solid waste collection although, as you will see below, there are also questions on waste disposal and recycling.

1. The role of local authorities in regulation and procurement

This first set of questions focuses on the incentive and ability of local governments to promote efficiency and competition and the ability of central or national government to influence those incentives and abilities. In a few countries (such as Canada), local governments are a responsibility of the states (and not the federal government). For these countries, questions 1.3 and 1.4 should be answered in relation to the role of the states (as opposed to the central government) in controlling the activities of local government.

1.1 *Economic role of local government*

- (1.1) What local services is the responsibility of local authorities (i.e., regulated by, purchased by or directly provided by the local authority)? For example, in many countries the responsibilities of local authorities include the regulation of, purchase of or direct provision of local roading projects, education, public housing, public transport, water and wastewater distribution and collection, local electricity and gas distribution, solid waste collection and disposal, public parks, flood control and so on.

1.2 Revenue sources of local government and lines of accountability

- (1.2) How do local governments raise revenue? Where does the remainder of their income come from? Are local officials directly elected or appointed by a higher level of government?

1.3 Control of local government by central (or sub-national) government

- (1.3) Are there rules governing how local authorities carry out these regulatory/procurement activities? Are local authorities subject to national legislation governing how they carry out their regulatory/procurement role? For example, are local authorities required to tender for specific services? Which services? How are these requirements enforced? Are local authorities subject to regulatory review processes? Do these regulatory review processes extend to review of procurement processes?
- (1.4) Are there fiscal or financial mechanisms by which the central (or sub-national) government can control the incentives or abilities of the local authorities with respect to their regulation/purchasing role? For example, can the central government threaten to withhold funding if the local authority does not comply with certain requirements?

If the local authority engages in cost-cutting (through, say, efficiency in procurement), is it able to enjoy the resulting cost-saving itself, or would a cost-saving lead to a reduction in the funds transferred from the central government?

Overall, do local authorities face strong or weak incentives to ensure the efficient regulation/procurement of local services?

2. Regulation and procurement of solid waste

In practice, solid waste collection is often provided directly by the employees of the local government, using equipment owned by the local government. In some cases, the service is organised as a corporation, fully owned by the local government (or by associations of local governments). In other cases, the service is provided by private firms. Although the ownership structure is important, these questions focus first on the opportunities for competition in this market – can firms (possibly including the incumbent, publicly owned operator) compete for the revenue available to existing providers of this service?

2.1 Sources of revenue for solid waste service providers

- (2.1) Who pays for (purchases) solid waste collection services – is it paid for by (a) local authorities; (b) customers (i.e., households and businesses); (c) some combination, or (d) some other source?

2.2 Competition for the market – contracting out, franchising or tendering

- (2.2) In the case where some or all of the price for solid waste collection services are paid for by national or local governments, are these funds available to other firms? In other words, can other firms compete to provide the solid waste collection services, either through a tendering process, or on a customer-by-customer basis? If so, how does the tendering process operate? What is the length of time between new tenders? Are there any requirements on the tendering process designed to ensure adequate competition?

- (2.3) Which prices (paid by the government to the successful bidder) are controlled by the tender? Are these prices fixed, or can they vary with, say changes in cost and/or demand? Does the contract specify how prices will be changed over time? Is the incumbent operator allowed to keep the benefits of any cost savings it makes? How does the government ensure that quality standards are maintained? How does the government avoid claims by the bidder ex post that it is unable to provide services at the current prices, which must be raised? Does the government own any facilities, which are to be operated and maintained by the successful bidder? How does the government ensure that these facilities are maintained towards the end of the tender period? Has the local government established a separate institution for carrying out such tenders and enforcing the terms and conditions of tenders? If so, what is the nature and function of that institution?
- (2.4) Are there any regulatory controls on who may bid for or win a tender (such as a licensing requirement)? Can foreign firms participate in the bidding? Are there any controls on the ownership or the lines of business of these firms? Are there any controls on foreign ownership?

2.3 Competition in the market – controls on entry and prices

- (2.5) In the case where some or all of the price for solid waste collection services are paid for by customers (households or businesses), can other firms compete to provide these services? (i.e. is there a statutory prohibition on competition)? If other firms can compete, do they do so in practice? Is competition limited to a certain class of customers, such as those, which produce the largest quantity of waste?
- (2.6) Are the prices charged to customers for solid waste collection regulated or set by the (national or local) government in some way? What principles are used to regulate or set these prices? How does the government ensure that quality is maintained when prices are regulated? How often are the regulated prices adjusted? Has the local government established a separate institution for carrying out such price regulation? If so, what is the nature and function of that institution?
- (2.7) Where private firms compete to provide solid waste collection services, are these firms required to be licensed? What license conditions are imposed (if any)? Are there any controls on the ownership or the lines of business of these firms? Are there any controls on foreign ownership?

2.4 Related markets – waste disposal and recycling

- (2.8) How is the market for waste disposal organised? Who purchases waste disposal services? Are they paid for by customers or directly by local governments? Where they are paid for directly by customers is there competition for waste disposal services? Where they are paid for by local government, are these services subject to tendering? What is the nature of the tendering?
- (2.9) How is the market for recycling organised? What national or local legislation mandates or provides incentives for recycling? Is recycling carried out separately from other waste management? Who pays for the services? Are they paid for by customers, the local government, or by the sale of the recycled material? Is the competition for recycling services? Are these services tendered? What is the nature of the tendering?

3. Market structure and competition issues in solid waste collection

For those countries, which allow competition in solid waste collection, this section seeks to provide a picture of the market structure and the competition concerns that have arisen.

3.1 Market structure

- (3.1) In those cases where the local government tenders for the right to provide solid waste collection services, how many bids are typically received? Do the same companies all regularly bid against one another, or is there a different combination of bidders in each tender? What are the rough market shares (viewed as a proportion of the value of the total solid waste collection revenues) of these companies? Have these market shares changed over time?
- (3.2) What is the ownership of the largest firms in this industry? Are they owned by local government or a group of local governments? In those cases where the government directly owns a waste collection company, are other private firms able to compete on a competitively neutral basis?
- (3.3) In what other markets do these firms operate? Are they integrated vertically into the provision of waste disposal services (such as incinerators) or recycling? Do they also compete to provide waste services in other cities?

3.2 Competition concerns

- (4.1) Have competition concerns arisen in the solid waste industry? In particular, have there been any cases of bid rigging (in the case of tendering), market sharing or price-fixing? Have there been allegations of predatory pricing? If so, please describe.
- (4.2) Have any horizontal mergers between solid waste management firms been challenged by the competition authorities? What remedies (if any) were proposed? Have competition concerns arisen from integration into waste disposal facilities?

3.3 Other issues (including environmental issues)

Private firms facing stiff competition may face strong incentives to cut costs, and therefore, may face strong incentives to violate environmental laws when doing so reduces costs. The privatisation of waste management may therefore need to be associated with new legislation and/or strengthened enforcement of environmental laws, especially in the case of hazardous wastes.

- (5.1) Have there arisen concerns regarding violation of environmental laws? Where competition has been introduced in waste collection or disposal, was this associated with enhanced concerns regarding compliance with environmental laws? Have environmental laws or law enforcement been strengthened?

NOTES

- 1 International Monetary Fund, *A Manual on Government Finance Statistics*, 1986.
- 2 For a list of such associations see the OECD 's web site:
<http://www.oecd.org/publish/monetres/malg/malglink.htm>.

QUESTIONNAIRE SOUMIS PAR LE SECRETARIAT

Toute étude sur les services de proximité et la gestion des déchets rencontre d'emblée deux difficultés. La première est de définir ce que l'on entend par "administration locale". Le FMI distingue quatre niveaux d'administration : (1) l'administration centrale ; (2) les administrations provinciales et régionales (lorsqu'elles existent) ; (3) les administrations locales, notamment les municipalités, les conseils d'établissements scolaires, etc. ; et (4) les autorités supranationales qui assurent des fonctions fiscales et effectuent des dépenses publiques sur le territoire national. Le FMI définit les collectivités locales comme étant "des unités d'administration exerçant une compétence autonome dans les diverses circonscriptions urbaines et rurales du territoire d'un pays"¹. Dans le contexte de cette table ronde, nous examinerons particulièrement le niveau d'administration chargé de la gestion des déchets solides, c'est à dire généralement les administrations locales.

La deuxième difficulté est que chaque pays membre peut compter plusieurs centaines (ou milliers) de telles administrations. Comment les pratiques de ces multiples administrations peuvent-elles être examinées, assemblées et synthétisées de façon à présenter un tableau intelligible au niveau national ? Il est suggéré que les contributions des pays se concentrent sur certains cas représentatifs (dont, par exemple, l'administration de la plus grande ville) de manière à limiter la quantité d'information à collecter et à consigner. La quasi-totalité des pays membres de l'OCDE possèdent une association nationale d'administrations locales qui devrait constituer une source d'information utile.²

Dans certains pays, il existe une distinction entre le marché de collecte des ordures ménagères et celui de la collecte des déchets des entreprises et des industries, chacun étant soumis à une réglementation différente. Si c'est votre cas, vos réponses aux questions ci-dessous devront faire la différence entre les deux marchés. La plupart des questions concernent la concurrence dans la collecte des déchets solides, mais certaines portent également sur l'élimination et le recyclage.

1. Le rôle des autorités locales dans la réglementation et la passation des marchés

La première question porte sur les incitations et la capacité des administrations locales à rechercher l'efficacité et la concurrence, et sur la marge de manœuvre des administrations centrales ou nationales pour influencer ces incitations et cette capacité. Dans quelques pays, comme le Canada, les administrations locales sont sous la responsabilité des Etats/provinces (et non de l'état fédéral). Pour ces pays, les questions 1.3 et 1.4 doivent être comprises comme portant sur l'influence des Etats (et non de l'administration centrale) sur les activités des administrations locales.

1.1 Rôle économique des administrations locales

(1.1) Quels services de proximité relèvent de la compétence des administrations locales (réglementation, passation des marchés ou gestion directe par l'administration locale) ? Par exemple, dans de nombreux pays, les responsabilités des administrations locales couvrent la réglementation, la passation des marchés ou la gestion directe dans les projets d'infrastructure routière locale, l'éducation, le logement social, les transports en commun, la distribution d'eau et

la collecte des eaux usées, la distribution locale d'électricité et de gaz, la collecte et l'élimination des déchets solides, les parcs et espaces verts, la protection contre les inondations, etc.

1.2 Sources de revenus des administrations locales et procédures de justification de l'emploi des fonds

- (1.2) Comment les administrations locales perçoivent-elles leurs recettes ? D'où provient le reste de leurs ressources ? Les responsables des administrations locales sont-ils élus directement ou désignés par un échelon supérieur de l'état ?

1.3 Contrôle des administrations locales par l'administration centrale (ou par des administrations infra-nationales)

- (1.3) Existe-t-il des règles régissant l'exercice de ces activités de réglementation et de passation des marchés par les administrations locales ? Les administrations locales sont-elles soumises à une législation nationale régissant leur rôle de réglementation et de passation de marchés publics. Par exemple, les administrations locales sont-elles tenues de recourir à des appels d'offres pour certains services particuliers ? Quels services ? Comment le respect de ces obligations est-il assuré ? Les administrations locales sont-elles soumises à des procédures d'examen réglementaire ? Par exemple, l'administration centrale peut-elle menacer de suspendre son financement si l'administration locale ne se conforme pas à certaines règles ?

Si l'autorité locale obtient des réductions de coûts (par exemple en faisant preuve d'efficacité dans la passation des marchés), peut-elle recueillir elle-même les fruits de ses efforts, ou une réduction des coûts entraîne-t-elle une réduction des budgets octroyés par l'administration centrale ?

Dans l'ensemble, les administrations locales ont-elles ou non de fortes incitations à assurer avec efficacité la réglementation ou la passation des marchés des services de proximité ?

2. Réglementation et marchés publics dans la collecte des déchets solides

En pratique, la collecte des déchets solides est souvent assurée directement par des employés des administrations locales, avec des équipements appartenant à ces mêmes administrations locales. Dans certains cas, ce service est assuré par une entreprise qui est la propriété de l'administration locale (ou de groupes d'administrations locales). Dans d'autres cas, il est assuré par des entreprises privées. Cette question porte essentiellement sur les chances qu'auraient d'éventuels concurrents sur ce marché, même si la structure du capital est, elle aussi, un élément important : peut-il y avoir concurrence entre plusieurs entreprises (dont éventuellement l'opérateur en place à capitaux publics) pour capter les budgets alloués aux actuels prestataires du service ?

2.1 Sources de recettes pour les prestataires de services de collecte des déchets solides

- (2.1) Qui paie pour (qui achète) les services de collecte des déchets solides - sont-ils payés par (a) les administrations locales ? (b) les usagers (ménages et entreprises) ; (c) une combinaison des deux ; ou (d) une autre source ?

2.2 *L'organisation de la concurrence sur le marché – sous-traitance, concessions ou appels d'offres*

- (2.2) Si tout ou partie du budget des services de collecte des déchets solides est financé par l'administration centrale ou par les administrations locales, ce budget est-il accessible à d'autres entreprises ? En d'autres termes, d'autres entreprises peuvent-elles, par le jeu de la concurrence, obtenir des marchés de collecte des déchets solides, soit par appel d'offres, soit de gré à gré ? Si oui, comment fonctionne la procédure d'appels d'offres ? Quel est le délai entre deux appels d'offres ? Existe-t-il des règles pour protéger la concurrence dans le processus d'appel d'offres ?
- (2.3) Quels prix (versés par l'administration à l'entreprise qui a remporté l'appel d'offres) sont déterminés par l'appel d'offres ? Ces prix sont-ils fixes ou peuvent-ils varier en fonction, par exemple, des modifications des coûts et/ou de la demande ? Le contrat précise-t-il comment les prix vont évoluer au cours de la période ? L'opérateur en place est-il autorisé à conserver le fruit des compressions de coûts qu'il réalise ? Comment l'administration s'assure-t-elle du respect des normes de qualité ? Comment l'administration peut-elle empêcher l'entreprise qui a remporté l'appel d'offres de déclarer *a posteriori* qu'elle ne peut assurer le service au prix actuel et que celui-ci doit être augmenté ? L'administration possède-t-elle des équipements qui doivent être exploités et entretenus par l'entreprise qui a remporté l'appel d'offres ? Comment l'administration peut-elle s'assurer que les équipements seront entretenus jusqu'à la fin de la période couverte par le contrat ? L'administration locale a-t-elle établi une instance spéciale pour gérer les appels d'offres et veiller à la bonne application des dispositions prévues ? Si oui, quelles sont la nature et les fonctions de cette instance ?
- (2.4) Existe-t-il des contraintes réglementaires s'appliquant aux participants ou aux gagnants de l'appel d'offres (par exemple la nécessité d'une licence) ? Des entreprises étrangères peuvent-elles participer aux appels d'offres ? Existe-t-il des limitations concernant la composition du capital ou le secteur d'activité de ces entreprises ? Existe-t-il des limitations pour les entreprises à capitaux étrangers ?

2.3 *Concurrence sur le marché – barrières à l'entrée et contraintes de prix*

- (2.5) Si tout ou partie du budget de collecte des déchets solides est payé par les usagers (ménages ou entreprises), la concurrence d'autres entreprises pour la fourniture de ces services est-elle possible (autrement dit, existe-t-il un obstacle juridique à la concurrence) ? Si la concurrence d'autres entreprises est possible, existe-t-elle en pratique ? Est-elle limitée à une certaine catégorie d'usagers, par exemple ceux qui produisent les plus grandes quantités de déchets ?
- (2.6) Les prix facturés aux usagers pour la collecte des déchets solides sont-ils réglementés ou fixés par l'administration (nationale ou locale) d'une manière ou d'une autre ? Quels principes sont appliqués pour réglementer ou fixer ces prix ? A quelle fréquence les prix réglementés sont-ils ajustés ? L'administration locale a-t-elle mis sur pied une instance spéciale pour appliquer la réglementation des prix ? Si oui, quelles sont la nature et les fonctions de cette instance ?
- (2.7) Si des entreprises privées sont en concurrence pour la fourniture de services de collecte des déchets solides, ces entreprises doivent-elles être titulaires d'une licence ? Quelles sont les (éventuelles) conditions pour l'obtention de cette licence ? Existe-t-il des restrictions concernant la composition du capital ou les activités de ces entreprises ? Existe-t-il des restrictions sur les entreprises à capitaux étrangers ?

2.4 Marchés connexes – Elimination et recyclage des déchets

- (2.8) Comment est organisé le marché de l'élimination des déchets ? Qui achète ces services ? Sont-ils payés par les usagers ou directement par les administrations locales ? S'ils sont payés par les usagers, y a-t-il concurrence pour les services d'élimination des déchets ? S'ils sont payés par l'administration locale, les marchés font-ils l'objet d'appels d'offres ? Quelle est la nature de la procédure d'appels d'offres ?
- (2.9) Comment est organisé le marché du recyclage des déchets ? Quelles obligations juridiques nationales ou locales existe-t-il pour inciter au recyclage ? Le recyclage est-il effectué indépendamment du reste de la gestion des déchets ? Qui paye pour ces services ? Sont-ils payés par les usagers, par l'administration locale, ou par la vente des matériaux recyclés ? Existe-t-il une concurrence sur les services de recyclage ? Les marchés sont-ils soumis à des appels d'offres ? Quelle est la nature de la procédure d'appels d'offres ?

3. Structure du marché et distorsions de concurrence dans la collecte des déchets solides

Pour les pays où la concurrence existe sur la collecte des déchets solides, cette section a pour objet de dresser un tableau de la structure du marché et des distorsions de la concurrence qui peuvent exister.

3.1 Structure du marché

- (3.1) Si l'administration locale lance des appels d'offres pour sélectionner le fournisseur des services de collecte des déchets solides, combien d'offres sont généralement reçues ? Les mêmes entreprises se retrouvent-elles généralement en concurrence, ou les soumissionnaires sont-ils différents à chaque appel d'offres ? Quelles sont les parts de marché approximatives de ces entreprises (par rapport au budget total de la collecte des déchets solides) ? Ces parts de marché ont-elles évolué au fil des ans ?
- (3.2) Quelle est la composition du capital des plus grands acteurs du secteur ? Sont-ils la propriété d'administrations locales ou d'un groupement d'administrations locales ? Si l'état possède directement une entreprise de collecte des déchets, la concurrence avec les entreprises privées est-elle équitable ?
- (3.3) Sur quels autres marchés ces entreprises sont-elles présentes ? Sont-elles intégrées verticalement pour assurer également l'élimination (incinérateurs, par exemple) ou le recyclage des déchets ? Sont-elles aussi concurrentes dans d'autres villes pour les services de gestion des déchets ?

3.2 Distorsions de la concurrence

- (4.1) Des problèmes de concurrence se sont-ils posés dans le secteur de la gestion des déchets solides ? En particulier, a-t-on observé des cas de collusion (dans les appels d'offres), de partage du marché ou d'entente illicite sur les prix ? Des accusations de prix d'éviction ont-elles été portées ? Si oui, veuillez donner des précisions ?
- (4.2) Les autorités de la concurrence ont-elles déjà fait obstacle à des fusions horizontales entre entreprises de gestion des déchets solides ? Quelles solutions ont été (éventuellement) proposées ? Des cas d'intégration avec des entreprises d'élimination des déchets ont-ils provoqué des distorsions de concurrence ?

3.3 *Autres aspects (notamment liés à l'environnement)*

Il n'est pas rare que les entreprises privées, confrontées à une âpre concurrence et poussées de ce fait à réduire leurs coûts, soient tentées d'enfreindre le droit de l'environnement si cela peut entraîner des économies. Il peut donc être nécessaire d'accompagner la privatisation de la gestion des déchets par des mesures législatives ou par un renforcement des moyens mis en œuvre pour assurer le respect du droit de l'environnement, particulièrement dans le cas des déchets dangereux.

- (5.1) Des problèmes se sont-ils posés dans le domaine des violations du droit de l'environnement? Lorsque la concurrence a été introduite dans la collecte ou l'élimination des déchets, cela a-t-il posé de nouveaux problèmes de respect du droit de l'environnement? Le droit de l'environnement lui-même ou la police de l'environnement ont-ils été renforcés?

NOTES

- 1 Fonds monétaire international, *Manuel sur les statistiques de finances publiques*, 1986.
- 2 Pour une liste de ces associations, on consultera l'adresse suivante du site web de l'OCDE :
<http://www.oecd.org/publish/monetres/monetreslink.htm>.

FRANCE

Le modèle français de fourniture des services publics locaux, (collecte et traitement des déchets) est historiquement celui de la régie directe et de la délégation de service public. Aux côtés des services publics locaux gérés en régie, c'est-à-dire fournis directement par les collectivités locales, on assiste depuis une vingtaine d'années au développement¹ des modes de gestion déléguée des services publics. La complexité des services fournis, mais aussi leur coût, ainsi que la pression des entreprises prestataires de services auprès des collectivités contribuent à cette évolution. Ceci n'est pas sans créer des difficultés sur la situation concurrentielle, ce qui a conduit à des mesures pour assurer le bon fonctionnement de la concurrence.

1. Le cadre juridique

Outre la régie, par laquelle elles assurent elles-mêmes la fourniture du service, les collectivités publiques disposent principalement de deux procédures de sélection de leurs cocontractants : le marché public et la délégation de service public. Si les procédures de passation des marchés publics sont depuis longtemps encadrées par des dispositions spécifiques, la délégation de service public soulève des problèmes particuliers de mise en concurrence, qui ont conduit à l'adoption en 1993 d'une loi relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques, dite "loi Sapin".

1.1 La délégation de service public

La délégation est devenue le principal mode de fourniture des services publics locaux.

En matière de collecte et traitement des déchets, la collectivité locale délègue ainsi le plus souvent à un prestataire de service privé, pour une durée déterminée, le soin de collecter et traiter les déchets. Elle conserve toutefois la maîtrise du service, et les relations entre elle et le prestataire sont organisées sur le fondement d'un contrat. Celui-ci comporte un cahier des charges qui définit les obligations du prestataire en terme de satisfaction des besoins de l'utilisateur.

Le contrat de délégation de service public porte sur l'exploitation du service, et peut prendre la forme d'un contrat de concession, par lequel l'exploitant réalise les investissements nécessaires et se rémunère par des redevances sur les bénéficiaires du service ou d'un contrat d'affermage, dans lequel c'est la collectivité qui construit les installations pour les louer à l'exploitant qui se rémunère par des redevances sur l'utilisateur ou d'un contrat de régie intéressée, où le prestataire reçoit de la collectivité une rémunération calculée sur le chiffre d'affaires. La délégation de service public n'est pas exclusive de la passation de contrats de marchés publics, notamment lorsqu'elle ne porte pas sur la totalité de l'exécution du service (cf. l'affermage où la collectivité conserve la charge de la réalisation des investissements).

1.2 Les marchés publics

Les collectivités locales concluent également des marchés de travaux publics ou de prestations de services. Les appels d'offres peuvent être ouverts ou restreints, avec ou sans sélection préalable des entreprises candidates par l'acheteur ou surperformances.

En matière de collecte et traitement des déchets, les contrats de marchés publics sont plus fréquents que les délégations de services publics, du fait des principes d'organisation des services de collecte et de traitement actuellement retenus.

2. La situation concurrentielle

2.1 Une offre concentrée

Dans le secteur des déchets ménagers, au stade de la collecte, trois groupes de construction et de services urbains se partagent 60 pour cent du marché. Celui-ci se répartit de la manière suivante : 75 pour cent pour la collecte traditionnelle, 18 pour cent pour la collecte des déchets encombrants, sept pour cent pour la collecte sélective.

Au stade du traitement des déchets, la part des opérateurs privés sur le marché s'élève à 92 pour cent.

51 pour cent des ordures traitées vont en décharge, 31 pour cent sont incinérés avec récupération d'énergie, sept pour cent incinérés sans récupération d'énergie, six pour cent compostés et cinq pour cent recyclés.

En outre, le capital de certaines sociétés peut appartenir collectivement à des groupes en principe concurrents.

2.1.1 L'intensité de la concurrence varie selon l'objet des marchés

2.1.1.1 La pression concurrentielle est faible pour le marché du traitement des déchets

En matière de déchets, la maîtrise du marché dépend largement de la maîtrise des opérations de traitement. Or, les opérations de traitement sont de plus en plus complexes, et de ce fait réservées à un petit nombre d'entreprises ayant les capacités financières et technologiques requises. Il s'agit en fait des majors français de la construction et des services urbains, représentés par leurs filiales spécialisées. Il est à noter que le développement de modes de collecte élaborés (cf. collecte sélective des déchets ménagers) est susceptible de rendre plus difficile l'accès des petites entreprises au marché de la collecte.

2.1.1.2 La recherche de la sécurité par les collectivités locales affaiblit la concurrence

De façon générale, les collectivités connaissent et respectent les procédures de mise en concurrence.

Toutefois, comme elles craignent par-dessus tout les défaillances techniques, les sociétés qui leur offrent les garanties techniques et financières les plus importantes sont souvent privilégiées. Cela se traduit par le recours aux prestataires qui affichent la compétence la moins discutable. Elles ont en conséquence

tendance à écarter pour références insuffisantes les sociétés nouvelles ou inconnues qui se présentent. Les grands groupes connus pour leur solidité disposent d'un avantage décisif.

Ainsi, l'absence fréquente d'indemnisation pour les travaux de préparation nécessaires à la présentation de leur offre constitue un obstacle au fonctionnement de la concurrence, car elle dissuade certains candidats potentiels de consacrer du temps à la réalisation des études nécessaires à la confection d'une offre.

3. Les mesures prises pour assurer le bon fonctionnement de la concurrence

L'action des autorités vise à maintenir le fonctionnement de la concurrence et à donner plus d'effectivité au dispositif légal. Une loi nouvelle a imposé dès 1993 aux collectivités publiques des règles de mise en concurrence des entreprises candidates aux délégations de service public, pendant que les autorités compétentes maintiennent leur contrôle du respect du droit de la concurrence et du droit de la commande publique.

3.1 La loi du 28 janvier 1993

3.1.1 La réponse législative

La mise en évidence des faiblesses du dispositif légal et réglementaire, face au développement soutenu des conventions de délégation de service public, a conduit le législateur à intervenir par l'adoption de la loi n°93-122 du 29 janvier 1993, dite loi Sapin. Cette loi, "relative à la prévention de la corruption et à la transparence de la vie économique" propose un instrument souple permettant de concilier des objectifs différents bien que complémentaires :

- la mise en place de procédures de passation qui permettent la sélection des candidats méritants, selon des procédures plus transparentes, respectueuses de l'égalité des candidats potentiels ;
- le maintien du principe de la liberté de choix du délégataire² par l'autorité délégante, et par conséquent du système de *l'intuitu personae* qui reste la marque fondamentale du régime des conventions de délégation de service public.

Nonobstant sa souplesse, cette loi a défini de nouvelles règles visant à remédier aux faiblesses constatées antérieurement. Elle impose en outre la rédaction d'un rapport sur les comptes et une analyse de la qualité du service.

3.2 Une meilleure transparence des conditions de passation des conventions

Cette loi oblige désormais l'autorité délégante à organiser une véritable mise en concurrence préalablement à toute décision d'attribution.

Cette obligation de mise en concurrence implique tout à la fois, de la part de l'autorité délégante, le respect de formalités de publicité³, l'organisation d'une procédure de sélection des candidats potentiels, et la définition des critères d'attribution formalisés dans un document d'appel à propositions.

En outre, par rapport à ce régime général, la loi comprend (Art. 42 à 45) des dispositions spécifiques aux seules collectivités locales, notamment :

- une délibération obligatoire de l'assemblée locale sur le principe de la délégation, avant la mise en œuvre de toute procédure de choix du délégataire ;
- l'intervention d'une commission spécialisée pour l'ouverture des plis contenant les offres des candidats et l'examen de leurs propositions.

Le rôle de cette commission spécialisée est déterminant parce qu'il contribue à éclairer le choix de la collectivité. En effet, la Commission rend un avis circonstancié à l'autorité habilitée à signer la convention de délégation. Cet avis, même s'il ne lie pas l'autorité, s'appuie sur un rapport qui présente la liste des entreprises admises à présenter une offre et l'analyse de leurs propositions. Ce rapport est l'aboutissement d'un travail de recueil et d'analyse des offres, et de classement des propositions les plus intéressantes.

Le choix du candidat retenu est effectué par l'autorité habilitée à signer la convention de délégation. Ce choix n'est cependant définitif qu'une fois que l'assemblée locale l'a ratifié, après avoir été complètement informée des conditions de sélection des candidats et surtout des motifs du choix effectué.

3.3 Une durée limitée des conventions

La loi du 29 janvier 1993 a posé le principe d'une durée limitée des conventions.

Dans le cas particulier du secteur de la collecte et du traitement des déchets, la durée des conventions ne peut être supérieure à 20 ans (loin^o95-101 du 2 février 1995).

3.4 L'encadrement des droits d'entrée versés par le délégataire

Les droits d'entrée⁴ sont interdits pour les conventions passées pour la collecte ou le traitement des ordures ménagères et autres déchets.

3.5 L'interdiction des clauses sans rapport avec l'objet de la convention

Les conventions de délégation de service public ne peuvent pas contenir de clauses par lesquelles le délégataire prend à sa charge l'exécution de services ou de paiements étrangers à la convention.

Cette disposition de la loi vise à prévenir les risques de corruption.

3.6 La production d'un rapport annuel comportant les comptes et une analyse de la qualité du service

Le délégataire doit établir un rapport présentant les comptes des opérations qu'il a effectuées et analysant la qualité du service. Ce rapport contribue à la transparence globale de la convention.

Le dispositif mis en place par la loi du 29 janvier 1993 comporte tous les éléments permettant le bon fonctionnement de la concurrence. Celui-ci demeure soumis au contrôle des autorités de la concurrence.

4. La mise en oeuvre des dispositions relatives aux délégations de service public et aux marchés publics.

4.1 La DGCCRF, un rôle à la fois préventif et répressif

Le rôle de la DGCCRF consiste à la fois à vérifier la légalité des procédures de passation des marchés publics ou de délégation de service public et à détecter les indices de pratiques anticoncurrentielles.

Le contrôle s'effectue par la participation aux commissions de marchés publics, ainsi qu'aux commissions spécialisées de délégation de service public.

A l'occasion de la participation de la DGCCRF à ces commissions (marchés publics et délégations de service public) en 1998, des indices de pratiques anticoncurrentielles concernant le secteur de la collecte et du traitement des déchets ont été relevés.

Ces indices, lorsqu'ils sont probants, donnent lieu à une enquête qui aboutira ensuite à une saisine du Conseil de la Concurrence fondée sur les Articles 7 (ententes) et 8 (abus de position dominante) de l'Ordonnance.

Cependant, lorsque l'enquête a permis d'identifier une infraction pénale à l'article 17 de l'ordonnance de 1986, qui prohibe la part personnelle et déterminante prise par une personne physique dans la conception, l'organisation ou la mise en oeuvre d'une pratique anticoncurrentielle, le dossier est transmis au procureur de la République.

4.2 Le rôle du Conseil de la Concurrence

En application des dispositions de l'article 53 de l'Ordonnance n°86-1243 du 1^{er} décembre 1986, modifiée par la loi n°95-127 du 8 février 1995, le Conseil de la Concurrence peut exercer un contrôle des pratiques anticoncurrentielles de personnes se livrant à des activités de production, de distribution et de services "notamment dans le cadre de délégation de service public".

Plusieurs décisions intervenues en 1998 illustrent la surveillance des autorités de la concurrence dans le secteur des déchets où le bon fonctionnement de la concurrence, se révèle délicat du fait d'une offre concentrée en quelques grands opérateurs.

La première décision⁵ illustre la nécessité de ce contrôle du marché de la collecte et du traitement des ordures ménagères pour mettre un coup d'arrêt aux stratégies de groupes consistant à se répartir les marchés par le biais de filiales apparaissant indépendantes et soumissionnant de manière autonome et concurrente.

En Ile de France, plusieurs sociétés, filiales d'un même groupe, avaient en effet présenté des offres distinctes dans plusieurs marchés, sans avertir le maître de l'ouvrage des liens qui les unissaient. Les responsables des sociétés du groupe avaient reconnu l'existence d'une coordination des offres entre elles,

qui devait permettre "de promouvoir la candidature des filiales les plus compétitives", ces coordinations ressortant également de l'examen des réponses aux appels d'offres concernant ces marchés.

Dans cette décision, le Conseil a rappelé "qu'est de nature à fausser le jeu de la concurrence entre des entreprises autonomes et à tromper le maître de l'ouvrage sur la réalité et l'étendue de la concurrence entre les soumissionnaires du marché considéré, le fait pour des entreprises ayant entre elles des liens juridiques et financiers, mais qui disposent de leur autonomie commerciale de présenter des offres distinctes et concurrentes après s'être concertées pour les coordonner ou les élaborer en commun".

La seconde décision⁶ concerne un abus de position dominante sur le même marché de la collecte et du traitement des déchets.

En effet, outre des ententes pour se répartir les marchés, les stratégies des groupes aux multiples filiales spécialisées sur les différents marchés liés à la collecte et au traitement des ordures ménagères, peuvent aussi conduire à des abus de position dominante, également sanctionnés par le Conseil de la Concurrence.

Ainsi, dans une autre affaire relative à la situation de la concurrence dans le secteur du traitement des ordures ménagères en Ile de France le Conseil de la Concurrence a-t-il condamné une société, exploitant plusieurs décharges dans cette région pour abus de position dominante. Cette société, filiale d'un groupe, consentait des tarifs préférentiels aux entreprises du groupe auquel elle appartenait, tarifs préférentiels qui n'étaient justifiés par aucune contrepartie, et donc étaient discriminatoires et susceptibles de favoriser de façon artificielle les entreprises de ce groupe par rapport à ses concurrents, tant sur le marché de la collecte que sur celui du traitement des ordures ménagères.

Pour définir le marché pertinent, le Conseil de la Concurrence a considéré qu'il n'existait pas un marché unique du traitement des ordures ménagères quelle que soit la méthode utilisée (recyclage, compostage, incinération ou mise en décharge contrôlée), mais au contraire des marchés distincts, notamment un marché permettant la valorisation décrite dans la loi du 13 juillet 1992, et un marché de la mise en décharge. En l'espèce, il a donc conclu à la définition d'un marché des décharges contrôlées de classe II (ordures ménagères) dont les contours correspondaient à la région Ile de France.

Pour définir la position dominante de la société en cause, le Conseil s'est fondé sur sa part de marché (59 pour cent), sur l'écart important qui la sépare de son principal concurrent, sur la circonstance qu'elle possède deux décharges qui disposent des plus grandes capacités d'enfouissement de la région, et enfin du fait qu'elle est adossée à un groupe puissant également présent dans le marché de la collecte.

Le Conseil a également intégré dans son analyse les conséquences de la loi du 13 juillet 1992 relative à l'élimination des déchets, qui, en instaurant un système d'autorisation préfectorale ainsi que des objectifs de réduction des décharges, a introduit des barrières à l'entrée pour de nouveaux arrivants.

5. Conclusion

La loi du 29 juillet 1993 a apporté de réels progrès au plan de la transparence des procédures de délégation des services publics, de plus les autorités chargées de la concurrence, conservent une grande vigilance vis-à-vis de ce secteur de la collecte et du traitement des déchets pour faire respecter les règles d'une saine concurrence.

NOTES

- 1 Le développement de ce mode de gestion se traduit par l'importance du montant global des contrats de gestion déléguée qui représentait en 1990, 30 à 32 milliards de Francs
- 2 La liberté de choix de l'autorité délégante subsiste mais elle est désormais encadrée de manière rigoureuse : la collectivité délégante peut choisir librement son délégataire de service public, mais elle est tenue de respecter les règles qu'elle s'est préalablement fixées pour ce choix, notamment les critères de recevabilité des offres des candidats.
- 3 La méconnaissance des règles de publicité et de mise en concurrence constitue d'ailleurs une cause de nullité de la convention.
- 4 Les droits d'entrée sont des sommes versées au moment de l'attribution du contrat ou au cours de son exécution et qui correspondent à une sorte de "pas de porte".
- 5 (Décision n°98-D -42)
- 6 (Décision n°98-D -68)

HUNGARY

Introduction

The organisation of solid waste management as a local service and, in particular, the promotion of competition in this field has recently become a focal point in Hungary. Accordingly, Parliament will discuss the Bill on Waste Management in October, and it will probably be made law before the end of the year.

Experience with the intergovernmental circulation of the draft bill indicates that environmental considerations (reducing pollution, elimination of illegal waste deposit sites, tightening of control) are frequently in conflict with the public interest in competition in various parts of the market (providing choice for consumers, improving efficiency of service). It is difficult to convince environmental and municipal officials that these considerations are reconcilable as at first glance administration under competitive conditions seems to require technically more demanding, more sophisticated work.

To ensure uniform understanding, hereinafter "municipality" shall mean the public entity in which local public administration is exercised, pursuant to law, through independent, free self-governance; in other words, it means local authorities. According to statistics as of January 1, 1999, there are 3154 local authorities in Hungary.

The Act No. LXV of 1990 on Municipalities (MA) – and its amendments – regulates the tasks of municipalities in a uniform manner, irrespective of the size of settlement. The MA also provides additional rules in respect of the municipality of Budapest – in view of the special role and peculiar position of the capital in the country – and for the county self-governments. Municipalities have discretionary powers in regard of the manner public services within the solid waste management category are implemented as well as in the available tools and possibilities.

In view of the fact that the practices of solid waste management are largely uniform across municipalities of various sizes, neither the size nor the number of municipalities is relevant for assessing the position of solid waste management.

In Hungary there is no regulatory distinction between the market for household waste collection and commercial/business waste collection, as long as non-household waste can be handled together with communal waste.

The joint or separate handling of these two categories of waste depends on the regulation of municipal solid waste management related public services by the municipality and on the definition of the types of waste categorised under the scope of public services.

For instance, in Budapest and some other cities, with the exception of solid waste not generated on a regular basis, the municipality, acting in its competency provided by law and based on legal powers, ensures in a local by-law the mandatory use of public services related to (non-hazardous) household

(communal) waste and other regularly generated waste (generated in the course of industrial or commercial activities, service provision or other economic activities).

In another model the municipality includes in its public services only the household (communal) solid waste, while in the case of industrial waste the owner of such waste is obliged to ensure its management; for this latter category the municipality provides no further detailed regulations such as the appropriate manner of disposing of such waste.

The services in this latter area, as well as the exceptions mentioned in the first category – i.e., non-hazardous waste not regularly generated, thus not falling into the scope of local public services – operate on a market basis.

Rules governing hazardous waste (control, transportation, treatment) are provided in a separate legal regulation, the Government Decree No. 102/1996. (VII.16.) Korm.

1. The role of local authorities in regulation and procurement

1.1 Economic role of local government

The operation of municipalities is regulated by the MA; their tasks are listed in Article 8 of the Act. Some of these tasks are mandatory, while others are discretionary.

Municipalities may act independently in local public matters. Such public matters involve the provision of public services to residents, the exercise of local public power as well as the creation of the organisational, personnel and material conditions thereof.

In such municipal affairs the representative bodies (municipal councils) act independently in their regulatory and administrative capacities.

The MA declares that the tasks of municipalities include ensuring the provision of the basic public services to local residents.

In respect of some of these services municipalities themselves may decide, based on the demand from residents and depending on their financial resources, which of the services not specifically listed in the law they would provide, to what extent and in what manner.

In the field of local public services the tasks of municipalities include in particular: urban development, urban planning, protection of the man-made and natural environment, housing management, flood control and drainage of rain water, canalisation, maintenance of the public cemetery, maintenance of local public roads and public areas, local public transport, public sanitation and provision of cleanliness of the settlement, provision for local fire protection and for local duties of public security, participation in the local supply of energy and in providing employment, provision of kindergartens, primary education, health care and welfare services as well as other tasks related to children and the youth; provision of community facilities; promotion of public education, scientific and artistic activities and sports; ensuring the rights of national and ethnic minorities; promotion of the community conditions of a healthy way of life.

In respect of the listed public services not made mandatory by law, the municipality has discretionary powers to decide in what manner they would be provided. They may even decide not to provide such services.

The other large category of public services consists of the tasks where the municipality has no discretionary powers; it must ensure that they are provided.

The municipality must provide for the supply of healthy drinking water, kindergarten education, elementary school education and instruction, basic health care and welfare services, street lighting, maintenance of local public roads and the public cemetery, and it must ensure the rights of national and ethnic minorities.

Even though the MA classifies the provision for public sanitation and cleanliness of public areas under voluntary public services, the Act of 1997 on health care reclassified it into the scope of mandatory local services.

1.2 Revenue sources of municipalities

The MA gives a detailed account of the responsibilities and competencies it prescribes. As a financial safeguard, the Parliament ensures the financial resources necessary for their provision and decides about the amount of budgetary transfers allocated to the various tasks. The financial management of municipalities must be within legal constraints, the main elements of which are the following:

- they may freely dispose of their property,
- they may allocate their revenues independently,
- they provide for the carrying out of voluntary and mandatory municipal tasks from their unified budgets.

Sources of revenue:

- own revenues (local taxes specified and imposed in the manner described in law, proceeds from their own activities, businesses or the yield of municipal property, dividends, interest income, rent, assumed funds, other revenues),
- shared central taxes (the legally specified percentage of the personal income tax),
- normative grants from the central government budget.

For tasks specified by Parliament as social priorities, municipalities may request targeted subsidies, while for high-cost investment projects they are eligible for earmarked subsidies. The Act on the 1999 Budget of the Republic of Hungary allocates a facility of 2 000 million HUF for earmarked subsidies related to the priority investment projects of municipalities launched in 1999. In respect of new projects starting in 1999-2000 in waste management, the appropriation amounts to 973 million HUF.

If a municipality runs a deficit through no fault of its own, it is eligible for additional government subsidies. Municipalities may have remaining revenues mostly as a result of favourable financial conditions in the previous period or revenues from the utilisation of their property.

The system of election of municipal officials and mayors is based on the Constitution of the country. The mayor of the municipality and the members of the representative body (council) are elected by citizens in a direct and secret ballot, pursuant to the universal and equal suffrage.

1.3 Control of municipalities by the central government

Procurement of municipalities above a value threshold specified in law are conducted according to the Public Procurement Act (Act No. XL of 1995). This format is only applicable to the municipal procurements financed from their own budget. "Procurements" financed by households - i.e. where the municipality acts in their interest and on their behalf - do not belong to the scope of the Public Procurement Act.

The Act No. XLII of 1995 (the Act on the Mandatory Use of Certain Local Public Services - hereinafter: Mandatory Services Act) separately regulates the specific technical rules governing the mandatory use of certain local services which constitute the most important tasks of municipalities; such tasks include the municipal responsibility related to communal solid waste.

The collection, removal and disposal of communal solid waste is a special public service that is mandatory for municipalities and that consumers are obliged to make use of.

Pursuant to the Mandatory Services Act, the public service provider is selected in a public tender. The winner of the tender must proceed in accordance with the Public Procurement Act when conducting its public service related procurements. The establishment of capital projects financed from central transfers, such as of waste treatment facilities (deposit sites, incinerators) is also governed by the rules of public procurement.

The ex post audit of municipalities is the duty of the State Audit Office. The ministry funding such projects is also entitled to conduct investigations; if the use of funds was not in line with regulations, the ministry may oblige the municipality to repay such transfers together with interest.

For certain public tasks, such as the obligations related to solid waste (establishment of solid waste disposal facilities) municipalities may also be eligible for normative investment purpose targeted subsidies (specified in terms of physical parameters) within the system of government transfers. The disbursement of such central funds is subject to very tight conditions; failure to comply with these results in the withdrawal of subsidies.

In the case of projects funded from the central budget and appraised and approved within the public procurement procedures no savings may be achieved at the municipality level due to the nature of performance based financing.

There are no central subsidies available for operating the services related to solid waste (collection, disposal, treatment). Costs related to the services are borne by the producers of waste; the polluter pays.

Incentives for the efficient procurement of local services include publicity as well as personal interest (involvement) because inefficient, expensive public services payable by local voters undermines the chances of local officials to be re-elected.

However, there is a disincentive in that municipalities, in order to economise on their revenues, have a vested interest in the profitability of the enterprises owned by themselves, therefore their own interests often prevail over the interests of voters/consumers.

2. Regulation and procurement of solid waste

2.1 General information about waste management

In Hungary almost 104 million tons of waste is generated each year. Of this, approximately 4 million tons/year is communal solid waste and approx. 20 million tons/year is treated liquid communal waste. The remaining approximately 80 million tons/year of waste is generated by industrial, agricultural or other business activities. Within commercial waste approximately 4.2 million tons/year is hazardous waste; within this, the volume of industrial waste is declining, that of communal waste is slightly increasing.

Depending on their nature and composition the treatment of solid wastes requires various technologies. Solid waste that cannot be directly recycled may be treated in several ways. The most frequent technique is depositing solid wastes in dumps, or their utilisation in incinerators. More than half of the solid waste in Budapest is used/disposed of in incinerators, while a smaller portion is deposited.

Almost 80 percent of solid communal waste are collected in some organised manner. 85 percent of the solid communal waste is disposed of by depositing. There are 2 700 communal deposit sites.

2.2 Sources of revenue for solid waste service providers

Services related to solid waste are paid for almost exclusively by the users of the service, i.e., the emitter; the producer of the waste, based on the polluter pays principle. The rates payable for the service are primarily dependent on the type of service used.

Pursuant to the authorisation in the Mandatory Services Act, municipalities specify the rates of public services the use of which is mandatory (related to the solid municipal waste – communal waste or waste that can be disposed of together with communal waste –) as well as the terms of application of such rates in local by-laws. The rates payable for services cover the costs of the complex public service – collection, removal, disposal (depositing or incineration). The various municipal by-laws regulate the level and terms of application of rates payable for the public services of mandatory use in highly different manners, several of which have been overruled by the Constitutional Court because of their unconstitutionality.

Municipalities have the responsibility to provide for the technical conditions of the service as well as for the related expenditure.

Waste management services outside the mandatory local public service provision obligation are provided on a market basis, where the price payable for the service is determined by the price formation mechanisms of the market, taking into consideration local conditions and circumstances.

2.3 Competition for the market – contracting out, tendering

The local public services subject to mandatory utilisation in the field of municipal household solid waste is generally not subsidised by municipalities. In Budapest this service is not subsidised, i.e., property owners of Budapest pay the full price for the disposal of solid waste. There are municipalities that provide some subsidies depending on the resources available.

Another possibility for the disposal of communal solid waste is for the municipality to provide for the organised collection of waste and to participate in that system, but not to require mandatory use of such system. Municipalities would typically provide the service within their own organisation, and the costs would be financed from their communal tax revenues.

A third, combined version of disposing of solid communal waste is where households pay for the service a price that is lower than the cost of the service, and the difference is paid to the service provider by the municipality, i.e., rates for households are subsidised from other municipal revenues.

Municipalities have the right to choose from among the above options.

In one of the competition supervision proceedings of the Competition Office we encountered the inappropriate use of municipal subsidies, which had an adverse effect on competition. In view of the extent of such effect and the other facts revealed by the examination the Competition Council terminated the proceedings but called on the municipality to operate the system of subsidies in conformity with the requirement of competitively neutral conditions. (For the brief description of the case see the Attachment.)

Municipalities typically meet their specified obligation in respect of public sanitation, and in particular the disposal of solid waste, through their former specialised corporations or the legal successors of these, mostly municipality owned. Though pursuant to the Mandatory Services Act municipalities invite a tender for such public services, i.e., several enterprises may compete for the provisions of such public services, in the vast majority of cases these contracts have been awarded to the former municipal corporations. The winner of the tender is awarded exclusive rights for a certain period of time.

The effective regulations do not allow for the selection of the service provider through agreement with the consumers.

Bids may be submitted not only by independent companies but also by groups thereof. Thus in Budapest, for instance, the consortium of the former service provider, the Metropolitan Public Sanitation Corp. and nine other undertakings won the right of exclusive public service provision for a period of ten years. After the date of the municipal by-law entering into force the losers of the tender may operate in Budapest only in the market of non-regularly generated solid waste, where prices are formed by market competition.

Depending on the terms specified in the calls for tender, the length of time between new tenders is generally five or even ten years, and the provision of exclusivity for 15-20 years is not uncommon. This procedure raises competitive concerns because it forecloses the market for a long period.

The obligation to invite tenders is prescribed in the Mandatory Services Act.

The scope of the Act No. LXXXV II of 1990 on Pricing (Pricing Act) does not cover the setting of the consideration payable for services subject to mandatory utilisation. According to the explanation to the Pricing Act, in such cases the consideration should be determined in a separate legal rule.

Pursuant to the Mandatory Services Act municipalities determine in local by-laws the terms and conditions of the services, such as technical requirements, rights and obligations as well as the rate paying obligation of the waste producer (the owners of property in our case), the level of rates, the payment schedule and other criteria.

As the Mandatory Services Act contained no other provisions concerning pricing, the municipalities that invited tenders typically requested, after the description of the terms of reference, the bidders to submit offers for the rates or sometimes even propose techniques for the provision of the

service. As a result, a rather diverse picture has emerged in the market of solid waste related public services, which gave rise to several constitutional concerns and resulted in infringements.

In certain areas the basis for the price of the public service is defined as a function of the number of persons generating waste (based on a theoretical waste normative depending on a specified volume of receptacle and number of times it is emptied), while other municipalities took the number of residential units as their basis, still others imposed identical fees on permanent residents and on owners who used their property on a temporary or seasonal basis.

Tenders are mostly invited for the complex provision of the public service (collection, removal, disposal), but there are cases where the municipality invites separate bids for the operation of the deposit site. In this case the public service would only cover collection and removal.

As a national practice, local municipalities generally regulate the full chain of municipal solid waste management in a uniform manner. In this case additional concerns were raised by the practice that the winner of the tender was authorised/commissioned to operate the waste deposit site (waste dump) as well. This duplicity gave rise to more problems because the rate for the complex public service – collection, removal, disposal (depositing) – was specified by the municipality in light of the rates offered by the bidders, while the fee payable for depositing waste at the dump was always determined by the operator of the dump, i.e., a competitor of the collectors.

From a competition policy perspective the desirable practice would be for the municipality to also determine the dumping fee payable by external collectors so that entrepreneurial interests cannot be enforced in the price of the service. In this area highly diverse pricing techniques are used, which raises a number of concerns. The uniform and comprehensive regulation of mandatory public service rates was introduced because of the absence of safeguards for the pricing in the municipal by-laws adopted pursuant to the Mandatory Services Act, i.e., the absence of the regulation of the pricing principle, of legal remedy and of the equivalence of service and consideration. The Constitutional Court found this unconstitutional and ordered the infringement to be terminated.

The gravity of the absence of safeguards and the concomitant necessity of its resolution is primarily due to the fact that most municipalities provide the solid waste related public services subject to mandatory utilisation through their own corporations, i.e., the price of the service is set by the entity of public power that has an indirect economic interest in the pricing.

The terms and conditions of pricing and of reviewing the prices are typically set forth in the service contract; the price of the public service is set by the municipality annually, and in most cases in view of the terms of reference and the contents of the bid.

The system of service and consideration is typically defined by the parties in such a manner that if cost savings are achieved, the benefits can be kept by the undertaking, but only if they satisfy the other conditions set in the contract. Failing this, the contract may be terminated.

We are not aware of any increase in the price of service during the year at the initiative of the service provider or of any organisation or institution responsible for carrying out the tenders or enforcing the terms and conditions of the tenders.

Commonal solid waste management activities and the provisions concerning local public services related to commonal solid waste are regulated by ministerial decrees¹.

There are no restrictions concerning the identity or nationality of bidders; preconditions for bidding include compliance with technical and other conditions (related to possession of licences for the

activity concerned) as well as compliance with requirements set by the entity inviting the tender which are applicable uniformly to all bidders. As a result, foreign enterprises may submit bids on their own or as stakeholders in jointly owned domestic companies.

In Hungary the collection of communal solid waste within the framework of public services is performed by companies. The ownership structure of such economic associations varies in a broad spectrum. The companies may be:

- 100 percent municipality owned (e.g. Budapest);
- with varying proportions of foreign investors due to the insufficient capital available to rural municipalities;
- with municipal majority ownership, and domestic or foreign partners (e.g. Pécs);
- with minority municipal ownership, and domestic or foreign partners (e.g. Debrecen), finally;
- 100 percent foreign owned (e.g. Vác).

There is no control over ownership or the terms of business, or rather controls exist only to the extent that is justified by conditions specified in the merger control provisions of the Act No. LV II of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Competition Act) and its amendments.

We are not aware of any other controls over foreign ownership in the scope of authority and competence of the Competition Office.

2.4 Competition in the market – Controls on entry and prices

The answer to the question about the choice open to customers of complex solid waste management services between service providers depends on the type of waste concerned.

In case of mandatory public services, consumers have no choice because the winner of the tender is awarded exclusivity for the term of the contract. Here the consumer may turn exclusively to the selected service provider. In this area no other entity may legally provide services.

In the case of the collection and removal of communal solid waste generated on a non-regular basis and not falling into the public service category, there is a competitive market, where consumers have discretionary powers to select the identity of the provider and are free to agree on the consideration for the service. There is no separate legal regulation for service providers in the latter category; in these areas the general legal system is applicable. Thus in Budapest, for instance, the firms satisfying the relevant legal conditions are free to compete for the management of non-regularly generated waste, which amounts to almost one fifth of the total volume of solid waste.

In respect of depositing at dump sites there is typically no competition because in the vast majority of cases solid waste can only be disposed of at the dump site designated by the municipality.

As for the service structure in the market segment, competition has become fairly intense as a result of the extension of the subjective scope of the public service to regularly generated waste; competition is most keen in the case of producers of large volumes of waste.

Municipalities in their by-laws specify the price of public services performed within waste management as well as the consideration and the related pricing conditions.

In the first stage the prices of public services subject to mandatory utilisation are outlined by the terms of reference because the issuer of the tender also request potential providers to submit bids for prices. The final price of the service is set following the finalisation of the terms of the service contract, taking into consideration the bid price and the municipal subsidy, if any.

In Budapest the price is set in the complex system of the by-laws regulating the legal relationship of the municipality, the service provider and the consumers and of the service contract. Essentially the municipality responsible for the provision of the service and the service provider determine the price of the service, generally on an annual basis, based on the formula set forth in the contract.

Maintenance of quality of service is ensured through a system of safeguards with several pillars. On the one hand, the price set by the municipality is determined together with related price application criteria; it is the duty of the relevant organisational unit of the municipality to monitor compliance with these; furthermore, other regulators (environmental authorities, public health authority) also perform inspections on a regular basis.

In addition, consumers themselves represent another safeguard, who react with increasing sensitivity to changes in the quality of service because of the increasing prices charged; legitimate complaints may result in the fundamental review of the contract.

There are no standards concerning the quality of service.

The prices of other solid waste related services not falling within the scope of the public service system are formed by the market in the framework of bargaining.

No separate institutions have been established for determining the consideration for waste management services.

There are no sectoral regulations concerning the entities entitled to provide waste management services; the law does not differentiate between various enterprise forms (or ownership). Such activities can be pursued, as long as the relevant conditions are satisfied, in possession of an operational licence, which is issued to private enterprises by the professional chamber with competence in the region on the basis of a position statement issued by the professional authority.

Provisions concerning services and services providers are set forth in sectoral regulations or acts of Parliament (see sections 65-67).

2.5 Related markets – Waste disposal and recycling

If they undertake municipal solid waste management tasks, municipalities have the right and obligation to provide for the conditions of waste disposal, i.e. treatment (dumping, depositing or utilisation in incinerators).

Depositing sites are typically established for each settlement, but it is increasingly common to create regional depositing sites (primarily for economic considerations). Currently there are approximately 2 700 legal depositing sites in Hungary. Very few of these, however, comply fully with all regulations. Operating costs vary significantly depending on the technical parameters and level of service, and accordingly the service prices also vary considerably.

Regional deposit sites are not distributed evenly; as a result of different conditions (number of sites, restrictions on types of waste allowed to be deposited, level of price, transportation distance etc.) there is increasing competition between sites in some regions.

Household solid waste within the scope of public services may only be deposited in the waste disposal facility (dumpsite or incinerator) designated by the municipality in the terms of reference.

Within the public administration boundaries of Budapest there is only one communal deposit, which will soon be closed down due to its limited capacity. Outside the administrative boundaries there is another deposit site accepting communal waste from Budapest (Dunakeszi), and yet another site is being established (in the Pusztaföldvár region).

There is only one communal waste incinerator, in the 15th district of Budapest. There are other incinerators elsewhere in the country but they mostly serve to satisfy the needs of their operators, though they undertake more and more incineration on commission.

The waste disposal services are purchased by the entities obliged to use the services, i.e., the producers of waste; this can happen on an individual basis, or in the case of block buildings, by their representatives. The services provided as public services are paid for directly by the residents or users, the municipality does not pay anything directly. Occasionally the municipality would participate in the rate system within a regulated framework, in the form of indirect subsidies, but this only takes the form of crediting the amount on the account of the obligees.

In the case of services subject to compulsory utilisation, the service provider is always selected through tendering.

The regulation of the recycling of solid waste is being designed now. The primary prerequisite for this is the establishment of the system of waste separation. As in Hungary waste separation is not an established practice (there are experiences only from small communities and from a relatively short time frame), the widespread introduction is possible only upon the concurrent introduction of legal and economic conditions. One safeguard would be the waste management bill under preparation, which Parliament intends to pass before the end of this year.

The Act on Waste Management will define the concept of public service in the context of municipal waste management, which definition has been missing from the regulatory system. This is needed because the municipalities assume responsibility for organising the provision of the public service; it is in this area that they are obliged to invite tenders and contract with the best bidder, and the law may impose obligations on property owners to make use of such services. A controversy has developed about the subjective scope of public service, i.e., whether the collection of continuously versus periodically generated waste constitute two separate markets, and if so, can the latter be performed outside the scope of public services, under free market conditions? The Competition Office has recommended that the collection of periodically generated waste be treated as a separate market and that this operates as a competitive market.

The Competition Office has recommended the incorporation of safeguards into the law concerning the pricing of services within the scope of public services – this is in line with the Constitutional Court ruling on the subject. Such safeguards would include the separation of the costs of collection and transportation services in a vertically integrated undertaking from the costs incurred in operating the disposal facility to prevent cross subsidisation.

3. Market Structure and Competition issues in solid waste collection

3.1 Market Structure

Municipalities tender for solid waste management only in the case of tasks within the range of public services. In response to these tenders there are varying numbers of bids received, depending on the local conditions, including the number of enterprises present on the market, their relationship to each other, the size of the assignment, the technical conditions in the area, expectations relating to future development as well as other considerations (e.g., other terms of the tender: whether only individual enterprises may bid or consortia are also acceptable, whether the area to be serviced can be divided or only one provider may be awarded exclusive rights, etc.); but there are always more than one bids.

These bidders are generally incumbent companies capable of performing the tasks concerned, but external, even foreign, companies may also bid.

The market share of bidders also varies depending on the conditions prevailing in the area; generally the former public service provider dominates but we have seen competing bidders realising more business than the public service provider.

The ownership structure of solid waste management companies is rather varied. For information on the ownership structure of enterprises authorised to perform public services, see Sections 66-67.

The ownership structure of enterprises operating in the market-driven waste management fields outside the range of public services is also diverse. On the market of construction and demolition rubble small enterprises predominate, most of which are private companies.

In the field of waste affected by the product fee [environmental surcharge] – packaging materials, tyres, refrigerators, and batteries – regional consortia have been awarded the contracts in tenders. These enterprises would also typically have some foreign ownership. The vast majority of companies have mixed ownership, where foreign participation may be as high as 100 percent. In this area there are no municipal corporations.

The winners of the contracts also receive grants from the ministry to support their economic operations; this may be a one-off grant (to establish the core network system) or operating subsidies.

Enterprises working in the market-based waste management segments mostly work in that single business, though they may provide other services either related to this activity (leasing of machinery, repairs) or unrelated services (property utilisation, specialised construction), but we have no information about the actual situation.

The complex public service subject to mandatory utilisation – collection, removal, disposal (dumping, incineration) – is provided in a vertically integrated corporate structure, which raises a number of concerns. (One of these is illustrated in the Attachment.)

Enterprises working with solid waste operate almost exclusively in one area, with the exception of regional enterprises; waste collection in other settlements is atypical.

3.2 Competitive concerns

Since the establishment of the Competition Office there have been 13 municipal solid waste related competition supervision proceedings altogether, of which only three were concluded with the

establishment of a violation within the competency of the Competition Office – fixing of selling price (two cases), and refusal to deal. Two cases were rejected for lack of competency.

As shown by the information gained in connection with the cases examined by the Competition Office, competition related concerns arising in the field of waste management are mostly rooted in the deficient or even contradictory regulatory system.

Municipalities typically discharge their municipal solid waste related public duties through their former corporations or the legal successors thereof. Public service providers have been selected through tendering since the coming into effect of the Mandatory Services Act. (In the vast majority of cases municipalities have some degree of ownership in corporations providing public services.)

On the market of public services subject to mandatory utilisation, in accordance with the Mandatory Services Act, the winner of the tender obtains exclusive rights to collect, remove and dispose of municipal solid waste as well as to operate the dump sites. While the price of the organised public service is set by the municipality in a by-law, the price for dumping is set by the operator of the dump sites, i.e., the public service provider that is also a competitor to the external enterprises shipping the solid waste to be deposited. To ensure competition-neutral conditions, this duality raises regulatory demands to:

- distinguish, in a transparent manner, between (public) services inside and outside the competitive sector, and to ensure the accounting separation of the costs of these two categories, because this is the only way to eliminate anti-competitive cross-subsidisation;
- ensure non-discriminatory access to the production factor indispensable for the business of public service providers, i.e., of the deposit site; finally;
- eliminate the concentration of the roles of authority, regulator and business in a single organisation i.e., the identity of the owner and regulator should be separated.

Even though the Mandatory Services Act, effective since 1995, has taken significant steps towards the market transformation of solid waste management services, the absence of its full coverage has raised more concerns, in respect of which Constitutional Court rulings have been issued. According to the Mandatory Services Act, public tendering is compulsory for mandatory public services, but no detailed rules have been designed for this area, that is, the terms and conditions of the tender are always specified by the entity inviting the bids. This is why in the area of Budapest the municipality, through its terms of reference, interfered in the existing market of solid waste management services by giving public service status to the regularly and/or continuously generated (non-household) waste management hitherto performed under market conditions, and also by providing exclusivity to the public service provider for a term of ten years. The complaint concerning the fairness of the exclusive tender was rejected by our Office due to lack of competency as the Competition Act refers procedures concerning the violation of provisions prohibiting unfair competition to the competency of the court. The complainant turned to the court on the grounds that the terms of reference issued by the municipality was anti-competitive; no ruling has been issued on this case yet.

The other main area of concern is related to the prices and conditions of their application as regulated in the local by-laws of municipalities. A number of complaints filed to the Constitutional Court objected to the fact that local by-laws did not set the indicators that serve as the basis for payment as a function of actual waste emission or the amount of waste removed. The Constitutional Court in its ruling found these provisions to be infringing taken into consideration the unconstitutional violation by omission due to the absence of safeguards which the Mandatory Services Act should contain in respect of pricing; as

a result, the Constitutional Court in its ruling obliged the legislators to terminate the unconstitutional status of the Mandatory Services Act.

The Competition Office has had no cases related to bid rigging, market sharing or price fixing; nor did we encounter predatory pricing. We have had no competition supervision proceedings or merger cases related to the concentration of solid waste management undertakings.

ATTACHMENT

**"DISPOSAL OF COMMUNAL WASTE" CASE
VJ-148/94¹**

Pursuant to the legislation in force care for the disposal of communal waste is the responsibility of local governments. In Dunaújváros the local government of the town ensures this by means of the Dunaújváros Town Administration plc (hereinafter called DTA) being its own property to an extent of 99.9 percent.

DTA is working in a competitive environment in respect of collecting/transporting communal waste and on the basis of an exclusive right it enjoys a monopolistic position in handling local waste (disposal of waste). DTA's waste transportation tariffs are approved by the local government; the fee of disposal is fixed by DTA in its own competence.

The Housing Co-operative INTERCISA, running 4 500 flats in Dunaújváros launched a proceeding against DTA's activity. Instead of with DTA the Housing Co-operative concluded an agreement effective from 1 July 1994 concerning waste transportation with another entrepreneur, which offered a more favourable fee than DTA. At the same time DTA raised the fee of waste disposal by 67 percent, and a month later it reduced the fee of waste collection by 17 percent. The tariff reduction was made possible by local government's aid granted to DTA.

The Housing Co-operative complained that the contract that it concluded with the new entrepreneur became unfavourable for it as a consequence of DTA's tariff alterations. The Competition Council acknowledged that the directions and proportions of the tariff alterations had such an effect and, in general, made the waste collecting activity of other entrepreneurs more unfavourable. DTA proved that raising the fee of waste disposal had been caused by objective cost factors and therefore no striking disproportion between performance and counterperformance as an evidence of abuse of dominant position could be demonstrated. The reduction of the fee of collection did not indicate circumstances condemnable from the view point of the competition law (the fee remained above the production cost level). Considering the facts, the Competition Council dismissed the request.

Nevertheless, it deemed necessary to draw the attention of the local government to the lesson of the case: the effective local governmental regulation and the existing structure do not promote the progress of competition. It proposed that the local government should put the fee-setting for waste disposal under its competence of supervision as well, further it emphasised the competition distorting character of such local government aid practice.

1. Joint decrees No. 1/1986. (II.21.) EVM -EüM, and No. 16/1996. (VII.15.) BM -KTM

ITALY

1. The role of local authorities in regulation and procurement

Law n° 142 of 8 June 1990 (Organization of Local Powers), containing general administrative rules to be followed by local authorities, grants exclusive competence to local authorities (municipalities and provinces) regarding the supply of those public services defined as "having social objectives and aimed at promoting the economic and social development of local communities". Services provided by local authorities include energy, natural gas, water, waste management, local transportation, education, roads, public lighting, libraries, kindergartens, school cafeterias¹.

Local authorities are entitled to perform their public interest functions with respect to the provision of local services in several ways. First, they can opt to provide specific services directly, when the establishment of a separate entity is viewed as not "appropriate" (the law refers to the limited dimension of the local market or to specific characteristics of the concerned service as possible reasons for the direct supply of services).

A second alternative available to local authorities is to provide local services through enterprises wholly or partially controlled. Different forms of such enterprises exist in the current Italian legislative framework. In particular, two main organizational forms, referred to in the law as "institutions" and "special enterprises", are employed. Institutions can be set up for the provision of social services not having "entrepreneurial relevance". These include, for example, the assistance to the elderly and handicapped and the running of some cultural events. Institutions do not enjoy financial autonomy, being totally dependent on their respective municipalities for funding. Special enterprises enjoy financial and operational autonomy to a greater extent and are required to balance their budgets (with the municipality providing sufficient resources to ensure the proper fulfilment of social obligations such as universal service objectives). Municipalities can also provide local services through consortia of enterprises (joint ventures of several municipalities) or through controlled enterprises with minority shareholdings held by private parties.

Granting franchises to independent enterprises ("when technical, economic or public interest reasons arise") represents an additional possibility for the supply of local services and, in the current scenario, a rather residual one.

Local services are financed, for a large part, through transfers from the national budget as well as local taxes, rather than directly charging users. This has a direct implication on the incentives for economic efficiency and fiscal discipline: such incentives exercise at present only a limited role. Also, substantial differences among services exist with respect to the relative share of the costs incurred which are covered through direct charges (see table 1). Formost of them direct charges imposed on users represent less than 50 percent of total costs.

Table 1: Major local public services in Italy in 1994

Services	Diffusion (population share) %	Total expenditure (billion of lire)	Coverage ratio (revenues/ costs) %
Water supply	100	4432	86
Cemeteries	100	691	35
Sewage system	100	1267	50
Street lighting	100	1478	0
Waste collection	100	7000	92
Local transports	90	not available	24
Funeral services	63	116	124
Day care centers	61	1050	33
Gas distribution	47	5003	116
Theaters, museums	38	332	30
Hotels and nursing-homes	31	828	68
Electricity	17	2076	122

Source: Enea-Nomisina "Rapporto sui servizi pubblici locali in Italia", 1999, quoted in Heimler, A. (1999), "Local Public Services in Italy: make or buy?" Milano

The current Government, in view of municipalities' limited incentives to achieve cost minimization having led to substantial budget deficits and generally poor services, has recently presented proposals aimed at amending Law n° 142/90 with the objective of introducing greater competition in the supply of local services, particularly for those services having "industrial relevance" (supply of energy, gas and water, road transportation and waste management services). The proposed amendments would introduce requirements for local authorities to ensure that the provision of industrial relevance services is done through competitive tendering. Furthermore, the proposed law establishes a strict separation between regulatory and operational functions.

2. Regulation and procurement of solid waste

2.1 Introduction

In Italy the institutional framework regulating the collection and disposal of waste is mainly based on the provisions contained in the legislative decree n° 22 of 5 February 1997. The enactment of this decree was prompted by the need to ensure the compliance of the national legislative system with three EU directives aimed at harmonizing the treatment of normal, dangerous and packaging types of waste within the European Community. The act contains, therefore, rules applying to all types of refuse as well as to all the phases of the waste management cycle (collection, transportation, recycling and disposal).

The legislative decree establishes, 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. In this submission we focus on solid urban waste management services, whose supply and financing is a direct responsibility of local authorities (provinces and municipalities).

To cover the costs incurred in order to ensure the supply of solid urban waste management services, municipalities impose a charge on households, which is expected to cover the totality of costs. This charge consists of a fixed amount aimed at covering the investments incurred to provide the service and of a part varying according to the estimated volume of the waste produced by the household (the size of the household is used as a proxy). The charge, collected by the municipality as if it were a tax, is therefore imposed regardless of the actual amount of waste produced.

In most cases, the funds raised charging directly for waste management services do not cover the whole of the costs incurred. Also, considerable differences among regions and among towns exist with respect to financial coverage. According to estimates referring to 1994, funds charged to customers represented around 92 percent of total costs incurred². Among 100 major cities in the country, 11 were able to cover all the costs incurred; 34 around 90 percent, 20 around 80 percent, 16 around 70 percent and eight less than 50 percent of costs.

Municipalities have been assigned exclusive responsibility for both the collection and the disposal of solid urban waste. They are required, in the fulfilment of their duties; to respect environmental and organizational procedures and standards issued by national and regional authorities. The financing and the management of the collection and disposal of special waste, on the other hand, represents a direct responsibility of the firms producing it: the "polluter pays principle" applies. Economic entities must also perform their obligations in conformity with national, regional and local rules dealing with environmental protection.

Legislative decree n° 22/97 establishes a national register, in which all firms operating in the waste management services market need to be enrolled. All firms complying with the technical and economic requirements are allowed enrolment in the register.

The new regulatory framework introduced by legislative decree n° 22/97 has significantly raised environmental standards, leading to a substantial increase in the costs of complying with environmental obligations when supplying waste management services. Managing the activity of disposing of solid urban waste, has in particular greatly increased in complexity: running a dump (the technique used to dispose of 60 percent of waste, the rest being recovered or eliminated through incinerators) has become quite a sophisticated activity requiring advanced technologies and significant investments. Also, the creation of new disposal sites is subject to substantial constraints. These developments have led to a significant and increasing separation of the two main phases (waste collection and disposal) of the waste management cycle: nearly 50 percent of the Italian population resides in cities where the two activities have been assigned by the municipalities to separate entities. Economies of scope deriving from the integration of the two activities are probably quite limited.

2.2 Waste collection services

According to a 1998 survey carried out by the association of private waste management services firms, in roughly 24 percent of all towns in the country the supply of waste collection services were provided directly by municipalities³. Direct provision of services appears to be more often carried out in cities of medium size while very rarely adopted in very small and very large towns. In 30 percent of towns, waste collection services were provided by enterprises controlled totally or partially by municipalities (or consortia of municipalities). This form of provision of the service is currently employed in all major cities (with the exception of Naples). For the remaining 46 percent of towns, waste collection services were

supplied by private firms. This was particularly so in small cities. It has been estimated that, roughly, 19 percent of the population resides in towns where the municipality directly provides the service, 43 percent of the population is covered by municipality-controlled enterprises and the remaining 38 percent by private firms. The whole market has been estimated to be worth approximately 4,500 billion liras (equivalent to 2,300 million Euro).

A survey conducted for the Competition Authority and referring to 1996 has shown that, on average, collection costs are substantially greater when services are directly supplied by municipalities or by controlled enterprises, compared to when they are delivered by private firms: average costs per tonne have been estimated equal to: 191,000 Lit (municipalities providing directly the service); 202,000 Lit (municipality-owned enterprises) and 168,000 Lit (private firms) respectively⁴. Also, average collection costs are rising with the dimension of the towns. Overall, economies of scale in waste collection appear to be limited⁵.

2.3 Related markets: waste disposal and recycling

Unlike waste collection, relevant economies of scale characterize the supply of waste disposal services: in order to reach the efficient minimal dimension, dumps and incinerators (the two methods used to eliminate waste) need to hold capacities which are considerably larger than those required to meet the needs of most Italian towns. As a consequence, dumps usually supply their services to several towns located nearby, according to plans established at a regional level (waste must be disposed of in areas located close to where it has been produced). Decisions with respect to planning the location of waste disposal centers as well as their operational rules are taken at the national and regional level. Concerning waste disposal services (a market worth around 1,000 million ECU), 15 percent of the market is accounted for by municipalities' direct supply; 40 percent by firms controlled by municipalities or consortia of municipalities; the private sector accounts for 45 percent of the market.

With respect to recycling, the new legislation has set ambitious goals with respect to the percentage of waste, which is expected to be recovered and recycled. Compulsory consortia of producers and users of packaging materials, including retail distribution firms, have been created for each specific type of packaging waste (glass, metals, plastic, etc.) with the purpose of managing the whole process of collection, selection and recovery of waste related to packaging of commercial and industrial goods. These consortia supervised by a national Consortium named CONAI (Consorzio Nazionale Imballaggi), also composed by producers and users, set objectives and priorities for all recycling operations. Producers of packaging materials rather than users are identified in the legislation as responsible for the recovery of waste.

3. Market structure and competition issues in solid waste collection

3.1 Market structure and competition issues

Other research carried out in 1997 for the Competition Authority by external consultants on the waste management services market in Italy included interviews with firms operating in the sector as well as a survey of three towns of average size (each with around 50,000 inhabitants) located in the central part of the country⁶. The firms interviewed pointed to the tendency shown by municipalities to prefer to renew the franchise of the existing incumbent firm rather than engaging in an open and transparent tendering process as one of the most serious obstacles to a more widespread use of competitive bidding. This overall preference for the incumbent supplier has been observed as being particularly true in small towns, where

local authorities prefer to maintain established and consolidated relations with the firms they have already learnt to interact with, rather than having to deal with other, less known, firms. More generally, a wide lack of transparency was observed in the tendering process, with no or little publicity given to the auctions. Also, several of the interviewed firms raised doubts about the ability of selected firms, being awarded the contracts only on the basis of operational costs, to actually supply services in compliance with existing environmental norms.

The enquiry also showed that the three towns surveyed had opted to resort to private firms because their in-house resources (both in terms of specialized workforce and machinery) would not have ensured an efficient provision of waste management services. The survey contained information regarding the selection process of the firms licensed as providers of the services, as well as the mechanisms used for supervising the performance of the licensed firms in the course of operations. In particular, it has been ascertained that the selection had been based on price conditions, with little or no consideration paid to other factors (such as the quality of the services supplied, the compliance with environmental standards, etc.). Only in one of the three towns, the tender has been awarded through a competitive process, with the participation by 13 enterprises to the tender (the selected firm was based in another region). The survey also pointed out that the three municipalities were somewhat constrained in their ability to adequately monitor the quality of the services supplied by the licensed firms due to insufficient internal resources. However, the experience with competitive auctioning has been estimated by the municipalities as overall positive, because of the enhanced performance of the services rendered.

Two of the municipalities surveyed (those which had not resorted to competitive bidding) expressed their intentions to create, together with other nearby towns of equivalent dimension, an enterprise (with the majority of shares to be owned by the same municipalities) charged with the supply of waste management services. The establishment of such enterprise was viewed as necessary by the involved municipalities as a means to achieve greater efficiencies and to reduce costs.

Concerning the duration of the contracts awarded by municipalities to private firms, one of their main features is represented by their general shortness. On average, contracts concerning waste collection services last three to five years. Contracts longer than five years are very rare. For the management of waste disposal sites and plants, contracts are usually even shorter, most of the time one to three years long.

NOTES

- 1 In Italy, several municipalities are also directly involved in some private business activities, like for instance the retail distribution of medicines or the production of milk.
- 2 See "Rapporto sui Servizi Pubblici Locali", ENEA and Nomisma, May 1999.
- 3 The survey examined the totality of Italian towns with more than 5 000 inhabitants and ten percent of towns with less than 5 000 inhabitants, covering a total of around 46 million inhabitants (out of a total of around 60 millions).
- 4 The survey has been conducted on a subset of Italian municipalities representing around 44 percent of the national population.
- 5 A study commissioned by the Competition Authority has estimated that firms supplying waste collection services reach an efficient minimum dimension when serving around 16 000 inhabitants. In view of such estimate it is very well conceivable that in medium and large size towns, services can be contracted out to different firms each covering specific sections of the town. This device would greatly increase the number of firms being able to offer bids, with reference to smaller areas. In fact, very few firms would be able to guarantee waste collection services in metropolitan areas as large as those of Milan or Rome. However, so far, only Naples has given three different licenses, each for a separate area of town.
- 6 This study and the one referred to previously have been commissioned to provide input into the assessment of the competition implications of the waste management services' regulatory framework. The special waste (of industrial and commercial origin) segments of the sector, characterized by the creation of compulsory consortia, received particular attention in both studies.

JAPAN

1. Roles of Local authorities in regulation and procurement

1.1 Roles

Local public entities of Japan include prefectural, city, town and village governments, ward offices of Tokyo, and associations established and run by local public entities. Prefectural, city, town and village governments are classified as "regular local public entities" while associations run by public entities are "special local public entities." The Local Autonomy Law stipulates that regular local public entities are widely responsible for road construction, education, public transportation, water supply and sewage systems, electricity and gas supplies, parks, flood control and other.

1.2 Revenue sources

Local public entities rely on two revenue sources; regular and specific sources. The regular revenue sources include Local Tax, Local Allocation Tax¹ and Local Grant Tax (Chiho-joyozei)². Specific revenue sources include spending by the National Treasury and funds raised by the flotation of local government bonds.

1.3 Procurement and its regulations

There are three ways that local public entities procure goods and services: general competitive bidding, competitive designated bidding and concluding contracts. In principle, local public entities are expected to hold general competitive bidding (Local Autonomy Law, Section 234). Local public entities can decide qualifications of bidders in advance in accordance with the types and amount of procurement. Qualifications of bidders include their records of construction, manufacturing or sales or other things the number of employees and the amount of capital (Local Autonomy Law Enforcement Ordinance Section 167-5).

2. Regulations and procurement of solid waste

2.1 Framework of waste disposal

As for waste disposal, entrepreneurs are responsible for their own industrial waste designated by laws, and city, town and village governments are responsible for non-industrial waste. City, town and village governments are required to work out waste management programs (Act Concerning the Waste Disposal and Public Cleaning, hereafter referred to as the "Waste Disposal Act").

Those who are actually engaged in disposing non-industrial waste are: (i) city, town and village governments; (ii) waste disposal firms commissioned by a city, town or village government; (iii) authorised waste disposal firms or; (iv) those who discharge waste. Industrial waste is disposed by either entrepreneurs themselves or industrial waste disposal firms or local public entities, which are commissioned by entrepreneurs.

Waste is collected, transported, processed and disposed in accordance with guidelines stipulated by laws and regulations. As for the collection of non-industrial waste (excluding human waste), city, town and village governments directly handle about half of them. About 30 percent of waste collection are commissioned to agents and the remaining 20 percent are dealt with by licensed garbage collectors.

As city, town and village governments are responsible for non-industrial waste disposal; the budget for waste disposal is earmarked in their general accounts. Fees and commissions from those who discharge waste and others are also used to finance waste disposal programs. As firms are responsible for industrial waste, the disposal cost is borne by them.

2.2 Regulations on waste disposal firms and commissioned contracts

When a city, town or village government commissions agents to deal with non-industrial waste disposal, they make contracts with the agents that meet the requirements stipulated by the Waste Disposal Law Enforcement Order. When businesses commission agents to deal with industrial waste disposal, contracts must be concluded in line with legal guidelines that stipulate, among other things, to make out a contract in a written form.

2.3 Regulations on waste disposal businesses

The Waste Disposal Act categorizes waste disposal businesses into two fields; waste collection and transporting, and waste disposal. Authorization is needed to operate either or both of these business fields. As to non-industrial waste, businesses must obtain the authorization of the city, town or village mayor every two years. As for industrial waste, businesses must obtain the authorization of the prefectural governor every five years. To obtain the authorization, businesses must meet all the necessary qualifications including human resources and facilities that ensure the appropriate implementation of waste disposal.

Fees of non-industrial waste disposal cannot exceed the amount of commission stipulated by ordinances of the city, town or village.

3. Competition policy viewpoint and FTC's activities in the field of waste disposal

3.1 Local regulation and competition policy

Regulation by local governments and competition policy with a view to creating a free and fair socio-economic system based on the rules of self-responsibility and market principles; the promotion of deregulation has been a crucial political agenda. With the enactment of the Decentralization Promotion Law of 1995 and Package of the Centralization Bills of 1999, the roles of local public entities have become more and more important. Accordingly, regulations of local governments are needed to be carefully reviewed more than ever. While the autonomy of local governments must be duly respected, considering the importance of promoting deregulation in recent years, their administrative measures are required to be

in harmony with the competition policy more than ever. The Three-Year Programme for Promoting Deregulation adopted at a Cabinet meeting in March 1998 says, "Local governments shall be expected to play active roles in promoting deregulation in accordance with the objectives of this Programme. Where necessary, the national government shall study and review regulations that are enforced independently by local governments as well as those based on national laws and ordinances, while paying due respect to the principles of local autonomy and decentralisation."

3.2 Competition Policy in waste disposal

As indicated by the Environment Basic Act, the sustainable socio-economic system with a lighter environmental load must be built. How to address environmental problems is becoming more and more important in every economic entity. In the waste-related field, a wide range of moves, including the enactment of recycling laws, have been taken in recent years.

Maintaining and promoting fair and free competition under a free market economy is the basis of the economic policy in Japan. In the environment-related fields where competition principles are hard to apply due to their unique nature (i.e. externality), it is important to make market mechanisms workable as far as possible. In the waste disposal industry, while a system must be created for maintaining the qualification of waste disposal operators and ensuring the appropriateness of operations, from a viewpoint of competition policy, a system which makes use of competition principle must also be built with a view to promote cost reduction and increase in efficiency of waste disposal services through new market entry and other factors for the benefit of the entire economy.

3.3 Activities of the Fair Trade Commission

With such viewpoints, the Japan Fair Trade Commission (hereafter referred to as the "FTC") has taken the following efforts in the fields of local government regulations and waste disposal.

3.3.1 Administrative and legal coordination

The FTC has been coordinating administrative measures with competition policy by publicizing, among other things, "Guidelines Concerning Administrative Guidance under the Antimonopoly Act" (Administrative Guidance Guidelines). Whenever the FTC found actions of local governments and other public organizations inappropriate in regards to competition policy, it requested the organizations concerned to make the necessary amendments.

The FTC expects local public entities to make more use of the Administrative Guidance Guidelines, so that the philosophy of competition policy would be reflected in their administrative measures. The FTC also responds actively to consultation requests from local public entities of the Antimonopoly Act (hereafter referred to as the "AMA").

For example, the FTC conducted a survey on administrative activities such as guidance, which recommended that, as to sales of designated garbage bags, wholesalers and retailers should sell the bags at a price determined by the local public entities. Furthermore, the FTC has coordinated administrative guidance of local public entities, which is highly likely to induce the violation of the AMA.

A variety of legislation has been enacted for waste disposal in recent years. The FTC has taken the following coordinations regarding waste disposal.

3.3.1.1 Container Packaging Recycling Act (Act for the Promoting of Sorted Collection and the Recycling of Containers and Packaging)

Non-industrial waste has steadily been increasing. Recyclables have not been fully recycled. Under such circumstances, the Container Packaging Recycling Act has been enacted to dispose waste properly and make the most of resources. Major parts of non-industrial waste are containers and packages, which may technically be recycled. The act indicates the basic principles of recycling of containers and packaging, programs for the remanufacturing of those which meet sorting-out standards, obligation of specified manufacturers and requirements for designated legal entities.

"Designated legal entities" that was established based on the act will be commissioned to remanufacture containers and packages by specified manufacturers who are obliged to do so. The FTC responded to the consultation and claimed that concerns on competition policy should not arise. One of these concerns was that a designated legal entity would restrain business activities of existing firms unreasonably through the entry into existing markets with taking advantage of monopolistic positions.

3.3.1.2 Home Electronics Appliances, Recycling Act (Act for remanufacturing specified home electronics appliances)

Reduction of waste and use of recyclables are not enough. Under such circumstances, an act was established to require retailers, manufacturers and other parties to take necessary measures concerning collecting, transporting, and remanufacturing of the waste of specific home appliances which are difficult for local public entities to dispose appropriately but need appropriate disposal and promotion of use of recyclables.

The act provides that consumers are to bear the cost of remanufacturing. The FTC responded to the consultation from the viewpoint that products that are easier to recycle should be developed and the burden of consumers should be reduced through encouraging competition among manufacturers.

3.3.2 Violation cases against the AMA

AMA violation cases involving waste disposal are as follows:

Sapporo Environmental Management Association (Sapporo Kankyoiji Kanri Kyokai), decided that member companies should refrain from making sales efforts toward customers of other members and forced the members to respect the decision. In December 1991, the FTC issued a decision to the association for violation of Section 8-1-4 of the AMA.

(Note): Five manufacturers of garbage incinerators for non-industrial waste conspired to fix public designated competitive biddings, competitive biddings and submissions of estimates to local public entities over the construction of garbage incinerators. Prior to this public bidding, they decided who would win the biddings. In August 1999, the FTC issued a recommendation for violation of Section 3 of the AMA. As the five manufacturers did not accept the recommendation, the FTC decided to initiate a hearing procedure.

3.3.3 *Consultation with business operators or trade association*

How to address waste disposal issues is becoming more and more important for business operators. An increasing number of business operations and trade associations seek consultations for waste disposal. The FTC gives consultations, so that they may not effect practices that would restrict competition. As a reference for other business operators and trade associations, the FTC has compiled major consultation cases into a brochure and has made it public.

A major consultation case that was made public.

A trade association of automobile tire retailers asked the FTC's advice, when they planned to hold consultation with a local public entity on the disposal of used tires and to draw up a memorandum with the local public entity, with regard to the problems on the AM A incurred by putting a clause on charges for disposal into the memorandum. The FTC replied that although there is no problem regarding the AM A drawing up a memorandum between a trade association and a local public entity for the disposal of used tires, it would bring infringement of the AM A if the trade association agreed and decided to charge for the disposal of used tires.

NOTES

- 1 Local Allocation tax is a certain part of state income such as income tax. It is allocated to the local public entities in order to ensure that revenue resources of each local public entity are balanced and to secure systematic operations of local administration without damaging the independency of local public entities.
- 2 Chiho-jyozai (literally, local grant tax) is tax which the central government collects and is granted to local public entities as it is. The central government acts for local public entities as a collection body for convenience of taxation and other things.

NORWAY

1. The role of local authorities in regulation and procurement

1.1 *Economic role of local government*

The responsibilities of the municipalities are education, health, social services, care for the elderly and handicapped, churches, cultural activities, regulation of local business, day care facilities, fire department, solid waste collection and disposal, water and wastewater distribution and collection, regulation of the area of housing and municipality roads.

The responsibilities of the counties are secondary education, hospitals, child welfare, county roads, and museums.

1.2 *Revenue sources of local government and lines of accountability*

Local governments' income is based on tax revenues as well as government grants from the General Purpose Grant Schemes and earmarked government grants.

Local officials are directly elected in local elections held every four years.

1.3 *Control of local government by central (or sub-national) government*

Local authorities are on a general basis given the choice of freedom to organise the services they are responsible for. Nevertheless, central government may attach requirements to earmarked grants.

The WTO GPA and EC/EEA rules on public procurement also apply to Norwegian municipalities when they put out tenders for waste collection services. Below the EC/EEA thresholds no national rules apply to municipalities' procurement and tender procedures, although recently a new law has been adopted.

Requirements may be enforced so that the local authorities do not receive the earmarked grants unless the requirements are fulfilled. Local authorities give reports to central government on their activities.

Central government may in some cases withhold funding through earmarked grants if the local authorities do not comply with certain requirements.

Cost cutting does in general not lead to reduction in the funds transferred from the central government.

2. Regulation and procurement of solid waste

2.1 Sources of revenue for solid waste service providers

According to the Norwegian Pollution Control Act of 13 March 1981 waste is divided into two categories: Consumer waste and production waste. Consumer *waste* means ordinary waste, including large objects such as furniture etc., from private households, small shops etc. and offices. The same applies to waste of similar types and amounts from other activities. Production waste means waste from commercial activities and services which is significantly different in type or amount from consumer waste. The municipality shall make arrangements for the collection of consumer waste. Production waste shall be delivered to a lawful waste treatment or disposal plant unless it can be recycled or used in another way.

The Pollution Control Act is based on the polluter pays principle. Producers of consumer waste will pay for the collection, transport, reception, storage control etc. of the waste through a fee determined and collected by the municipality as reimbursement for its services. The producer of the waste will pay for the treatment of producer waste itself, directly to the provider of the service, be it a private enterprise or a public body.

Through a tendering process or contractual negotiations, a municipality can buy services from private enterprises, and in that case the municipality will pay some of the revenue to the contracting party. But in any case, the original source of the revenue will be the producer of the waste.

2.2 Competition for the market – Contracting out, franchising or tendering

National or local governments never pay for collection of production waste.

Collection of consumer waste is legally a responsibility for the municipalities, but the physical collection may be left to private companies. But in any case, the producer of the consumer waste is never in a direct contractual relation with the private Collection Company. The parties to this contract are the municipality and the private collector. The money flow goes from the producer of the waste, via the municipality to the collector. Collection contracts between private companies and producers of consumer waste will be contrary to the Pollution Control Act. Contracting on a custom er-by-custom er basis has to go via the municipality, and is therefore practically excluded.

Many Norwegian municipalities have established internal production units, but legally, and in relation to the waste provisions in the Pollution Control Act, these units are to be regarded as internal parts of the local government. On the other hand, they may compete with private companies in a tendering process.

The Pollution Control Act obliges all municipalities to determine a fee to cover all costs associated with collection, transport, reception, storage, treatment and control of waste. The fee shall fully cover the costs. For waste which the municipality has duty to collect, receive or treat (mainly consumer waste) the fee must not exceed the costs incurred by the municipality. For collection etc. of other types of waste (typically production waste), the municipality may take a fee exceeding the cost incurred.

Within the limits of the WTO GPA and EC/EEA rules and the Pollution Control Act the specifications of the tenders are fully left to the municipalities to decide. The final contractual prices will

influence the municipal costs in the waste sector, and therefore also the fee to be collected from the waste producers.

Change of prices is regulated by ordinary contractual principles between the municipality and the private collector.

Quality standards are controlled by the municipality itself both as pollution authority and as party to a contract with the private collector. The details in this control may differ from municipality to municipality.

Collection of production waste is the pure responsibility of the waste producer. The price level is decided by the market. Municipalities may compete in this market along with private companies.

No person may collect consumer waste without consent of the municipality. No specific requirements to collectors have been set out in national legislation.

Collection of production waste needs no consent from the municipality, and no requirements have been set out in national legislation.

The main principle of the WTO/GPA and EC/EEA rules on public procurement is that all procurements above the thresholds shall be put out on tenders in the whole EEA area. The rules apply to municipalities' procurements above NOK 1.6 million. Below this threshold there is currently no legally binding rules governing municipalities' procurements. However, the Parliament has recently decided to enact a new law on public procurements below the EC/EEA thresholds. The objective is to have similar procurement rules above and below the thresholds for both the state and the municipalities.

The Norwegian Competition Authority may intervene against anticompetitive mergers or acquisitions.

2.3 Competition in the market – Controls on entry and prices

There are no statutory prohibitions on competition. But competition in the consumer waste market depends on whether the municipality want to provide the services itself (monopoly), or use tenders. Information received by central authorities indicates that other firms do compete, but the level of competition varies a lot from large to small municipalities. The only legislative limit on competition relating to class of customers follows from the municipal responsibility to collect consumer waste, see above.

The waste legislation is based on the polluter pays principle, but the national legislation or authorities do not specify the exact prices to be charged. On the other hand, the waste legislation obliges the municipalities to set a fee equal to its cost in the waste sector. See above. Municipal waste fees are normally adjusted each year. Municipalities may have established internal community "production units" to take care of the waste sector and normally such units calculate the fees to be charged from their customers. But formally, competency to decide the prices remains a municipal, local governmental responsibility. See paragraph on the nature of these production units.

2.4 Related markets – Waste disposal and recycling

Disposal of consumer waste is a municipal responsibility. The legislative structure of this market is basically the same as the structure in the market for collection of waste. Any person that operates a waste treatment and disposal plant that may result in pollution or be unsightly must have a permit from public authorities. Conditions may be imposed in the permit, for instance as regards transport, treatment, recycling and storage of waste and measures to prevent the facility from becoming unsightly. Both municipalities and private undertaking operate in the disposal market.

The organisation of the recycling market is very much the same as for waste disposal, but in general, the recycling markets is more privatised than the disposal market.

3. Market structure and competition issues in solid waste collection

3.1 Market structure

We do not have any information on these issues.

The solid waste collection may be divided into three organisational forms. Ordinary municipal production units account for 42 percent of the production. Municipal limited companies or foundations account for 29 percent, and private parties handle another 29 percent¹.

Even though much of the production is handled by the municipalities themselves, it turns out that other firms often is invited to participate in competitive tenders. In a study² from 1996 waste collection was the municipal service most frequently exposed to competition (either by means of tenders or in the form of negotiations with two or more suppliers). 78 out of a sample of 119 municipalities (65 percent) reported that they had exposed some or all of the waste collection to competition. 28 of these municipalities had exposed all of the waste collection services to competition. The second largest service being exposed to competition is road maintenance (38 percent).

Even though other companies are invited to compete for the waste collection contracts, this competition is not always neutral.

In a survey from 1993 the Norwegian Competition Authority found that ¾ of the municipalities made procurements from locally established suppliers. Favourable treatment of local suppliers has been disallowed since the EEA agreement entered into force in 1994. Nevertheless, a survey by the Authority in 1996 showed that the municipalities to a large extent have continued this practise, *inter alia* by limiting public procurements to local suppliers or by a subsequent preference for the municipality's own production unit.³

More recently a Norwegian court handled a case concerning transgression of the EC/EEA rules on public procurement. A municipality was convicted for having favoured a local supplier and was ordered to transfer the contract to the company that had the economically most favourable tender.⁴

Cross-subsidisation may occur in situations where the municipality has monopoly rights on some services while competing on others. In the waste collection sector this is the situation when the municipality has the sole right to collect consumer waste but also competes with other firms for the collection of production waste. It is difficult to establish whether cross-subsidisation actually takes place. Surveys have tried to explore this, but without any clear conclusion. The Norwegian Competition

A uthority has handled a com plaint by a private enterprise on alleged cross-subsidisation by a m unicipality. The A uthority w as unable to reveal w hether cross-subsidisation had actually taken place.

3.2 *Competition concerns*

There have been no cases of bid rigging, market sharing or price fixing. The Competition Authority has handled one case concerning alleged cross-subsidisation by the m unicipality (see paragraph above). The m ost frequent com petition concern is a lack of com petition neutrality.

The EEA rules on public procurem ents are im portantm eans to preclude favourable treatm ent of locally established suppliers. In Norway there are no legally binding rules on public procurem ents below the EEA thresholds. The enactm ent of such rules has been proposed in public report on procurem ent⁵. See also com m ents above.

The Norwegian Com petition Authority has on several occasions advocated effective rules on public procurem ent. It m ay be that private actions are not sufficient to control local suppliers from being favoured by m unicipalities and thus that a surveillance authority should be established. Studies of the extent of and reasons for favourable treatm ent of local companies w ill notw ithstanding rem ain an im portantm eans for the Com petition Authority.

There have not been any cases concerning horizontalm ergers or vertical integration.

3.3 *Other issues (including environmental issues)*

No inform ation available.

NOTES

- 1 Source: Grøvdahl og Hagen, NIBR-notat 1997:105
- 2 Egil Kjerstad og Frode Kristiansen: Erfaringer med konkurranseutsetting av kommunal tjenesteproduksjon. SNF-rapport 87/96, Stiftelsen for samfunns- og næringslivsforskning, Bergen-Sandviken 1996.
- 3 Konkuransetilsynet: Kommunenenes innkjøpspraksis, Konkuransetilsynet, Oslo 1996.
- 4 Norsk Gjenvinning vs. Nes kommune, Rettens gang.
- 5 NOU 1997:21 Offentlige anskaffelser

ANNEX**EXPOSING LOCAL SERVICES TO COMPETITION***A report by the Nordic competition authorities¹, No 1/1998***1. Municipal waste collection²****1.1 Short description of municipal waste collection**

In all the Nordic countries local authorities are obliged to organize collection and transportation of household waste, legally defined as waste from households and waste from enterprises of similar type and quantity as households. Households and enterprises possessing waste that is covered by the municipal waste arrangement are obliged to attend the arrangement. Local authorities do also handle other types of waste from enterprises. We denote waste that is handled by the local waste arrangement as "municipal waste collection".

Annually, the municipalities of the Nordic countries handle approximately 11.3 million tons waste a year. Although this sounds like a pretty high amount, it is only around four percent of the total of the generated waste. Households' waste constitutes approximately 1/3 of municipal waste collection. The remaining 2/3 consists partly of waste from enterprises that is covered by municipal waste collection and partly of waste from enterprises that are not covered by the arrangement but nevertheless choose to buy the service from the local authority.

Table 1: Municipal waste collection in the Nordic countries

	<i>Total amount. 1000 tons</i>	
	1985	1994
Total Nordic countries	.	11 317
Denmark	2 430	2 708
Finland	2 500	2 100
Iceland	.	176
Norway	1 968	2 366
Sweden	3 660	3 967

Source: Indicators of the State of the Environment in the Nordic countries.

Tema Nord 1997:537. Nordisk Miljøministeråd

Although the local authorities are obliged to organise collection and transport of waste, they do not have to supply these services themselves. Many municipalities have handed over the services to private parties. All the Nordic countries are currently utilising a considerable and increasing number of private entrepreneurs. More and more municipalities place the supply of the waste collection services with private parties. In Denmark a survey³ showed that a great majority of the local authorities (85 percent) had left the waste operations – either by negotiated contracts or by tenders – to private parties. In 1991 this share was around 27 percent, meaning that a considerable increase has taken place during the last years.

In the Finnish county Uudenmaan Lääni, a survey⁴ showed that private entrepreneurs operated as much as 92 percent of the waste collection. Waste collection was the second largest private business branch of the local service production. Only laundry services were provided in a larger degree by private parties. The large share of private entrepreneurs in Finland may be due to the special Finnish system of privately arranged transport (see below). Neither for the municipal nor the private services is the vehicles owned by the local authorities. However, it should be underlined that the figures might give a distorted impression since they relate only to one special county and not to the whole of Finland.

The use of private enterprises in Norway and Sweden are also extensive. The Norwegian Competition Authority has recently made a survey⁵ of municipal waste collection. According to the survey in 1997 the share of private entrepreneurs was 73 percent. In Norway as in Finland the share seems to have increased the past few years. In Sweden a survey⁶ showed that the local authorities provided 23 percent of the collection and transportation of waste themselves, while 63 percent was left with private entrepreneurs. In 14 percent of the municipalities the services were provided by both private and municipal entities. However, if measured in quantities private parties handled only 57 percent of the households' waste, while municipalities handled the remaining 43 percent.

In most Nordic countries there has during the past few years been a trend towards fewer and bigger companies in the waste collection sector. This is mainly due to the fact that large international concerns have entered the market by means of acquisitions of small local firms. National concerns have also been created through mergers and acquisitions of small local firms. In Finland there are four large enterprises with a total market share of around 20-30 percent: Waste Management Ympäristöpalvelut Oy (US owners), Säkkiväline Puhtaanapito Oy (Finnish owners), Brown Ferries Industry Finland Oy Ab (French owners) and Rikaton Oy Ab / SOL (Finnish owners). In Denmark there are two large nationwide operators – Renovadan (owned by Waste Management) and Marius Pedersen (Danish owners).

In Sweden the market is dominated by two enterprises, WMI Sellberg AB and Ragn-Sells AB. WMI Sellberg is owned by Waste Management International.

Although in Norway the concentration of the waste collection sector has been increasing, the element of multinational enterprises has been lesser than in Finland and Sweden. The Norwegian concern Norsk Gjenvinning has during a few years established itself as an important operator in the Norwegian waste collection market. In this case the expansion has primarily taken place by acquisitions of smaller transport companies. A new development is that waste collection companies owned by large municipalities as Oslo, Bergen etc. now have begun to compete for assignments in other parts of the country. The waste collection companies of the local authority of Oslo – Miljøtransport AS – lost the contract for collection and transport in its own municipal Oslo. However, the company, which owns several transport vehicles, now competes aggressively for assignments in other Norwegian municipalities. In addition, the number of inter-municipal companies has been increasing.

In spite of the establishment of large national and international concerns the concentration is still relatively small compared to other industries. In all Nordic countries there is still a large number of small and medium sized collection and transportation companies. In Finland there are more than 500 private companies offering waste collection and transport services, of which approximately 200 specialised in municipal waste collection only. The average turnover of the companies of the industry is approximately 2 million Finnish marks.

1.2 *The extent of competition exposure*

The number of private operators supplying waste collection services on behalf of local authorities may serve as an indicator of the extent of competition exposure, in particular after the EC rules on public procurements came into force in 1994. However, the indicator is not precise for several reasons: (i) Competitive tenders may be won by public enterprises, (ii) the local authorities may leave the services to private parties with no prior competition (illegal after 1994), (iii) private production is not necessary for local services to be exposed to competition. Thus, there is a need for more direct indicators.

In a Norwegian survey⁷, 65 percent of the local authorities informed that they had wholly or partly exposed their municipal waste collection services to competition. This was considerably higher than for other local services. Road maintenance was number two with 37 percent. It is reason to note, however, that the share also encompasses those that had been engaged in partly competition exposure. In a survey in 1997/1998 by the Norwegian Competition Authority⁸ 83 percent (300 of 361) of Norwegian local authorities answered that competition exposure / competitive tendering had been completed in the waste collection sector. 5.5 percent answered that competition exposure had been considered but left for further consideration, 5.3 percent that competition exposure had not been considered, and 6.1 percent that competition exposure was under consideration.

A Danish survey⁹ showed that 27 percent of Danish local authorities had used competitive tenders when assigning waste collection operations in 1990-91. However, no number exists that gives a precise picture of the use of competitive tenders today, but estimates suggest that approximately ¼ of Danish local authorities regularly put out to tender their waste collection obligations. This share is somewhat distorted since the two largest municipalities – København/Fredriksberg and Århus – have not as yet used tender for their waste collection operations. Both local authorities entered long-term agreements with private waste collection operators before EC rules on public procurement entered into force.

Nowadays, most Icelandic local authorities use competitive tenders and it is expected to increase in the future. During the last years several municipalities have merged and thereby improved the conditions for the use of competitive tenders. Nevertheless, collection and transport of waste in the largest municipality – Reykjavik – are still operated by local authorities with no use of competition exposure.

In Finland Suomen Kuntaliitto (the association of municipalities) has tried to estimate the extent of competition exposure in the municipalities, but the results of the survey are not very clear and hence exact numbers can not be presented.¹⁰ However, the numbers indicate that the extent is relatively small and that the opportunity to expose local services to competition is not utilised in full. The reason why competition exposure in Finland according to the survey by Suomen Kuntaliitto is lower than in other Nordic countries is due to the special Finnish system of privately organised collection and transport. This is in itself a form of competition exposure, and should therefore be counted on equal terms as competitive tenders. Housing co-operatives and others when purchasing waste collection services from the privately organised system also uses competitive tenders.

In Sweden has "Nämnden för offentlig upphandling" (the directorate for public procurement – the NOU) made a survey in which it turns out that public authorities saved a total amount of approximately SEK three milliard per year by exposing their suppliers to competition. Furthermore, the NOU concluded that local authorities and municipal companies made the largest savings. It proves that it has been possible for the local authorities to lower their costs by exposing their operations to competition.

The conclusion is that the local authorities in Nordic countries to a large extent exposes waste collection services to competition by means of competitive tenders. In Finland the local authorities may

expose their waste collection services to competition by establishing a form of local market for these services. Also in this system competitive tenders are used by private procurers. In all Nordic countries competition exposure seems to be increasing, even if the extent of competition exposure is high already.

2. Types of competition exposure

2.1 Competitive tenders

In all Nordic countries competitive tenders are the most used forms of competition. Competitive tenders normally mean that the local authority invites tenders for an exclusive right to operate collection and transport in a certain time period, though variations have occurred.

The third largest municipality in Denmark – Odense – chose to split its geographic area in four parts and invite separate tenders for each of these four separate sub-regions. Odense's own operator, which was organised as a limited company, participated in the competition and won three out of four regions. The remaining area was won by one of the large nation-wide companies.

Like Odense the Swedish municipality Uppsala split its area into sub-regions and invited separate tenders. In addition separate bid rounds were organised sequentially with one year between them. The motive of the local authority for this practise was to secure efficient competition not only for that particular tender, but also for future tenders.

In Norway a development has taken place where waste collection companies owned by the local authority compete for assignments in other municipalities. An interesting example is the local authority of Oslo, which invited tenders for ¾ of the waste collection operations. These operations were previously provided by Oslo's own company – Miljøtransport AS (MT). MT, which had won assignments in other municipalities, did not win the competition in Oslo. The operations were transferred to the privately owned company Transportsentralen AS. MT must now compete in other municipalities and on other activities to survive.

In Iceland smaller local authorities have co-operated on the procurement of waste collection services, while Iceland's largest municipality – Reykjavik – still handles collection and transport itself with no use of competition exposure. This difference between large and small municipalities is also found in other Nordic countries.

2.2 The Finnish system – privately arranged waste collection

Finland differs significantly from other Nordic countries by allowing municipalities to delegate the order function to the single household or firm. Each of the households must then enter into contracts with private suppliers of collection and transport of waste collection. The households pay the supplier directly for this service, not via municipal charges. When a local authority has decided on a privately arranged waste collection, it can not assign a contract exclusively. Neither can it oblige a property owner to use a particular transporter nor has it the right to prevent a transport company to offer its services. The municipality can, on the other hand, decide on what types of waste to be encompassed by the system, the maximum price that can be charged and in what region the companies are obliged to offer their services.

Table 2: Finland – Organisation of transport of households' waste collection

Organisation	Number of municipalities	Percent of the municipalities	Number of inhabitants	Percent of the inhabitants
All privately arranged	158	61	1 717 394	42
All municipal arranged	40	15	759 874	19
Mixed system	62	24	1 593 784	39
Total	260	100	4 071 052	100

From table 2 we see that as much as 61 percent of the municipalities have chosen privately arranged collection and transport of waste collection. Only 40 municipalities have chosen municipal waste collection. On the other hand, privately organised transport only encompasses 42 percent of the Finnish population, which means that primarily small municipalities have chosen this solution. Another interesting point is that in municipalities with a mixed system the transport is often organised in such a way that the municipality handles scattered populated areas, while the private solution is used in densely populated areas.

The number of companies that operate on a local market varies. On average there are 2.4 transport companies in each municipality. The largest number is 13. The input/share of participating private entrepreneurs is very high both in municipally and privately arranged transport. A survey in a Finnish county (Uudenmaan Lääni) showed that private parties supplied as much as 92 percent of waste collection services.

The local authorities may stipulate conditions with respect to types of waste, prices and regions in the privately organised transport. The Finnish Competition Authority examined in 1997 competitive effects of these conditions in connection with privately arranged collection and transport.¹¹ It found that in municipalities with weak competition the market price was equal to the maximum price stipulated by the local authority, while in municipalities with efficient competition the price was lower.

Several local authorities have the past time chosen to end privately arranged transportation of households' waste. The municipalities especially point to two reasons for this change. The first concerns the payment for the services. If a household does not pay the private supplier the supplier may cancel the contract and refuse to collect the household's waste. This is a problem for the local authority, which is responsible for the waste collection operations. Direct charges paid to the local authority will solve this problem. Secondly, local authorities claim that the change is due to organisational problems connected to the economic risk of the companies involved. Unprofitable collection routes may create financial problems for a company and in extreme cases lead to bankruptcy. Also, this will put the municipality in a difficult situation.

Another and perhaps even more important point is that the waste collection charges on municipal waste collection seem to be lower than the price the households must pay to privately arranged transport. Suomen Kuntaliitto (the association of municipalities) in Finland makes an annual survey¹² of among other things how the charges for waste transport varies with the transport system. The 1997 survey showed that

for transport of garbage bags the charges of municipal arranged transport was on average 20-25 percent lower than privately arranged transport.

3. Experiences with competition exposure

Municipal waste collection has been exposed to competition for a while and to an increasing extent, thus the experience with this service is probably more profound than for other local services.

3.1 Cost savings

In Denmark surveys show that there is little doubt that municipalities have saved costs by making use of competitive tenders. Danish municipalities that in the period 1990-91 made use of tenders in waste collection experienced on average cost saving of ten percent.¹³ Konkurrencerådet (the Competition Council) has in its survey given examples of cost savings up to 24 percent by making use of competitive tenders.¹⁴

In Norway the Competition Authority has recently made a survey of competition exposure of municipal waste collection.¹⁵ In its survey it found that the costs per subscriber were lower among those municipalities having exposed municipal waste collection to competition than for the others. The difference was however only 3.5 percent and was not statistically significant. Differentiated according to ways of assignment it was found that municipalities that made use of open (i.e. all companies may participate) competitive tenders had lowest average cost (NOK 596.50) per subscriber. Municipalities that used limited (a limited number of companies were invited to participate) competitive tenders or procurement after negotiations had highest average cost (respectively NOK 658.50 and NOK 641.39) per subscriber.

The relationship between the annual waste collection charges and competition exposure was also examined. The charges shall cover all costs of municipal waste collection, and is thus a measure of unit costs. It was found that the average level of the charges was lower in municipalities that had invited tenders for the services compared to those municipalities that had not made use of tenders. The difference was also statistically significant. Those municipalities that had used open or limited competitive tenders had on average lower waste collection charges (NOK 948.13), than those who had assigned contracts without any invitation for tenders (NOK 1062.94).

In the survey of the Norwegian Competition Authority the municipalities were also asked whether competition exposure had any cost saving effects. 78 municipalities answered affirmative. Of the 25 municipalities that mentioned cost savings in percent, it varied from three percent to 54 percent, and on average it was 20 percent. According to 26 municipalities competition exposure had led to cost increases. The remaining 45 municipalities reported no change of costs.

Also in Finland the increasingly intense competition has most probably reduced the charges for waste collection. For instance, according to Pääkaupunkiseudun Yhteistyövaltuuskunta (the Co-operation Delegation of the Region Surrounding the Capital) it has been possible to lower transport costs in the region of the capital since 1989 by a total amount of 28 percent, because the transports have been exposed to competition. Concerning the question of which system – competition exposure of the municipality or private actors – is most efficient, the situation is somewhat unclear. The survey held by Suomen Kuntaliitto (the association of municipalities) in 1997 concluded that charges on municipal transport of garbage sacks were 20 – 25 percent lower than by private transport. According to private companies these figures are not reliable. The municipality has information about the maximum charges only and not necessarily about the actual charges paid to a private company by a residential area. The private companies also point out that

the circumstances are not always comparable, and hence the comparison made by Suomen Kuntaliitto is not reliable.

Within the private arrangement a survey made by the Finnish Competition Authority showed that the competitive conditions affected the level of charges within each municipality. When competition was good, the charges of the private suppliers were below the ceiling stipulated by the municipalities.

In Sweden there are no surveys that investigate cost savings specifically for waste collection. There are on the other hand some examples of savings from procurements. In the municipality of Sundsvall the private entrepreneur made an offer that was 12 percent below the offer from the municipal company. The county council of Stockholm has made a study¹⁶ of how the municipalities of the county make their procurements. From the study the following is stated with respect to procurements of waste collection in the municipality of Täby.

"The competition between the waste collection companies has increased the last few years as a result of more companies entering the market. The municipality procures all parts of waste collection from competing companies and it is presently supplied by three different companies. Sellbergs, which previous to the procurement had all operations, still handles most of the operations. However, two other companies, Miljöservice and Skafab, have made successful entries by making the best offers for parts of the services. The procurement was handled as an open procurement with advertisements being made in the EGT. In addition invitations were made to a dozen other potential suppliers. The agreement was written for five years with a right for prolongation. With comparable quality the effects of the procurement is a reduction of the charges of 30 percent. It is noticeable that Sellberg lowered its charges considerably when it was exposed to the increased competition."

The experience indicates that it is generally possible to save costs by exposing municipal service production to competition, in particular for municipal waste collection. Some examples and more systematic studies show that the savings are more than ten percent. The Norwegian survey also suggests savings, although the estimates are somewhat lower.

3.2 *Quality*

In the survey of the Norwegian Competition Authority municipalities were asked whether they experienced quality changes as a result of the competition exposure. 52 percent of the municipalities considered that the quality of the waste collection services had not changed as a result of the competition exposure. 39 percent of the municipalities meant that the quality had improved, while 8 percent felt that competition exposure had led to lower quality on waste collection. Thus, as much as 92 percent of Norwegian municipalities considered that the quality of waste collection and transport had not deteriorated as a consequence of competition exposure. It should be pointed out that these are the considerations of the municipalities with respect to quality changes. We do not have any indicators for actual quality changes. If supplemented by surveys of users' opinion one would have had a clearer idea of quality changes.

4. **Competition policy issues and actions**

Competition exposure of the production activities of state, counties and municipals (hereafter denoted municipal sector) seems to be increasingly more widespread. Both the extent of competition exposure and the way competition exposure is handled give rise to challenges for the competition authorities. In this chapter we discuss how to develop further our involvement in the competition exposure

process in order to achieve economic efficiencies. The working group will point out competition policy issues that are raised by competition exposure and suggest certain pertinent actions to deal with these issues.

4.1 Competition policy issues

Competition exposure of the municipal sector gives rise to especially two issues to be handled by the competition authorities. The first issue is when municipalities do not expose their own production to competition, even though this is possible and efficiency gains might be achieved. The second is when municipalities expose their production activities to competition in a way that reduces the procompetitive effects. In both situations the competition authorities face apparent challenges.

4.1.1 Lack of competition exposure

Efficiency of the municipalities is particularly important since this sector is mainly financed by taxes and duties, which entail an efficiency loss. Competition exposure is socially desirable as long as it increases economic efficiency.

From experiences with competition exposure it turns out that municipalities can achieve large budgetary cost savings, which under many circumstances also will be savings in terms of economic efficiency. In case of a 10 percent cost reduction public expenses on care for elderly people alone will be reduced with around NOK 3 milliard (ECU 375 million).

It is a commonly expressed concern that competition exposure might lead to qualitatively inferior products, in particular when the services are supplied by private profit-maximising companies. Also in this field experiences show that there is little if any grounds for such concerns. On the contrary, there are several examples that users are more satisfied with the private than the municipal company. The problematic cases are often due to uncertainty about what quality shall be supplied by private companies. Thus, it is important for local authorities to give a clear and precise description of the service when tenders are called for. Then the supplied quality can be compared to the prescribed services.

Why then, should a municipality not wish to expose its operations to competition? Competition exposure touches on an ideological tradition and way of thinking. In some political milieus it is a principal opposition to competition exposure, especially of traditional welfare services like for instance care of elderly people. Other milieus wish to promote competition exposure to the largest possible extent and consider it a policy goal to limit the role of the municipalities as far as possible. Unions of municipal employees have also opposed competition exposure. It is their members that potentially might lose their jobs if a private company wins the tender. The administration has conflicting interests. On the one hand a successful competition exposure will be positive for economic management of the municipality. On the other hand the administration has a role as an owner role and a responsibility as an employer for the unit that shall be exposed to competition.

In the waste collection sector competition exposure in the form of tenders is so widespread that it cannot be said that lack of competition exposure is a problem. To some extent the same goes for other technical services like road maintenance etc. However, typical welfare services like care for elderly people are to a much less degree exposed to competition. Lack of competition exposure is therefore a topical question in these sectors. The problem is of particular importance since welfare sectors like health services, social services and education on average constitute almost 90 percent of the municipal expenses.

4.1.2 *Lack of efficient competition exposure*

The working group has previously pointed to examples where municipalities explicitly have taken steps to design competition exposure properly. In the Swedish municipality Uppsala waste collection was exposed to competition by dividing the municipality into five sub-areas, for which tenders were put out separately. In addition tenders were called for sequentially with one-year interval between the sub-areas.

Lack of efficient competition may nevertheless be a problem when municipal services are exposed to competition. Firstly, it is uncertain to what extent the municipalities can promote efficient competition when tenders are called for. The EC rules on public procurement stipulate relatively strict procedural requirements for carrying out procurement of services. Assignments might either be based on lowest price or the economical best offer. State and local authorities must specify what criteria the assignments will be based on. It is unclear whether, for instance, the authority can specify that no contract will be entered with a company if this means that the company would achieve a dominant market position.¹⁷ The EC rules also contain provisions that shall prevent splitting up contracts in order to avoid fulfilling the threshold levels, which in certain situations might prevent a division that is intended to secure efficient competition.

Secondly, it might be in the own interest of the municipality to let shortsighted cost savings outweigh long-sighted competition concerns. The municipalities must consider such trade-offs if a nationwide supplier has a tender that clearly is better than one from a smaller supplier. A better tender will as a direct effect reduce the expenses of the municipality. On the other hand, assigning the contract to a nationwide supplier might mean reduced competition in future tender rounds, which in turn might mean higher prices and increased expenses for the municipality. This effect will be uncertain, however, and might in addition depend on whether potential prospective competitors will survive by achieving contracts with other procurers. Thus, the municipalities might not always be expected to take long-term competition conditions into consideration.

Both the limited opportunity due to laws on procurement and the lack of will or interest of municipalities to promote efficient competition exposure might represent a potential problem for competition authorities. If an assignment of a contract by the municipality leads to a significant increase of concentration (which might increase the risk of market power), it might be a case for the competition authorities to intervene and for instance deny the municipality to enter the contract. To what extent this can be done under the current competition rules is to the knowledge of the working group uncertain, and in practise there are few examples of such interventions, even though an increase of concentration has been experienced in the waste collection sector (see previous chapter).

There is, however, an interesting case from Iceland concerning this issue. The Icelandic competition authority handled an invitation to tender made by Socialforsikringsinstitusjonin (the Social Insurance Institution – the SFI). The case concerned remedies for handicapped people. According to the law on social insurance the SFI pays a large part of the costs for such equipment. A contract for year's procurement of such equipment was put out to tender by the SFI. The Icelandic Competition Council received a complaint on this matter. The Council considered that the SFI was a dominant procurer. Suppliers that did not achieve contracts with the SFI would be excluded from the market, leading to a dominant position for the contract party. In this case the Icelandic Competition Council might have used Article 17 of the Icelandic Competition Act concerning abuse of market dominance and ordered the SFI to divide the tender or similar actions, a matter that was affirmed by an appellate body. Such actions were not necessary in this case, however, since the SFI entered contracts with several suppliers. Nevertheless, the case shows that Icelandic Competition Authorities might have intervened against anti-competitive procurement activities by state or municipal operators.

4.1.3 *Lack of competition neutrality*

Competition neutrality issues have often been discussed in situations where state or municipal operators enter a market in competition with private companies. Competition exposure of municipal production of goods and services entails the opposite situation, namely that private companies enter a market to compete with existing municipal operators. In many ways the issue for competition authorities is similar in the two situations: how to secure that competition takes place on equal terms when municipal and private operators compete in the same market. However, there is one major difference. Since local authorities are free to choose whether to expose their operations to competition or not, restrictions on how to do this might give negative incentives for the municipalities to engage in competition exposure at all.

When a state or municipal entity operates in rivalry with private companies there is a risk for distortions to competition. The municipal operator may choose to be organised as part of the local administration, a situation that entails risk for cross-subsidisation and other favouring treatment of the municipal operator. In addition come legal matters such as the fact that municipal operators are exempted from paying value-added tax and that the risk for bankruptcy is practically eliminated.

It might seem as a paradox that the municipality first wishes to make its own production unit more efficient by exposing it to competition, and then gives the same unit special advantages. The explanation may be that there are conflicting interests between political/administrative interests and the management of the municipal operations. The administration of the municipality may promote societal objectives while the management of the municipal production unit may maximise private economic objectives. At the same time the management – also in a competitive market – will have opportunity to influence the competition conditions of its own operations.

4.2 *Competition policy remedies*

Lack of competition exposure, inefficient competition exposure, unequal competition conditions etc are challenges raised by competition exposure that must be handled by competition authorities in the best way possible. In this respect it is worthwhile to consider several remedies, of which some are discussed below.

4.2.1 *Mandatory competition exposure*

In United Kingdom the parliament enacted a new law¹⁸ in 1988, which obliged local authorities to expose to competition certain services produced by the municipalities themselves, i.e. mandatory competition exposure. Similar general rules do not exist in the Nordic countries with one exception. In Finland the act on public procurement was renewed in the beginning of 1998. During preparation of the reform it was in particular discussed whether the duty of the municipalities to engage in competition exposure should be extended by putting municipalities' own production and procurement on equal footing. A duty to engage in competition exposure was adopted for municipal building projects above FIM 5 millions in cases where state support was granted.

In a 1992 Swedish ministerial paper¹⁹ a new law was proposed, which would entail an obligation for the state, the municipalities and the counties to use competitive tenders in connection with procurement of specific services. The starting point was that all operations that were not discharge of public authority should be exposed to competition. Mandatory competition exposure should encompass mainly technical services. The costs of the services that were to be exposed to competition was estimated to be at least SEK 50 millions. With an assumed net saving of ten percent the proposal was expected to entail cost savings of at least SEK 5 millions. The proposal for mandatory competition exposure was never adopted.

Among others the municipalities objected strongly to the proposal. Instead it was presupposed that the state, the counties and the municipalities on a "voluntary" basis should increase their share of competitively contested services.

The EC rules on public procurement are in many ways mandatory rules for state and municipal authorities, as an eventual law on mandatory competition exposure would be. When authorities procure goods or services in a market, they must follow specific procedures stipulated in the regulations. The contract must as a main rule be assigned after an open competitive tender. The rules do not however oblige public authorities to expose their own operations to competition.

Legislation is in the political domain and is not a task for the competition authorities. This does not preclude however that the competition authorities may increase their knowledge about what effects a law on mandatory competition exposure might have. This is and should be an area of interest for the competition authorities as long as the objective is economic efficiency and the means is competition.

Another variant would be to give the competition authority power to order competition exposure of state and municipal operations, when they find that this will give rise to societal economic gains. Nordic competition authorities do not currently have such a remedy. The working group is of the opinion that this is a decision that should be taken on the political level or by the particular public authority for the entity concerned.

Nevertheless, the working group would like to point out that if the process of competition exposure goes slowly, and large parts of the state or municipal sector are protected from competition in such a way that there are considerable potential for gains in economic efficiency, there are grounds for contemplating remedies that to a larger extent may contribute to speed up competition exposure.

4.3 Active information and advocacy

In all Nordic countries the competition authorities have as one of their tasks to point out competition reducing effects of regulations and actions by the state or municipalities. They also have the opportunity to propose alternative actions with a view to reduce or eliminate competition-reducing effects. The working group recommends that the competition authorities give priority to this task with respect to competition exposure of state and municipal sectors. The reason is partly the lack of alternative remedies; partly that several issues are of a political character and involve other authorities. In addition one should not underestimate the effects of such actions.

Publication of reports on competition exposure or lack of competition exposure contributes to increase knowledge level about this topic, but also to put the issue on the agenda. It is not seldom that a report is followed by a debate and possible changes.

The Swedish Competition Authority has made a great effort in the information field in order to influence the municipalities to take into consideration competition issues, among other things by publication of a number of reports.

The Norwegian Competition Authority has worked out two reports on municipalities' procurement practices and recently a report on competition exposure in the waste collection sector.

The Danish Competition Council has on several occasions worked out guidelines on proper "competition practice" among other things within the field of competitive tenders. The council has among other things advocated that the duration of contracts shall not be longer than three-five years. The

guidelines are not binding for the authorities but the experience is that the guidelines have influenced the behaviour of the market participants.

Another relevant remedy may be to publicly point out to authorities concerned the negative effects of a lack of competition exposure. This remedy shall not be underestimated and in particular represents a type of pressure. First, pressure might be created since the advocacy is public, meaning that the opinions of the competition authority might be publicised through media and other channels. Second, it is frequently expected that the authority concerned shall provide an answer or reasoning, meaning that they are put under pressure to explicitly defend the arrangement if they do not want to change it. In Denmark the authority concerned is obliged to answer within a given time (three months), and the answer shall also be public.

Public authorities shall often promote other objectives that may be at least equal in importance as the competition concerns. Public advocacy may function more efficiently as a competition stimulating remedy if the competition authorities in their recommendations make proposals that do not preclude other societal objectives.

The competition authorities may also use research to indirectly promote competition on municipal production. However, this requires that the competition authorities have the necessary resources for financing research on competition exposure. The merits of utilising external research competencies are among other things connected to the reliability this would give to the report because of researchers' presumably higher theoretical knowledge and neutrality. Alternatively, competition authorities might build up research competencies themselves and produce research reports on their own. This is, however, more demanding and far-reaching and is hardly a realistic objective for the competition authorities. It is nevertheless important to establish a milieu for constructive and critical dialogue with researchers. This will also lay the foundation for developing a capability of the competition authorities to make their own surveys.

4.3.1 *Securing competition neutrality*

Competition exposure frequently means that municipal and private operators compete head-to-head for assignments, customer's etc. In this situation it is important to secure that the competition as far as possible is on equal terms in order to have the production allocated to the most efficient operators.

Sweden has enacted a law on improper behaviour in public procurement²⁰ (LJU), which complements the law on public procurement (see below). The law, which came into force in 1994, concerns improper behaviour from a state or municipal procurer, for instance in the form of favouring the municipality's own production unit. The Swedish Competition Authority may bring forward cases to the Market Court (Marknadsdomstolen). This court has only reached a decision in one case, namely the procurement by the municipality Linköping of community aid, where the municipality had favoured its own production. In line with the opinion of the Competition Authority the court decided that the behaviour of the municipality was in conflict with LJU and should not be repeated in the future.

In Sweden a public report²¹ was presented in 1995, which focused on measures to increase competition neutrality in connection with municipal pricing etc. The report found that the most serious and possibly most frequent competition problem in connection with state and municipal business activities were situations where services are sold on free markets to distorting low prices. Unjustified suspension of tenders to the advantage of own business activities and competition distorting support for own production were also identified to be problems to competition. In the study the following was suggested:

- that a law on competition neutrality in connection with pricing by the state or the municipalities should be enacted, with a requirement that state or municipal business activities under certain conditions should have separate accounts from other operations, that the price should be based on costs and that the pricing should not entail unreasonable pricing from a societal point of view ;
- that the special laws that regulate operations having aspects of both public authority and business activities should be complemented with rules that prevent authorities from mixing different roles;
- that it is clarified in the law on public procurement or other laws that procurement cannot be suspended without business justifications;
- that the law on municipalities should be examined in order to make more precise under what circumstances municipalities and county administrations may operate businesses on competitive markets.

The proposal did not lead to any amendments of existing or any new laws. However, in December 1997 the Swedish government decided to establish "a council for competition on equal terms between public and private sectors" (Konkurrensrådet). According to the directive from the government the task of the council shall be to point out hindrances for public and private sector to compete on equal terms. Representatives from both public and private sector participate in the council. The work shall be held tentatively for three years and thereafter be examined. The council shall by dialogue and contact between parties concerned shed light on concrete cases and seek to achieve consensus about how long-term rules of the game shall be formulated in the best way possible.

In Finland the Competition Council has decided on the neutrality problem in their interpretation of the law on public procurement. In a decision the Council has found that tender (also a very cheap tender) from a municipal business operation or other municipal entity, cannot from a total economical point of view be considered to be the best as long as the offer presupposes economic support from the procurer. Such an offer can only be compared to other offers if the subsidies from the procurer are taken into account in the offer.

Distortions to competition may also take place when an operator in the so-called third sector²² that is supported by the state or municipality can utilise these competitive advantages to foreclose a private company from the market. In Finland this is particularly relevant for the grants provided by Raha-Automattiyhdistys (association for the management of slot machines) to organisations within the so-called third sector in the market for health and social services. Distortions to competition may take place when no clear definition exists for the municipality's role as an authority, procurer and producer.

The working group thinks it is important to establish means to deal with problems concerning competition neutrality in connection with competition exposure. When the state or municipality chooses to expose its own activities to competition, certain requirements should be stipulated, which ensure that competition takes place on equal terms, either in the form of a law or in other ways.

As mentioned above the issues that are raised in connection with competition neutrality have often been discussed in situations where a state or municipal company establishes itself in competition with private companies. This is an issue that frequently arises in connection with competition exposure if the municipalities own production loses the tender competition, because the own production unit may want to enter other markets.

In connection with the above mentioned survey "Konkurrens i balans" the Swedish Competition Authority stated as its basic point of view that the state, municipality and county authorities should not do business on markets with efficient competition. Instead, civil servants should develop their competencies as procurers and make use of competitive markets. The working group supports this statement concerning markets with efficient competition.

However, the working group will not generally advise that state or municipal businesses shall not enter markets with inefficient competition. This may be market where the basic market conditions or where overriding welfare objectives create obstacles to efficient competition. A restrictive attitude towards letting municipalities' own production units enter new markets might entail that the municipality chooses not to expose its production unit to competition, for instance because of a wish to avoid loss of working places if it loses the contract.

The working group would like to stress, however, that a mixture of monopoly and competition activities always would be problematic from a competition policy point of view. If the state or municipality decide to enter new markets it must be because the basic preconditions for those markets or overriding welfare objectives do not allow efficient competition to take place. Furthermore, the own production unit must operate on the same terms as private companies and it should be secured to the maximum extent possible that distortions to competition does not take place. The working group thinks that it must be demanded that the own production unit is divested as a separate limited company operating under the same conditions as private companies, meaning *inter alia* that the company must be able to go bankrupt.

4.3.2 Separation of monopoly and competition activities

Several of the problems that are raised in connection with competition between state/municipalities and private operations might be softened or a solution is found by means of organisational measures such as divestiture or separate accounts. In Iceland the competition authorities have the opportunity to order such a divestiture. According to the Icelandic Competition Act article 14.2 the Competition Council may order an economic division between the monopoly part of its production activities and the part that operates in free competition against other suppliers. The Competition Council has interpreted this article in such a way that the economic division also applies to the administration of the activities in question. On the basis of this article the Competition Council has for instance ordered an administrative divestiture of the cemeteries of Reykjavik that operates funeral homes as well as publicly financed cemeteries.

The Icelandic Competition Act differs from the other Nordic competition acts by having economic separation explicitly formulated in one of the provisions of the act. Also in the other countries there is probably to a certain extent possible to intervene against anti-competitive conduct, abuse of market power or similar actions by a state or municipal business activity. It is not straightforward to draw a line since there is a lack of experience in this field. Nevertheless, it is more uncertain whether other Nordic competition authorities may order the state or municipal activity to divest its competition activities from its sheltered activities.

The working group considers it to be a very important task for Nordic competition authorities to secure efficient competition when the state or municipal sector has been exposed to competition. A very important contribution in this respect would be to secure that municipal and private production units compete on tenders on equal terms, thereby allocating production to the most efficient units. On this background the working group considers it particularly important to increase the power of the competition authorities. Firstly, the authorities should uncover the scope of the existing acts. If the competition acts proves to be insufficient there is a need for amendments of the act, thereby enabling the authorities to

handle such types of problems. Statements in reports, approaches to relevant authorities etc are not sufficient in this field.

4.3.3 Administration of the law on public procurements

The working group has noticed that municipalities only to a limited extent abide to the law on public procurements. In Sweden the accountants of the Parliament have presented a report on this.

The administration of the law on public procurements is organised differently in the various countries. In Denmark a special unit within the Danish Competition Authority has been given the task to administer the EC rules on tenders in Denmark. The Competition Authority shall identify presumed transgressions of the rules on tenders and handle complaints on such transgressions. The Authority has no competencies to decide on concrete cases, but shall present presumed transgression for a special decision unit (Klagenævnet for Udbud), which is an independent administrative body. Since 1998 the body has decided on 50 cases, of which transgressions were found in half of the cases. However, none of these cases have entailed that the contract has been transferred to another supplier.

In Sweden the municipalities must adhere to the law on public procurement²³ (LOU) if they choose to expose their own production units to competition. LOU is mainly based on the EC rules on public procurement but Sweden has chosen also to regulate procurements below the EC thresholds. The law regulates how procurements shall take place with respect to types of tender competition, time periods and announcements, choice of supplier etc. The county administrative court (Länsretten) may during ongoing procurements and after receiving complaints from a tenderer decide whether to intervene against the procurement. After the tender has come to a completion the case might be brought before the district court (tingsrätten) with a plea for damages. The directorate for public procurement spreads information on and has the supervision of LOU. It has turned out that the enforcement of LOU is weak, especially since a court trial is costly and since potential complainants hesitates to go to a court trial from fear of being blacklisted.

Also in Finland the law on public procurement applies below the EC thresholds. It is the Ministry of Trade and Industry that has the supervision with the law on public procurement.²⁴ In practice the Finnish Competition Authority has no tasks under this law. Disputes in connection with public procurement are handled by the Competition Council, which is a public body resembling a court. The Competition Council may among other things order that a municipal procurement decision is to be cancelled or changed.

The working group considers the law on public procurement as an important means to secure efficient competition exposure of municipal activities. There are several measures to be considered in this connection. The competition authorities should try to strengthen the possibilities to sanction transgressions of provisions of this law. The competition authorities may also suggest that they be given the authority to administer the laws. This might give the authorities the resources to give higher priority to the work on competition exposure.

4.3.4 Maintenance of efficient competition

The competition authorities has a role to play to secure efficient competition both in the short and the long term

In the short term it is of course important for the competition authorities to enforce the prohibitions of collusive tenders. To secure an effective enforcement it is vital that the procurers of the

municipalities knows the prohibitions of the competition act and that they contact the competition authorities in case of suspicion of transgressions.

The municipalities may arrange for efficient competition in the long run by designing the tender conditions in a way that counteract the development of market dominance. Both for waste collection and care for elderly people there are examples of municipalities having designed tender conditions that will make it easier to sustain competition in the long run.

The competition authorities should have an independent responsibility to inform on what experiences the municipalities have with the different forms for competition exposure. This might take the form of "guidelines" or "recommendations" for the municipalities. We also refer to the above mentioned guidelines on proper "competition practise" worked out by the Danish Competition Authority, among other things with respect to competitive tenders.

It would in addition be of great interest to investigate the potential short and long term effects on competition from inter-municipal co-operation on procurements. In the short term co-operation on procurement might be pro-competitive by making it more attractive for more market participants to submit tenders. In the long run co-operation on procurement might give rise to an increase in supply side concentration, thereby making it more difficult to sustain efficient competition.

It is unclear to what extent the competition laws may be applied to intervene against the procurement decisions by the municipalities in order to counteract market dominance. This can only be decided by the courts. The possibility to complain to the competition authorities about the decisions by the municipalities should be made known to the market participants, thereby making it easier for the competition authorities to be aware of cases where there is a possible competition problem.

NOTES

- 1 The following two chapters are a translation of chapters 3 and 5 of the report
- 2 This chapter is a summary of contributions of each of the Nordic countries.
- 3 Ole Kirkelund: Kommunenemes finansiering av avfallsbortskaffelsen, 1997
- 4 Survey in 1996. Tabustutkimus Oy.
- 5 Konkuransetilsynet: "Konkuranseutsetting av renovasjonstjensten", Oslo 1998.
- 6 Per Nilzén: Hushållens avfallskostnader 1997, Renhållningsverksföreningen.
- 7 Egil Kjerstad og Frode Kristiansen: Erfaringer med konkurranseutsetting av kommunal tjensteproduksjon, SNF-rapport 87/96, Stiftelsen for samfunns- og næringslivsforskning, Bergen 1996
- 8 See footnote 5
- 9 Kommunemes landsforening: "UDBUD - Stigende interesse og klar effekt
- 10 Survey in 1997, Suomen Kuntaliitto.
- 11 Konkurenserverket: Kommunens roll vid avfallstransport i privat regi och därmed förbunden konkurrens, upublicert rapport, 1997
- 12 See footnote 10
- 13 Kommunemes landsforening: "UDBUD - Stigende interesse og klar effekt." Noverber 1992.
- 14 Konkurrencerådet: "Konkurrenceredegjørelsen." Desember 1997.
- 15 See footnote 5.
- 16 Konkurrens i kommunal sektor - erfaringer från upphandling i Stockholms län. Länsstyrelsen i Stockholms län, Rapport 1996:15.
- 17 In a recent case in Denmark a traffic company wanted to invite tenders for several separate routes. The company asked the Danish Competition Authority whether it might be stated in the tender documents that the same company could only win a limited number of the routes. As guidance the Competition Authority replied that the traffic company might stipulate such a condition as a contractual requirement.
- 18 The Local Government Act of 1988
- 19 Anbudskonkurrens vid offentlig produktion. Ds 1992:121
- 20 Lagen om ingripande mot otillbörligt beteende avseende offentlig upphandling.
- 21 Konkurrens i balans. SOU 1995:105.

- 22 Non-profit organisations
- 23 Lagen om offentlig upphandling (SFS 1992:1528)
- 24 Laki Julkisista Hankinnoista (1505/92)

SLOVAK REPUBLIC

1. The role of local authorities in regulation and public procurement

Under the law on municipal establishment, "local self-administration" means that the municipalities are authorised independently to decide and perform the following activities:

- realise the construction, maintenance and administration of local communications, public areas, municipal cemeteries, cultural, sporting and other municipal facilities and local historical monuments and constructions;
- ensure the provision of public services (municipal solid waste disposal and municipality cleaning, administration and maintenance of public green grounds and public lighting, water supply, wastewater disposal etc.) and public transport.

A municipality is authorised to perform its self-administrative function in the following three ways:

- 1.....b
by establishing its own public utility which realises the mentioned service;
- 2.....b
by choosing the individual firm as a supplier and concluding a contract;
- 3.....b
by choosing several firms as suppliers.

A municipality which chooses a supplier (points 2 and 3) must act pursuant to the law on public procurement of goods, services and public works.

Under the law on municipal establishment the municipalities, in fulfilling the mentioned tasks, issue for the territory of municipality "generally binding regulations" (hereinafter only GBR) which must not be contrary with the Constitution, law or other generally binding regulations. The municipality in the GBR sets down the conditions and a procedure under which it acts in practice.

A local self-administration acquires its incomes primarily from :

- municipality property and from a state property allocated to the municipality for a provisional time period;
- tax revenues of municipal undertakings;
- revenues of collections and presents;
- state subsidies.

Pursuant to the law, the municipality authorities are represented by:

- a mayor who is directly elected by the inhabitants for a period of four years;
- a municipality representation containing the deputies who are elected in the direct elections by the inhabitants for a period of four years;
- a municipality office, which is an executive authority of the municipal representation as well as municipality mayor, ensures the administrative and organisational affairs concerning the municipality authority and is represented by the municipality employees who are employed under the Labour Code.

The utilisation of financial resources connected with the state budget of the Slovak Republic, a municipality budget (goods, services and public works) through production, purchase or lease must be pursued according to the law on public procurement. This law sets out a procedure to be followed in a public procurement with the aim of (a) ensuring that public funds are expended economically and effectively; (b) ensuring that the procurement process is transparent; and (c) to ensure that all bidders face the same conditions to promote development of the competitive environment. In addition, this law determines the competence of the Ministry of Construction and Public Works of the Slovak Republic and regional authorities in public procurement of goods services and works.

The law on public procurement sets out in its provisions the procedure of a procurer in choosing the contract partner for the provision of goods, services and public works. Pursuant to the law a procurer is represented by a municipality or legal entity connected with a municipality budget. As it is ensuing from the above-mentioned a municipality in expending its financial resources is due to act in accordance with the law on public procurement.

Regarding the forms or methods to be used for choosing a contract partner, the law sets out a public tender as an essential method of public procurement. The other methods of public procurement are as follows: restricted tender, negotiation proceeding, price offer and direct set-up under which a procurer is permitted to act only if he fulfils some of the conditions determining their usage. There is not any difference, set out by the law on public procurement, between the procedures concerning a participation of domestic or foreign entrepreneurial subjects in the public procurement. The state supervision over an observance of law on public procurement (including at the municipality level) is performed by the state regional offices.

2. Regulation and procurement of solid waste

As was mentioned in the previous part, a municipality in choosing the contract partner for management and disposal of solid waste is due to act pursuant to the law on public procurement. The other case arises when the municipality establishes its own legal entity for fulfilment of the mentioned activity. Disposal of solid waste may be organised by the municipality pursuant to the law on concession procurement which stipulates the rules for procuring the construction of publicly-owned facilities which are paid in whole or in part by the private funds.

The payment issues in the field of municipal waste management may be divided into two parts. It is dealing with a charge duty under the law on charges for waste collection onto the waste depot. This charge duty may not be removed from a municipality to an inhabitant. Costs regarding the collection, separation and disposal of municipal waste as well as costs connected with the operation of waste depot are permitted to be reflected in the price of waste disposal and liquidation which is set out in accordance with

the law on prices in a contract concluded under the Commercial Code including the price calculation and invoice.

A municipality as a legal entity has the right to conclude a contract under the Commercial Code and, in accordance with the GBR for municipal waste management, to stipulate the conditions regarding the municipal waste management in compliance with the programme of waste economy including the price assessment pursuant to the corresponding price measures valid for a given time period. Public services which involve also the municipal waste disposal and liquidation are organisationally operated by a municipality whereby an inhabitant of municipality is due to contribute to the municipal costs pursuant to the law.

Under the law on waste management a municipality is considered to be the producer of municipal waste arising within the municipality territory and is also responsible for management and disposal of the arising waste. Under the mentioned law the producers of municipal waste are also responsible for waste collection, utilisation of arising waste considered as the resources of recycled materials or energy when performing their own activities, further for offer of waste which is not used to the other entities and for the waste liquidation if it is not possible to ensure its utilisation (under this law the recycled materials are raw materials or other substances acquired from the waste which are useful for the further processing or other utilisation, however, they are still considered as waste until the next processing). Property owners or individual citizens are not considered to be waste producers though this waste is produced by them.

Under the law on municipal establishment a municipality is also responsible for performance of public services (municipal waste disposal, cleaning of municipal territory etc.). Within the set of activities concerning waste management (i.e., collection, disposal, separation, storage and liquidation) a municipality has to manage all these issues since it is the waste producer. The municipality may solve this problem substantially through the following methods:

1. to establish its own public utility which performs the mentioned service;
2. to choose the individual firm as a supplier and conclude a contract;
3. to choose the several firms as suppliers.

Regarding points 2 and 3, a municipality as the unit is a purchaser of services concerning the waste management grounded on the municipal waste collection eventually municipal waste processing. The municipality chooses a supplier or the suppliers within the whole territory of the Slovak Republic according to the results of tender and concludes the contracts with them.

Regarding the price regulation it falls under the provisions of the Act No. 18/1996 Coll. on Prices, Decree No. 87/1996 and Measure of the Ministry of Finance of the Slovak Republic. Under the Article 11 of the Act No. 18/1996 on Prices the Ministry of Finance of the Slovak Republic sets out an extent of price regulation by its decision on price regulation (Measure of the Ministry of Finance) and regional and local authorities perform the price regulation in extent stipulated by the decision on price regulation (Price Measure). The Ministry of Finance of the Slovak Republic also sets out the price regulation and authorises the regional and local authorities to decide in the matters of price regulation. The local authorities after the negotiations with a municipality determine the maximal prices of goods at the local level in extent set out by the Ministry of Finance. The Measure of the Ministry of Finance No. R 1/1996 stipulates an extent of goods falling under the price regulation. Pursuant to the Measure for Classification of Production 90.002 "The Solid Waste Management" (with the exception of the special waste management) officially determined price (i.e., the maximal price, which may be applied). A municipality imposes the costs of waste management (i.e., waste disposal, storage and combustion) upon

the inhabitants of municipality. With regard to the fact that the maximal prices in the solid waste management in the most cases are approved by the corresponding municipality (as a component part of its municipal policy) it may occur that the costs concerning the waste disposal are on the edge of profitability.

Law on charges for the waste disposal and storage sets out payment of these charges and a method of calculation concerning the different methods of waste disposal. These costs are paid by the waste producer.

As was stated above, a municipality is a waste producer and hence also a waste owner. The municipal waste management may be realised by the municipality through the mentioned three methods. The municipality (according to the points 2 and 3) is as a purchaser of service and a firm eventually the firms as the service suppliers. After the choice of a supplier, with the exception of the chosen firm, other suppliers of service may not operate within the territory of municipality. The municipality performs a choice of supplier (suppliers) within the whole territory of the Slovak Republic according to its own consideration, concludes with them the contracts which may be within in a time period appropriate to the nature of economic activity (to the nature of provided service) and also may enter the contract relations with the other firms if they offer the services at higher quality and lower price level. This is an essential base of economic competition in the mentioned area.

3. Market structure and competition issues in the solid waste management

3.1 Case on horizontal agreement restricting competition in the waste disposal

Twenty-one representatives of municipalities and entrepreneurs founded an association whose activities were focused on municipal waste disposal and storage. Membership in this association was tied with the provision of deposit. The town called Rajec was provided with more than a third of the votes. The supreme authority of the association was represented by a meeting of the members whereby a quorum was ensured if there were present members holding more than two thirds of the votes. The meeting of members was authorised to decide by two-thirds majority of present votes. Therefore the opinion of the town Rajec was the decisive factor during the voting procedure at the meeting of members. The statute of association defined a duty: "to perform the waste disposal only through the company *Technické služby mesta Rajec* (Technical services of the town Rajec) or through another waste disposal company but this company has to be approved by the meeting of members". As it came out from the voting mechanism it was not possible to agree with the other waste disposal company without the favourable approval of the town Rajec which is the biggest co-owner of a waste depot and owner of the company *Technické služby mesta Rajec*.

The relevant market was defined as the provision of waste disposal service. This market was closely connected with the relevant market where there are provided the waste disposal and storage services. It was territorially determined by the collection area the waste dumps. Only from this collection area the waste dedicated for the waste dump may be transported. The dump became an essential facility since there are economical and ecological barriers to the creation of another dump.

Economic competition in the field of waste disposal is grounded on the fact that the municipalities should have the possibility to choose an advantageous trade partner for waste disposal from the firms operating in the market. Members of the association, having agreed with the provisions of statute, which should have been aimed at or could result in the restriction of competition, excluded the possibility of choice of the supplier, gave up their right concerning the choice of waste disposal supplier, divided the waste disposal market and determined only the one waste disposal supplier. The mentioned provision of statute was evaluated as an agreement restricting competition, which is pursuant to the Article 3. Paragraph 1 and 3 of the Act No. 188/1994 Coll. on Protection of the Economic Competition prohibited

and invalid and the Antimonopoly Office entailed the obligation to refrain from its fulfilment. The mentioned agreement was considered as a horizontal agreement concluded on the customer side.

3.2 Case on concentration in the market of recycling

At the beginning of 1999 the company T ento, a. s. Žilina (hereinafter only T ento) acquired a control over the company Zberne surovín Žilina, a. s., Žilina (hereinafter only Zberne surovín) and there a concentration occurred pursuant to the law on protection of the economic competition.

The company T ento is one of two Slovak producers of toilet paper, paper handkerchiefs and paper napkins and the only producer of kitchen towels whereby a substantial part of its production allocates in the foreign markets. Within the framework of this examination the Office found that the company T ento had a dominant position in the relevant market only in supply of the product called tissue paper.

There was another relevant market which has been examined by the Office namely a market of waste paper purchase and sale. The second participant of concentration namely Zberne surovín represents one of the three biggest purchasers of waste paper within the territory of the Slovak Republic and at the same time one of the waste paper suppliers for the company T ento. The company Zberne surovín was established on May 20, 1996 through a splitting of the previous state enterprise Zberné suroviny Žilina. From the Office's investigation it ensued that this company did not have a dominant position in the mentioned market.

Both participants of the concentration represent the companies, which their products and services locate within the whole territory of the Slovak Republic and also their competitors operate within the whole territory of the Slovak Republic. The geographically relevant market is the market of the Slovak Republic.

A large number of natural and legal entities operate in the waste paper market but only six entities hold a share bigger than one percent. Only four entities hold a bigger share than ten percent thereof. As concerns the production assortment of company T ento the entry barriers may be considered as very high. Waste paper market with exception of the approximately ten most important purchasers is represented by a lot of small entrepreneurial subjects whose shares in the Slovak market are negligible. Purchasers work mostly on a regional principle and as the natural entities undertake on a basis of professional licences. Entry barriers from a viewpoint of expended costs are not high but with regard to a wide network of individual purchasing shops it would not be easy to compete with the contemporary established purchasers. Purchase from the citizens is in stagnancy; waste paper is purchased mainly from the producers as a waste material from the production. Nowadays sellers require the waste paper to be in sorted and packed form what may be realised in a big amount only in such case if a purchaser owns devices for sorting a packaging. Purchase of these devices requires the financial resources what may be presented by the fact that just a necessity of investment by the company T ento into the technical equipment of company Zberne surovín is the main reason of appraised concentration.

Position of the one concentration participant (i.e., the company T ento) in the relevant product market defined by the production assortment of this company will remain unchanged also after the concentration.

Property entry of the company T ento into the company Zberne surovín which is simultaneously personally interconnected with the company Bratislavské zberne surovín, a. s., Prešov and with the company Zberné suroviny, a. s., Bratislava resulted to a creation of a dominant position in the waste paper market. After the concentration the company T ento through the property and personal interconnections

controls an important share in the waste paper market which is strategic raw material for the production of paper but at the same time also for production of its competitor in the market as well as for other producers operating in the other relevant markets the company Tento has significantly advantageous position in relation to acquiring this material for production.

The Office will prohibit this concentration which creates or strengthens a dominant position unless the participants prove that overall economic advantages of the concentration will outweigh the harm on competition. Overall economic advantages of concentration will be especially seen if a concentration results towards investment into out-of-date devices of the company Zberne surovín what brings effects concerning a quality of waste paper supplied also to the other customers. Nowadays in the field of waste paper collection and revaluation there was no success in reaching a level of the year 1989. In the mentioned year this level was comparable with the EU countries. The mentioned concentration which is presumed to result towards investment into the new devices and technology for the waste paper revaluation should be the one of possible solutions for increasing the level of waste paper collection in the Slovak Republic and its utilisation as a recycled material.

SPAIN

1. The role of local authorities in regulation

1.1 *Economic role of local government*

1.1.1 *What local services is the responsibility of local authorities?*

The Spanish Constitution (December 1978) establishes that the Spanish State is organised from a territorial point of view into municipalities, provinces and autonomous communities. It establishes that municipalities must have autonomy when managing their own interests.

In 1985 a law was approved (Law 7/1985) to regulate the activities of municipalities, provinces and other local entities. This law establishes that municipalities are responsible for a series of services including public transport, provision of water, wastewater collection, gas distribution, urban planning and solid waste disposal and collection. This law allows these services to be provided under a monopoly regime, having the approval of the Autonomous Community. Municipalities can provide these services either directly, or through enterprises belonging totally or partially to the municipality or contracting out through tenders. When contracting out, municipalities must comply with the directives established in this law, in laws governing contracts by the State, in those approved by their Autonomous Community, and with the European Community legislation. In any case, they cannot contract out without tender above the threshold fixed by the directives affecting all Spanish public administrations and when contracting through tenders, they must comply with the publicity conditions established in the royal decree (18 April 1998) that develops the law 7/1985.

In 1998, a solid waste law was approved (Law 10/1998). This law acknowledged the constitutional sharing of competencies between the State and the Autonomous Communities regarding solid waste, while being warrant for the competencies of municipalities. This law establishes that municipalities are obliged to provide urban solid waste collection and disposal, and municipalities with more than 5 000 inhabitants are obliged to have selective collection by the year 2001. Autonomous Communities can approve plans for the disposal of urban solid waste, in which case municipalities could join in the integrated system designed for the management of packaging waste (Law 11/1997). Autonomous Communities could keep for them selves, the management of some kinds of waste. This law entitles local entities to provide these services directly or contracting them out.

Some data could be of interest when focusing urban waste management.

Of a total population in Spain of around 40 million people, 19.5 million live in municipalities of less than 50 000 inhabitants.

Total expenses for the management of urban solid waste by the Public Administrations were in 1996, 226.9 billion pesetas (approx. 1.4 billion euros), from which 203.4 were expenses of the municipalities.

2. Procurement of solid waste

Having underlined the regulatory framework in the previous section, and highlighting the fact of the Spanish special configuration of three levels of regulatory entities, the Central State, the Autonomous Communities, and the Municipalities, we will proceed to analyse how *competition for the market* takes place in the major cities of Spain, both for the collection and for the disposal and treatment of urban solid waste.

2.1 Sources of revenue for solid waste service providers

In 1988 a law was passed which regulated the financing of local entities. The purpose of the law was to guarantee the financial autonomy of local entities while providing the basis of their financial soundness. Revenues of local entities could come from three different sources: revenues from non-taxing origin, taxing revenues, and revenues coming from Central Government and Autonomous Communities.

The law established an automatic mechanism which fixes every year the revenues to local entities coming from the National Budget, and rationalised the taxing revenues of the local entities, cancelling a long list of local duties for specific services, establishing three main taxes for all municipalities: a tax on real estate, a tax on economic activities carried out in the municipality and a tax on vehicles. Two other taxes were established, on public works and building sites and on the increased value of land. No duties could be levied on street cleaning, civil protection, and street lighting. At the same time a limitation was put on the local specific duties that pay for specific services, the total of these duties could never be higher than the cost of the services. Ten years later in 1998, a new law established a list of services provided by municipalities which could be paid for by local specific duties, among them was the collection, disposal and treatment of urban solid waste.

For our concern, following the law 39/1988, major municipalities had nullified the specific taxes that pay for the collection and disposal of urban solid waste. This service is financed mainly by the tax on real estate (*impuesto sobre bienes inmuebles*). Such is the case for Madrid.

Barcelona has no collection tax for urban solid waste for households and normal shopkeepers and offices, and as in Madrid this service is paid with the revenue of real estate tax, but they have a special tax for retailers and wholesale facilities which produce over a certain volume of waste. In Barcelona, disposal and treatment of urban solid waste is provided by an entity that is supra municipal. This Environmental Metropolitan Entity pays for this service from the water distribution specific tax, increasing this tax by a fixed amount per cubic meter consumed.

2.2 Competition for the market in urban solid waste collection

Most of the cities of Spain contract out the urban solid waste collection. However there are important exceptions. Valladolid (400 000 inhabitants) directly provides the collection of urban solid waste, with staff and vehicles belonging to the municipality. Sevilla (700 000 inhabitants), Pamplona, and Palma de Mallorca have enterprises belonging to the municipality that are in charge of providing the collection.

We focus on the following major cities, Madrid, Barcelona, Zaragoza, and Valencia.

Madrid (2 900 000 inhabitants) started contracting out urban solid waste collection in 1968 for its periphery for a period of 25 years. In 1995 a second contract was signed for this area for a period of eight years. In 1972 a contract was signed for the area inside the periphery ring for a period of 25 years. In

1999 two tenders were launched for this centre area with two separated contracts for a period of eight years. One firm won both tenders.

Barcelona (1 505 805 inhabitants) started contracting out urban solid waste collection in 1974 for a period of 25 years. A new competitive tendering process is being carried out at present, the results will be known in December 1999. The city has been split in four areas, as stated in the tendering specifications; one firm can win in a maximum of two areas, for a period of seven years.

Valencia (746 683 inhabitants) started contracting out urban solid waste collection in 1970 for a period of 25 years. The last tender took place in 1994, for a period of ten years. The city was divided in two zones, north and south, the tendering specifications did not allow one firm to win in both zones.

Zaragoza (607 000 inhabitants) contracted out urban solid waste collection for the first time in 1987 for a period of ten years. This contract when finished was extended for another ten years.

2.3 Competition for the market in urban solid waste disposal and recycling

The conditions that rule the contracting out of these activities of the waste industry are quite different from those related to the collection due to the sunk investment needed.

In Madrid, the Municipality three years ago contracted out through a competitive tender the construction and exploitation of a facility whose cost was 15 billion pesetas. For a period of 25 years. This year a new facility has been tendered for 25 years, the cost of this new recycling plant was 14 billion pesetas.

In Valencia the disposal and recycling is provided by the Metropolitan Entity (*Conseil Metropolitá*) and is carried out by a firm belonging to the Metropolitan Entity. In Valladolid, where collection is done directly by the municipality the disposal and recycling was contracted out through competing tender in 1985 for a period of 16 years. Some cities like Zaragoza tender together collection and disposal.

2.4 Market structure

There are around seven private important firms in the market of waste collection, all of them related to construction and public works companies.

In the market for disposal and recycling where huge sunk investment are needed proposals are made by groups integrated with the previous firms, plus firms related to other economic sectors, in some cases to the energy sector (utilities).

UNITED KINGDOM

1. The role of local authorities in regulation and procurement

1.1 *The economic role of local government*

From April 1998, the local government structure has consisted of English County Councils, District Councils, London Borough Councils, the Corporation of London, Metropolitan Borough Councils, and Unitary Councils; Welsh and Scottish Unitary Councils; and Northern Ireland District Councils. In England, County Councils are generally responsible for strategic planning, highways, traffic, social services, education, libraries, fire services, consumer protection and refuse disposal. District Councils have responsibility, *inter alia*, for local planning, housing, environmental health, cemeteries and crematoria, leisure services and parks, tourism, markets and fairs, street cleaning, litter prevention and refuse collection. The London Borough Councils, and the Metropolitan and Unitary Councils in England, Wales and Scotland, are responsible for all services. The District Councils in Northern Ireland have fewer functions than their English counterparts and deal mainly with environmental health, leisure, and refuse collection and disposal. Regulation of waste is not a local authority function, but is carried out by the Environment Agency, which is an agency of central government.

Thus in general, local authorities are responsible for the collection of municipal waste at District Council level, and the treatment and disposal of municipal waste at County Council level where both such Councils cover an area, and otherwise one authority is responsible for both collection and disposal. Solid waste collection and disposal services are purchased by the local authorities.

1.2 *Revenue sources of local government and lines of accountability*

Local government is financed by a variety of means. For councils other than County Councils, central government grants are made based on an assessment of what spending central government considers is required to provide a standard level of service, this Standard Spending Assessment (SSA) being a guideline for the size of the grant. Business rates are levied which are pooled centrally and distributed to local authorities. Rates are levied on individual residents in accordance with the council's assessment of what will be needed to balance the budget for the year, although there is a limit to the amount which can be levied, again related to the SSA. Councils may also engage in certain limited trading activities and the sale of assets. For County Councils, a SSA also applies and grants are made from central government, and these councils levy additional funds pro rata from District Councils within their boundaries.

Councillors at all levels are directly elected. County Councils are elected every four years; in the intervening years, other councils may have four-yearly elections or hold elections for one third of their councillors in each of the three years between District Council elections. At any level of local government, the full Council has the ultimate responsibility for all decisions and actions.

1.3 Control of local government by central government

The Local Government Acts 1988 and 1992 contain requirements that local authorities place certain services out to tender, a process known as Compulsory Competitive Tendering (CCT). Rules for the procurement of waste and other services are based on EC legislation; they include the Public Works Contracts Regulations 1991, the Public Services Contracts Regulations 1993, and the Public Supply Contracts Regulations 1995. A local authority may set up its own direct service organisation (DSO) to compete with private contractors. Originally, unless it could show good reason, a local authority was required to accept the lowest tender. Temporary exemption from CCT could be granted in certain circumstances, such as the failure of a private contractor.

CCT is, however, to be abolished on 2 January 2000, under the Local Government Act 1999, and replaced by the concept of "Best Value". This will apply to a wider range of services than those covered by CCT. Local authorities will have a duty to obtain best value by securing economic, efficient and effective services, and continuous improvement in service delivery. This will involve setting, and publishing targets and monitoring performance, with an external audit framework and the possibility of intervention by central government where a council is significantly failing to meet its obligations. Services will be able to be provided by local authorities, private sector contractors, or in public-private partnership. One of the key concepts of Best Value is partnership and "cross-cutting" relationships - that is, contracts or service provision covering more than one authority or more than one function/service area.

In the run-up to the introduction of Best Value, certain CCT requirements have been relaxed and some services exempted. Rather than the lowest tender being the basic criterion for awarding contracts, authorities will be expected to provide evidence that they have approached their decisions in a clear, transparent and soundly reasoned manner, and that considerations of price and quality have been soundly balanced. For waste management services, there has also been relaxation of regulations relating to the timing of the tendering process, the length of contracts, and the treatment of extraneous costs. The minimum threshold for the size of all contracts subject to CCT has been raised. Additionally, certain local authorities piloting Best Value have been completely exempted from CCT.

Waste disposal is required to be contracted out under the Environmental Protection Act 1990 and waste disposal authorities may set up an arm's length Local Authority Waste Disposal Company to provide the service, or alternatively contract out the entire service. Under Best Value, the relevant part of the Environmental Protection Act will be repealed, thus permitting local authorities to take the waste disposal operation back in-house should they wish, provided that they can demonstrate that best value is being achieved.

2. Regulation and procurement of solid waste

2.1 Sources of revenue for solid waste service providers

Waste collection services are paid for by a combination of means. Collection of household waste is free of charge; that is, it is paid for by the local authority, with some exceptions. The local authority may charge the householder/customer for the collection of garden waste, and bulky household waste such as furniture. Collection of commercial and industrial waste may be carried out by the local authority, or may be carried out by a private contractor. In these cases the service is paid for by the customer.

2.2 Competition for the market - contracting out, franchising or tendering

Waste collection services are open to competition through CCT. This covers municipal waste collection services run by the local authority as well as street cleaning and litter collection; tenders for waste collection services may also include those additional services. The legislation originally set the length of time required between new tenders at five-seven years, which was subsequently amended to six-ten years, but in the run-up to Best Value the regulations relating to length of contract have been revoked.

The Local Government Act 1988 introduced the concept of anti-competitive behaviour. In deciding to award a contract, the local authority must not act in a manner having the effect, or intended or likely to have the effect, of restricting, distorting or preventing competition. The onus is on local authorities to demonstrate how proposals for tendering are designed to avoid having such an effect. For example, local authorities are expected to consult the private sector on how contracts are packaged. This helps ensure that a good response to a contract is received.

Under the Local Government Planning and Land Act 1980 and the Local Government Act 1988, the Secretary of State has powers to act against local authorities that do not comply with the CCT rules. A notice may be served on the local authority asking it to explain its actions in allegedly awarding work to the DSO unfairly, for example. A direction may then be made withdrawing the power from the authority to carry out certain work, or imposing conditions on its continued involvement. Complaints may be made by private contractors as well as the public, trade associations, and opposition councillors, or the Secretary of State may act on his own initiative. Matters and allegations dealt with include accepting the bid of the DSO when it is not the lowest, contract conditions and tendering procedures, resourcing disputes, exclusion from the tender list, and the packaging of the contract. Contractors may be concerned that they were placed at a disadvantage compared to the DSO because, for example, the DSO, in formulating its bid, was given access to information denied the private sector bidders. In all these circumstances, it would fall to the Department of the Environment, Transport and the Regions to consider whether the tender process had been properly carried out and, if necessary, to require re-tendering.

Notices may also be served and directions made as appropriate where a DSO has failed to meet its financial objective. The objective is to break even, having first allowed for a six percent rate of return on any capital employed. This is to ensure that they prepare realistic bids, comply with them if successful, and offer value for money for the local taxpayer. While failure to meet the financial objective does not necessarily mean there are competition concerns, it can be an indicator.

Price structures within the tender may vary considerably. They can be based on demand, but are mostly fixed sum for various elements. A price review mechanism may be included, and inflation increases are normally specified. Cost benefits, for example from commercial and industrial waste collection, may be passed back to the local authority, or may be retained by the contractor.

There are no regulatory controls on who may bid for or win a tender, or on the ownership, domestic or otherwise, of the firms.

2.3 Competition in the market - controls on entry and prices

Firms can compete for collection of municipal waste under the tendering process and for other wastes through direct contact with the customer. In practice, the private sector does not always wish to compete for local authority tenders - the competition may be limited to five tenders or fewer, due to a perception that there is a bias on the part of some local authorities towards the DSO. Those that do attract extensive competition tend to be key strategic contracts.

There is no regulation of prices.

There is no requirement for licensing of waste companies *per se*. However, environmental controls are placed on waste disposal operators through waste management licences, regulated by the Environment Agency under the Environment Protection Act 1990. A site licence is needed for the deposit, recovery or treatment of controlled waste in or on land, and a mobile plant licence may be needed for the recovery or disposal of waste using certain types of mobile plant. Controlled waste in this context means household, industrial or commercial waste. To obtain a licence the applicant must have any necessary planning permission and is a "fit and proper person". The criteria include whether there is adequate financial provision to fulfil the obligations of the licence, whether there is a technically competent person to manage the licensed activities, and whether there are past convictions under relevant legislation. It may also be necessary to register as a waste carrier or waste broker, where similar conditions of "fitness" apply.

2.4 Related markets - waste disposal & recycling

The treatment and disposal of municipal waste is arranged by the local authority at County Council level. The service is paid for by the local authority. Some commercial and industrial waste is collected by the local authority (waste collection authority) as part of its statutory duty. The disposal of this waste is included within the collection service, and is paid for by the customer either to the council or to the council's contractor direct. Commercial and industrial waste is also dealt with directly by the private sector waste contractors. A gain collection and disposal are a combined service, and are paid for direct by the customer.

Contracts for waste disposal tend to be for much longer time periods than those for waste collection - typically for ten - 25 years - due to the need for capital investment in infrastructure, and therefore value can be of the order greater than £10 million per annum. Central government does provide grants under the Private Finance Initiative (PFI) to encourage partnership with the private sector in waste management contracts.

The term 'recycling' can mean the collection of recyclable materials ("recyclate") either from the doorstep or from 'bring banks' (for paper, bottles, and so on); the separation and sorting of the recyclate; and the reprocessing of the recyclate. Collection and sorting/separation is carried out by the private sector, the public sector at both county and district council level, and by the voluntary sector. It is normally undertaken as part of the waste management service. Recyclate is normally delivered to reprocessors who are entirely within the private sector. Collection from the bring banks and sorting/separation plants may involve a "merchant", who is normally a private sector operator who bulks and hauls large quantities of a single material.

Financial incentives to recycle are provided in the form of Recycling Credits, payments made by waste disposal authorities to waste collection authorities, or to third parties such as charities, in respect of waste removed from the disposal stream for recycling. There is less competition for recycling services, due to a small number of reprocessors and market domination in certain geographical areas. The services are not usually tendered but operate on spot prices and very short-term contracts. Government is looking at ways to stimulate a change to longer-term contracts, and a greater number of outlets, to promote greater market stability.

3. Market structure and competition issues in solid waste collection

3.1 Market structure

The number of bids received tends to be small for collection services (usually up to six), but large for disposal services (there can be as many as 20 or more). Usually the same firms competing. Market shares have changed over time, from being largely public sector oriented to domination by five large companies. The companies concerned are mainly large multinationals, which have waste as only a small interest. There remains some local government ownership of disposal services, for which provision is made under the Environmental Protection Act 1990.

There is considerable vertical integration within the waste industry covering the range of waste management options, but not in respect of the reprocessing of recycle.

3.2 Competition concerns

There have been no cases raising significant issues under competition legislation. Under the Restrictive Trade Practices Act 1976, which requires agreements containing certain types of restriction to be submitted to the Director General of Fair Trading (DGFT) for registration, the small number registered to date have all been found not to contain restrictions of sufficient significance to warrant action in the Restrictive Practices Court. Nor has the Office of Fair Trading's Cartels Task Force uncovered any evidence of significantly anti-competitive activity such as bid rigging, price-fixing, or market sharing.

Although a small number of complaints is received about matters other than restrictive agreements in waste management, none of them has provided evidence warranting a formal investigation under the monopoly provisions of the Fair Trading Act 1973 or under the Competition Act 1980. There have also been no mergers raising competition concerns in the market for the supply of waste management services.

3.3 Other issues (including environmental issues)

Environmental law has been strengthened over the last ten years, including the implementation of EC directives, with powers of enforcement being incorporated into one body, the Environment Agency. Improved standards and the introduction of a landfill tax have increased the costs of waste disposal. This has resulted in some small firms attempting to evade disposal costs by, for example, fly tipping, causing some environmental concerns.

The Producer Responsibility (Packaging Waste) Regulations 1997 aim to secure a more sustainable approach to dealing with packaging waste through recovery and recycling rather than landfill. Businesses subject to the regulations (the criteria are based on turnover and the volume of waste handled) are required to register with the Environment Agency and to achieve target levels of recycling and recovery in relation to the volume of packaging material generated. The companies can organise the recovery and recycling of sufficient material themselves, or join a compliance scheme, which assumes responsibility for meeting the obligations of all its members. Such schemes also have to be registered with the Environment Agency.

The Secretary of State for Trade and Industry, advised by the DGFT, assesses whether a scheme has, or is likely to have, the effect of restricting, distorting or preventing competition, or that, where it does, that effect is, or is likely to be, no greater than is necessary to achieve the environmental or economic benefits set out in section 93(6) of the Environment Act, and that the scheme does not, and is not likely to, lead to an abuse of market power. There is also provision for registered schemes to be monitored by the DGFT.

Up to the end of 1998 the DGFT had given advice on 15 schemes. Negative advice was given on only one occasion. In that case, the company did not proceed with its application for registration.

UNITED STATES*

Background on government structure in the United States: The US has four layers of general government: federal, state, county, and local. Under the US Constitution, powers that are not specifically granted to the federal government belong to the (50) states, including the power to create county and local governments (cities, towns, villages, etc.).¹ In addition to general government units, there are many special purpose districts (such as school districts, recreation districts, and public transportation districts) that provide services and may have taxation powers. These districts may include all or parts of several local government units.

Table 1 provides the number of different types of governmental units in the United States.

Table 1. Number of local governments by type²

Counties	3,043
Local General Governments	35,962
School Districts	14,556
Other Special Districts	33,131

1. The role of local authorities in regulation and procurement

1.1 *What local services are the responsibilities of local authorities?*

In general, local governments have responsibility for most local services. These include, but are not limited to: airports, education, fire protection, public buildings (including maintenance), highways, hospitals, public housing, libraries, public parking facilities, parks and recreation, public welfare, refuse collection, sewerage, public transit, utilities (including cable TV), and water. The nature of local control of these services varies a great deal. In many cases, county, state, or federal government funds help pay for the services.

In the case of some local services, for-profit firms and non-profit organisations (many of them using volunteer labour and financial donations) are also providers. For example, private, non-profit

* These materials have been organised by John C. Hilke, Economist and Electricity Project Coordinator, United States Federal Trade Commission, Bureau of Economics, Division of Economic Policy Analysis, and by Mark Cohen, Economist, United States Department of Justice, Antitrust Division. Dr. Hilke's views expressed here are his personal views and do not purport to be those of the United States Federal Trade Commission or of any individual Commissioner. Mr. Cohen's views expressed here are his personal views and do not purport to be those of the United States Department of Justice or of its Antitrust Division.

schools, hospitals, and fire protection organisations are common. For-profit refuse collection firms are common as well. (See Table 3, below.)

1.2 *How do local governments raise revenue? Where does the remainder of their income come from? Are local officials directly elected or appointed by a higher level of government?*

Common sources of income that are raised locally include sales taxes, property taxes, and user or franchise fees.³ In some states, counties and some local governments are allowed to collect income taxes.⁴

Additional sources of income come primarily from grants from higher levels of government. Some of these grants are for specific purposes, but many are generalised "block grants." In some cases, local governments have to provide some degree of matching funds garnered from local sources to obtain the grant from a higher level of government.

With very few exceptions, local officials are locally elected or are appointed by local elected officials. Individuals do not hold offices at more than one level of government at any point in time. Officials are elected or appointed to hold office for a fixed term. In several states, a local official may be removed from office before his or her normal term expires through a "recall" election (if enough voters petition for such a special election). Incumbents win most recall elections.

1.3 *Are there rules governing how local authorities carry out these regulatory/procurement activities? Are local authorities subject to national legislation governing how they carry out their regulatory procurement role: For example, are local governments required to tender for specific services? Which services? How are these requirements enforced? Are local authorities subject to regulatory review processes? Do these regulatory review processes extend to review of procurement processes?*

Restrictions on local government practices tend to be limited to civil rights, labour rights and environmental issues or to criminal conduct standards and to procedural requirements for tendering. State procedural requirements may include a minimum number of bidders. Other than these procedural requirements and targeted restrictions, there are few dictates from higher levels of government about how local governments operate, including how they decide to provide services.⁵ Federal and state governments generally do not review procurement decisions concerning local services.⁶ (However, see the Response to 2.4 concerning the use of experience requirements to favour local suppliers.)

The restrictions on local procurement practices generally concern the integrity of the process rather than the mechanics. For example, local authorities and higher level authorities would be concerned if procurement decisions were being altered due to threats of violence or bribery. Criminal offenses in connection with procurement may fall under the jurisdiction of local, state, or federal law enforcement authorities. Criminal law is likely to apply if an auction is influenced through threats of physical violence or bribery or by collusion among bidders.⁷

Most local governments routinely have financial audits conducted by independent auditors or by the local government's own auditor. These audits may extend to broader inquiries such as efficiency studies and studies of procurement practices in some cases, but these audits are usually conducted and reviewed at the local level. When a local government receives a grant from the federal or state government, the local government will be required to show that the funds were spent as required by the grant.⁸

1.4 Are there fiscal mechanisms by which the central (or sub-national) government can control the incentives or abilities of the local authorities with respect to their regulation/purchasing role? For example, can the central government threaten to withhold funding if the local authority does not comply with certain requirements? If the local authority engages in cost cutting, is it able to enjoy the resulting cost saving itself, or would a cost-saving lead to a reduction in the funds transferred from the central government? Overall, do local authorities face strong or weak incentives to ensure the efficient regulation/procurement of local services?

As noted above, restrictions on local government practices tend to be limited to civil rights, labour rights and environmental issues or to criminal conduct standards. In these areas, the threat of withholding funds is the primary enforcement mechanism with respect to federal policies. Because local governments are creations of their respective states, state government mandates could be enforced directly through enforcement law suits or other disciplinary actions, but the threat of withholding grant money is commonly employed here as well.

There is little direct effort by higher levels of government to influence the way local governments operate in the areas of regulation and purchasing. If such measures were adopted by higher levels of government, withholding of funding is a likely enforcement measure. The options for applying this type of pressure on local authorities have been curtailed considerably, however, by the trend toward block grants and away from specific purpose grants that local governments have to apply for.

Under most block grants from higher levels of government, the local government has complete control over how the money is spent. Any savings can be spent as deemed appropriate by local government or returned to the people in the form of lower taxes. The primary restriction on using cost savings to lower taxes is that some grants require matching funds from local governments.

In general, there is relatively little pressure from higher levels of government for local governments to perform efficiently in regulation or procurement. However, there is a great deal of pressure for such efficiency enhancements from local taxpayers/voters and officials.⁹

This point is illustrated by survey data collected in the US by the International City Manager's Association in 1997. Respondents were asked to identify factors spurring local government interest in adopting private service delivery (contracting out to private suppliers). The table excerpts the percentage citing each factor, across all respondents.

Table 2. Factors Spurring Local Government Interest in Adopting Private Service Delivery¹⁰

44%	External fiscal pressure
89%	Internal attempts to decrease costs
11%	State or federal mandates
25%	Change in political climate
7%	Citizen group favouring privatisation
21%	Unsolicited proposal from potential vendors
11%	Concerns about [local] government liability

An important note: in the US, revenue sources of local governments (as well as county and state governments) tend to be quite sensitive to economic conditions. As a result, local governments go through a "feast or famine" cycle. Local, county, and state governments generally are not allowed to have a budget deficit and most of them found it politically difficult to have a budget surplus. When the economy goes

into recession, many local governments experience a fiscal crisis in which officials desperately seek ways to preserve service levels, despite falling revenues. Thus, pressure on the operating departments of local government (from local officials and voters) to reduce costs tends to be inversely related to the business cycle.

2. Regulation and procurement of solid waste collection and disposal services

Background on survey statistics regarding provision of solid waste collection and disposal: a useful data source for examining trends in the provision of local services in the United States is the series of surveys conducted by the International City Management Association (ICMA). The following table excerpts statistics on solid waste collection and disposal taken from the ICMA's *The Municipal Year Book 1999*, Chapter 5 ("Local Government Use of Alternative Service Delivery Approaches").

Table 3: Exclusive Use of Public Employees for Provision of Selected Services Compared to Use of Contracting Out with For-Profit Firms (1988 through 1997)

The number next to the date is the percentage of responding jurisdictions that use public employees exclusively in providing the listed service. The number in the parenthesis (to the right) is the percentage of responding jurisdictions that provide the service exclusively by contracting out. In nearly all cases listed here, the contracts are with for-profit firms.

<u>Year of Survey</u>	<u>% of Jurisdictions Using Only Public Employees</u>	<u>% of Jurisdictions Exclusively Contracting Out</u>
Residential Solid Waste Collection		
1988	52.0%	(36.0%)
1992	46.7%	(38.3%)
1997	36.8%	(49.0%)
Commercial Solid Waste Collection		
1988	40.0%	(38.0%)
1992	23.3%	(54.4%)
1997	23.1%	(60.2%)
Solid Waste Disposal		
1988	51.0%	(25.0%)
1992	31.5%	(32.9%)
1997	30.0%	(40.8%)

ICMA notes that relatively few jurisdictions have shed functions,¹¹ but that solid waste collection and disposal are exceptions. Solid waste collection has reportedly been shed by ten percent of respondents while commercial collection has been shed by 11 percent of respondents to the ICMA's survey. Disposal services have been shed by 14 percent of respondents. Franchises and concessions are more common in solid waste collection (residential 14.2 percent, commercial 16.9 percent) than in any local service other than public utilities. Not all contracting out by local governments entails a formal competition process. Some cities with substantial contracting out do not rely on a formal competition process. For example, the city of San Jose, California, contracts out approximately \$250 000 000 annually (25 percent of its budget), but only started consideration of formal competition procedures in 1996. During its study of competition

procedures, San Jose surveyed eight cities selected for their leadership in privatisation. Most reported a mix of formal and informal processes used to contract out. ("Alternative Service Delivery Methods and the Competition Process, San Jose, California," published by the ICMA, 1997.)

2.1 Who pays for solid waste collection services? Are they paid for by (a) local authorities; (b) customers (i.e. households and businesses); (c) some combination, or (d) some other source?

The common patterns of payment for refuse collection include: a separate refuse collection assessment on each household or payment out of general tax revenues. (Note: there is a tax bias toward payment from general revenues. For individual tax payers who itemise deductions on their federal income taxes, local taxes are deductible in calculating taxable income while fees paid for similar services from private suppliers are not deductible.) Businesses often desire special forms of refuse collection and pay for these themselves. User fees collected by local government or by competing firms are somewhat more common in rural areas where government operated and financed services are somewhat less comprehensive than in urban areas.

2.2 Can other firms compete to provide solid waste collection services, either through a tendering process, or on a customer-by-customer basis? If so, how does the tendering process operate: What is the length of time between tenders? Are there any requirements on the tendering process designed to ensure adequate competition?

Some degree of competition applies to residential refuse collection services in somewhat more than half of US local governments. For various historical and cultural reasons, government employees are most likely to be the exclusive providers of residential refuse collection in larger cities in the Northeast and smaller cities in the South. Western cities of all sizes are more likely to utilise competition to procure residential refuse collection services. The proportion of services subject to competition rises to about ¾ in refuse collection from commercial establishments.

There are many differing arrangements with respect to the method and frequency of tendering. As mentioned above, some local governments use a formal bidding system, while others rely on informal processes. Most local governments utilise contracts covering three to seven years. Customer-by-customer competition is most common in collection of solid waste from commercial establishments.

One of the most interesting cases of contracting out of refuse collection services occurs in the city of Phoenix, the ninth largest city in the US (1990). Since 1978, Phoenix has provided a tendering system in which private suppliers compete with city departments to provide services including residential solid waste collection.¹² Separate tenders are allowed for six sections of the city. A contract for refuse collection lasts for five to seven years and one or more areas of the city come up for tender every other year. For each multi-year contract, private suppliers and the city's public works department submit bids to supply the service. The city then selects the winning bidder and contracts with that bidder. Both private suppliers and the city public works department have won bids. Private parties may serve up to half of the city at any one time. In the case of the bids of the city's public works department, there is a separate auditing department with the responsibility to ensure that the bid of the department is consistent with anticipated costs of providing the service. This helps 1) to ensure that the city department will not win the tendering by offering an unrealistic low bid, and 2) to encourage private parties to undertake the costs of preparing a bid.

2.3 Which prices are controlled by the tender? Are these prices fixed, or can they vary with changes in cost or demand? Does the contract specify how prices will be changed over time? Is the incumbent operator allowed to keep the benefits of any cost savings it makes? How does the government ensure that quality standards are maintained? How does the government avoid claims by the bidder ex post that it is unable to provide service at the current prices, which must be raised? Does the government own any facilities, which are to be operated and maintained by the successful bidder? How does the government ensure that these facilities are maintained toward the end of the tender period? Has the local government established a separate institution for carrying out such tenders and enforcing the terms and conditions of tenders? If so, what is the nature and function of that institution?

The basic choice is between a fixed price contract and an adjustable rate contract. Fixed price contracts force the contractor to assume all the risk associated with variations in the inflation rate. Contractors typically require compensation (a risk premium) for assuming such risk, as would most businesses. (Essentially, a contractor who accepts a fixed price contract is offering both to provide a service and to insure the buyer against inflation.) An adjustable rate contract allows risk sharing between the local government and the contractor and should result in lower bids. There are two common methods for adjusting rates. One is an automatic adjustment that is keyed to a widely accepted measure of inflation. This has the advantage of avoiding disagreements on the appropriate inflation adjustment. Another alternative is an adjustment process uniquely attuned to the operations of the particular contractor. This is akin to utility rate hearings in which the contractor requests adjustments based on its specific expenditures. The transaction costs of the latter process may be relatively large because of the incentives and opportunities to overstate cost increases in order to secure a higher rate increase.

A gain, focusing on Phoenix, the price specified in the residential solid waste collection contract is a per household price, so the revenue of the contractor will increase with increased demand. This has been important in Phoenix because the city has experienced rapid growth in population. The winning bidder can retain the benefits of any cost savings it is able to realise.

The contract price in Phoenix is fixed for the first year of the contract, but it is adjustable for the last four years of the contract. Adjustments to the contract price in the last four years are based on changes in the cost of operations, as reflected in the US Department of Labour's Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers. The contract price is adjusted annually after the first year by the percentage change in the CPI. The annual change may not exceed eight percent in either direction. In other cities, contractors are allowed to request a price increase if their costs prove to be unexpectedly high.

In order to avoid deteriorations in the quality of service, Phoenix includes financial penalties if households are missed during collections. Further, the city delays payments until claims by citizens concerning damages done by the contractor during collections are resolved. Private bidders must post a performance bond. Among US local governments that contract out for services, performance bonds are perhaps the most common method to assure contractor performance. The city of Phoenix employs inspectors who conduct spot checks on quality of service and respond to complaints by citizens. The city also operates a customer complaint telephone line and uses the pattern of complaints to evaluate performance. The city plans to use surveys of consumer satisfaction to assure that quality is maintained with a proviso that unacceptable levels of consumer satisfaction that go unremedied for two years may result in early termination of a contract on the basis of non-performance.

The contracts for solid waste collection in Phoenix do not require giving control of city-owned equipment to contractors. The length of the contract (five-seven years) was selected specifically to avoid this. Five years is approximately the period necessary to amortise equipment used for solid waste collection. The only pieces of equipment owned by the city in the areas served by private contractors are

the refuse containers used by the individual households or groups of households. Here the procurement costs proved to be considerably lower for the city than for contractors, so the city elected to retain this part of the operation. City inspectors monitor for abuses of this equipment by the contractor.

Most local governments use relatively modest contract periods, like Phoenix. There are a few examples of local governments with much longer contract periods stretching 20 years or more.

Issues of contractor treatment of local government assets arise most frequently when local governments contract for the operation of transfer stations and disposal sites. Contractual provisions, performance bonds, and monitoring by city employees are the typical means of trying to curtail abnormal wear and tear on local government-owned assets.

To avoid ex-post manipulation by the contractor, Phoenix continues to provide refuse collection services in other parts of the city so that it could expand these services if the contractor attempts to hold up the city. Further, the city retains the right to take control of the contractor's equipment if service is stopped while the contract is in force. The contracts specifically state that a strike is not a justification for non-performance. Finally, the city offers a letter of commendation to contractors that perform as expected. This commendation will not be forthcoming if the contractor does not perform adequately.

The Phoenix auditor's office is in charge of the bid process and evaluates the bids. As mentioned above, a member of the city auditor's staff helps create and certify the validity of the bids from the city's public works department. The auditor's department is also responsible for assuring that if the city wins the bid, its costs stay within its bid. The auditor's department conducts an annual audit of the public works department to secure compliance.

An important issue in Phoenix and other cities using competitive bidding is displacement of government workers. Phoenix gives preference to displaced workers in filling other city job openings and requires contractors to offer jobs to displaced workers. Contractors are not required to retain unsatisfactory displaced workers.

2.4 Are there any regulatory controls on who may bid? Are there any controls on the ownership or the lines of business of these firms? Are there any controls on foreign ownership?

Generally, there are no absolute controls on who may bid. However, local governments often informally or formally take into account non-price factors such as financial stability and experience. The most important of these restrictions are "experience" requirements, sometimes suggested by incumbent suppliers. For example, requirements that the bidder have experience doing similar work in the same state may effectively exclude potential bidders with operations in other states, including neighbouring states, or outside the U.S. Experience requirements have generally displaced more explicit contractual restrictions that exclude non-local suppliers. Many bid systems require that the potential contractor be able to post a performance bond and demonstrate that it has insurance coverage.

To the best of our knowledge, there are no explicit restrictions preventing foreign ownership of local waste-collection bidders. To the extent that bidding firms are public companies, there is no publicly available system to monitor or preclude foreign ownership of securities issued by these firms that falls below the substantial ownership disclosure thresholds of the Securities and Exchange Commission.

2.5 In the case where some or all of the price of solid waste collection services is paid by customers, can other firms compete to provide these services? Is competition limited to a certain class of customers, such as those, which produce the largest quantity of waste?

In most instances, franchises are exclusive. Where bidding is on a customer-by-customer basis, multiple suppliers are more likely.

See the response to 3.2 and 3.3.

2.6 Are the prices charged to customers for solid waste collection regulated or set by government in some way?

In three of the fifty states (Montana, Washington, and West Virginia), refuse collection prices are regulated to some degree at the state level. Some California counties also regulate rates.

In the Phoenix example, the price is determined by contract on a per-household basis and the money is paid from general revenues. Where private suppliers collect from individual customers, rates may either be on an average-per-household basis or on a volume basis. Where exclusive contracts are granted, there is more likely to be a limit on fees. For refuse collection, rate setting is most likely to occur through the contracting process or franchise granting process rather than through some ongoing rate regulation agency.

2.7 Where private firms compete to provide solid waste collection services, are these firms required to be licensed? What license conditions are imposed (if any)? Are there controls on the ownership or lines of business of these firms? Are there any controls on foreign ownership?

Some states or local governments require suppliers to have a solid waste collection license for each truck they operate. Per truck fees are generally modest. Most states and local governments require safety inspections of refuse collection vehicles. The more binding constraints on solid waste collection firms come from environmental, health and labour regulations and from requirements of insurers. Local governments typically require private contractors to carry insurance against a wide variety of problems that might lead to legal claims against the supplier (or the local government) for damages to persons or property committed by the contractor. To obtain such insurance, the contractor is often required by the private insurer(s) to show evidence of operating capabilities and sensitivity to operating risks in the business. Failure to operate according to the recommendations of the insurer may result in cancellation of the insurance or the assessment of higher rates.

To the best of our knowledge, there are no widespread restrictions on the ownership of other lines of business by these firms. We do not know of any restrictions on foreign ownership.

2.8 How is the market for waste disposal organised? Who purchases waste disposal services? Are they paid for by customers or directly by local governments? Where they are paid for by customers, is there competition for waste disposal services? Where they are paid for by local government, are these services subject to tendering? What is the nature of the tendering?

Until the rise of the environmental movement, local governments often provided residential service and many local governments operated landfills. Some also provided commercial collection service. Usually, private companies were not permitted to compete with the municipalities, especially for residential service. Today, many of these communities hire private companies to provide the service. In

most cases, the private firm is given the exclusive right to collect the waste in a franchise area. The franchised firm is often chosen by a bidding process. Local governments are increasingly contracting separately for collection and disposal services. Where service competition is on a customer-by-customer basis, each collection firm typically offers a vertically integrated collection and disposal service. Individual customers seldom make a separate decision about disposal.

The passage of stricter environmental laws has increased the cost of operating landfills and increased the efficient scale of operating landfills. As a result, many of the communities have stopped providing this service. These communities have chosen not to construct new facilities or upgrade their old facilities to meet the new environmental standards but, instead, have turned over operation of their facilities to private firms, or sold their facilities to private firms. In some cases, a number of communities have joined together to operate regional landfills. In some instances, local governments have elected to construct and operate solid waste incineration facilities. The local government then sells the heat (or steam) produced from these facilities.

2.9 *How is the market for recycling organised? What national or local legislative mandates provide incentives for recycling? Is recycling carried out separately from other waste management? Who pays for the service? Is their competition for recycling services? Are these services tendered? What is the nature of the tendering?*

The extent and organisation of recycling varies considerably in different parts of the country. Some areas have extensive programs that collect and separate aluminum, steel, and a wide range of plastics, cardboard containers, newspapers, and other paper. Much recycling is driven by environmental concerns and by avoiding costs of disposal. Recycling programs have arisen in part because of state and local government mandates to reduce the volume of refuse going into landfills. The state mandates typically do not specify how local governments must approach recycling. Some local governments have made recycling mandatory for commercial establishments in order to reach recycling targets.

Recycling is commonly carried out on a separate schedule from other solid waste disposal and usually employs separate equipment that allows collection personnel to sort the recycling items by separating plastics, metals, and paper. The range of materials collected for recycling varies considerably from city to city.

Recycling programs seek to be self-supporting, although success in this regard depends to a large extent on volatile prices for the recycled items, disposal fees that are avoided, and on public participation rates in the recycling program (route economies). In most cases, participation by individual households in the local government's recycling program is voluntary. However, local governments may employ various inducements to encourage citizens to participate. (For instance, one local government awards small cash prizes to randomly selected households that participate in the recycling program.) To the extent that financial support is needed for a recycling program, general revenues are typically used. Some federal and state funding is available to launch recycling programs. For example, funds from higher levels of government are sometimes used to provide consumers with recycling containers at the beginning of the program.

In the Phoenix example, recycling has been combined into the solid waste collection competitive bid process. Typically, waste collection and recycling are subject to the same type of procurement or combined as in Phoenix. In Phoenix, bidders are required to collect refuse one day per week and to collect recycled items one day per week. The contractor brings the recycled items to the city's recycling centers for processing. The city thus retains the functions of sorting and selling recycled items.

3. Market structure and competition issues in solid waste collection

3.1 *In those cases where the local government tenders for the right to provide solid waste collection services, how many bids are typically received? Do the same companies all regularly bid against one another, or is there a different combination of bidder in each tender? What are the rough market shares of these companies? Have these market shares changed over time?*

A relatively modest 26 percent of the respondents to the ICMA's 1997 survey cited an "insufficient supply of competent private deliverers" as an obstacle to adopting private service delivery.¹³ The guidelines for public-private competition suggested by the ICMA recommend that local governments not contract for services where only one bidder is likely to participate. In the Phoenix example, the number of private bidders has averaged four and has ranged from six to three. The number of private bidders has declined over time primarily due to mergers. The city is concerned about the decline in the number of private bids.¹⁴ The identity of the bidders largely has remained the same, but the city has a program seeking to encourage additional viable private bidders. More generally, local governments that are concerned about the number of bidders may be able to increase their number by developing a wider bid solicitation process or by modifying the terms of future contracts to encourage more bidders.

Because solid waste collection markets are local in nature and many continue to be served primarily by local government departments, competitive conditions in relevant markets are unlikely to have much relationship to figures developed for the nation as a whole. At the national level, the structure of solid waste collection continues to be un-concentrated, but the structure at the local level may differ considerably. There are no publicly available statistics for assessing market shares at the local level. As the ICMA statistics indicate, there are many local markets that continue as government operated monopolies and others that have a considerable degree of competition. However, an important caveat is the relationship between collection and disposal, which may involve serious restrictions on competition through new entry, discussed in 3.2 and 3.3.

3.2/3.3 *What is the ownership of the largest firms in this industry? Are they owned by local government or a group of local governments? In those cases where a government directly owns a waste collection company, are other private firms able to compete on a competitively neutral basis? In what other markets do these firms compete? Are they integrated vertically into the provision of waste disposal services or recycling? Do they also compete to provide waste services in other cities?*

In most local markets, the largest firms are national or regional private corporations. These firms operate in a number of local markets, providing residential collection, commercial collection (small containers from one to ten cubic yards (CY)), and roll-off (large containers up to 40 CY) collection services. They also operate transfer stations,¹⁵ recycling centers, sanitary landfills, and incinerators in a number of these local markets. In the past, private firms were often large collection firms in one or a few local markets, frequently also providing disposal services. Most of these firms have been acquired by the national or regional firms.

US local governments do not generally own firms. Where a local government continues to perform collection services with its own employees, it may either provide collection services on an exclusive basis or in competition with private firms (as in Phoenix). (See Table 3.)

3.4/3.5 Have competition concerns arisen in the solid waste industry? In particular, have there been any cases of bid rigging, market-sharing or price-fixing? Have there been allegations of predatory pricing? Have any horizontal mergers between solid waste management firms been challenged by the competition authorities? What remedies (if any) was proposed? Have competition concerns arisen from integration into waste disposal facilities?

There have been several market allocation cases brought against private firms that provide commercial and roll-off services in local markets.¹⁶ The suits generally involved agreements not to solicit each other's customers and several included exchanging price lists, price fixing, and bid rigging. These cases primarily have dealt with commercial and roll-off service not residential collection or disposal services. There have been a few private predatory pricing cases brought against private hauliers. Again, these cases usually deal with commercial or roll-off services. Some of these private cases have been successful, despite the substantial burden on complainants in bringing such cases. Additionally, private hauliers have complained that the prices being charged by their competitors do not cover or barely cover their competitors' disposal costs. Often, the competitor is the owner of the disposal site.

The US Department of Justice has also brought a monopolisation case against Browning/Ferris Inc. (BFI), a large national firm, and two of its subsidiaries. The case was brought in two local markets where the defendants were alleged to have market power and large market shares in small container hauling. It was alleged that each of the defendants, acting with specific intent, used and enforced contracts containing restrictive provisions to exclude and constrain competition and to maintain and enhance their market power. BFI settled the case by agreeing to modify its contracts in those two markets. The types of provisions that were challenged and changed included the exclusive right to collect and dispose of all of a customer's waste, the initial term of three years, automatic renewals of three years unless the customer gave advance notice, and payment of large liquidated damages for terminating the contract at other times. The contracts provide little price protection for the customer, allowing the firm to raise price for several reasons stated in the contract without any recourse for the customer and to raise prices for other reasons unless the customer objected in a timely manner. A similar monopolisation case was brought against Waste Management, another large national firm, in two different local markets. It was also settled with similar contract modifications.

A number of horizontal mergers have been challenged by the Antitrust Division of the US Department of Justice. These cases have involved allegations that the merger would substantially lessen competition in the provision of: (1) small container hauling services; (2) disposal services; and/or (3) transfer station services in local markets. Divestiture of small container routes, landfills, and transfer stations in the local market have often been required as remedies. In some cases, contract modifications to make the contracts less restrictive have been required instead of total divestiture of small container routes.¹⁷ Landfills often serve larger areas, so that sometimes sale of space in the landfill (that can be resold by the purchaser) has been required instead.

Disposal costs are often the largest cost for a commercial waste haulier and can easily amount to over 40 percent of its total costs. For this reason, control of disposal sites and transfer stations by the major hauling firms in a market has raised competitive concerns, although no merger cases have been litigated on this point.¹⁸

3.6 *Have their arisen concerns regarding violations of environmental laws? Where competition has been introduced in waste collection or disposal, was this associated with enhanced concerns regarding compliance with environmental laws? Have environmental laws or law enforcement been strengthened?*

To date, there does not appear to be a discernible correlation between competition and environmental problems. To the extent that solid waste disposal raises public concerns about environmental effects, a favourable environmental compliance record is likely to be a competitive advantage rather than a liability. A diverse publicity about environmental compliance on the part of a supplier can also have negative commercial effects on the supplier to the extent that customers become concerned about being judged liable for non-compliance by their supplier of waste collection or disposal services. Insurers may respond negatively as well to a flawed environmental record.

Environmental laws and enforcement regarding disposal and collection of solid waste have generally been strengthened over time, but this does not appear to be directly related to privatisation of disposal or collection services.

NOTES

- 1 In most instances, there are several cities, towns, and villages within a county; however, some parts of the county will not be included within a city, town, or village. In the following discussion, local government is defined as the smallest unit of general government with jurisdiction over a given location. Cities generally have larger populations than towns and towns generally have larger populations than villages. States often set a minimum population requirement for a local entity to be designated as a city.
- 2 The American Almanac/Statistical Abstract of the United States, 1995-1996, Table 472.
- 3 Property taxes, on average, provide for approximately 23 percent of general revenues, sales taxes provide 12 percent, income taxes and licenses provide nine percent, user charges (long- and short-term) provide 28 percent, and intergovernmental transfers provide 28 percent. The American Almanac/Statistical Abstract of the United States, 1995-1996, Table 501. Some counties or local governments also operate retail business enterprises such as liquor stores or electric utilities that generate revenues; enterprise revenues are not included in the above calculations.
- 4 For example, in the State of Maryland, counties collect income taxes through surtax on the state income tax and some of these funds flow through to local governments based on the residence of the individual taxpayers.
- 5 See the response to 2.6 for an exception with respect to collection of solid waste.
- 6 However, if the higher level of government perceives that the local government is facing severe financial difficulties, the higher level of government may effectively take control of most local government functions until the financial crisis is alleviated. Well-known examples of such take-overs include those in New York City (1970s) and Washington, D.C. (late 1990s).
- 7 The federal and state antitrust agencies found numerous collusive agreements in contracting for road construction projects during the 1980s. See the response to 4.1 and 4.2 regarding antitrust cases in solid waste collection and disposal services.
- 8 A recent exception to the generally routine review of local performance by state officials has been in the area of education. Some states recently have established educational performance standards. Failure of a school district to meet these performance standards may result in the state taking control of that school district. Another exception has come in the form of planning requirements. For example, some states require local governments to establish and follow-through on a multi-year plan regarding disposal of refuse and recycling.
- 9 There is a strong literature in urban economics about competition between jurisdictions to attract businesses and population. This literature originated with Charles Tiebout's article in the Journal of Political Economy (October 1956, 64:5, 416-424) entitled "A Pure Theory of Local Expenditures." The fall 1997 issue of the Journal of Economic Perspectives contains a section of articles relating this theory to recent political discussions of fiscal federalism and general devolution of functions to lower levels of government.
- 10 ICM A , The Municipal Year Book 1999, p. 41.

- 11 When a jurisdiction sheds a function, it neither performs the function or contracts for its performance. When a jurisdiction sheds a function, residents of that jurisdiction must obtain the service on an individual basis or do without the service. Jurisdictions that have shed a function no longer appear in the ICM A statistics regarding that function.
- 12 Another important form of competition in providing services is competition between government units. The most explicit instance of this competition is the Lakewood Plan in Los Angeles County. Originated in 1954, this program gives local governments the choice of providing a variety of services themselves or of contracting with the county for the service. In a vast majority of cases, the cities have elected to receive the services from the county because of economies of providing the service at that level. A related competitive option is available in Prince George's County, Maryland, where local governments select whether to provide services themselves or allow the county to provide the service. If the local government elects to provide the service, the county government transfers to the local government a portion of the county government's general revenues comparable to the county government's avoided costs. Local governments may elect to provide part-time police services, for example, with the county providing these services during other periods.
- 13 "Selecting Services for Public-Private Competition," ICM A , MIS Report 28:3 (March 1996), p.8.
- 14 ICM A , The Municipal Year Book 1999, p.44.
- 15 A transfer station is a facility (usually close to one or more population centers) where waste is consolidated for shipment to a (more distant) waste disposal site.
- 16 Roll-off service is collection using large waste-containers at the customer's site. The containers are rolled on or off a flatbed truck by hydraulically tilting the bed of the truck and using a winch to raise the container onto the truck or lower the container from the truck.
- 17 Another remedy element in some cases has been a requirement that the parties obtain prior approval from the relevant antitrust agency before undertaking any additional mergers.
- 18 Litigation may be difficult in instances where local governments or a combination of local governments and private firms are involved in actions that raise competitive concerns. Actions of local governments that are approved or supervised by a state often are shielded from antitrust review under the "state action" doctrine.

AIDE MEMOIRE OF THE DISCUSSION

1. The role of local authorities in regulation and procurement

The Chairman emphasised that local governments have an important role in regulation and public procurement. But local governments do not always have strong incentives to promote competition, efficiency and high quality services. Local governments usually do not raise all of their own revenue and, as a result, do not face the same level of pressure from taxpayers to use their resources efficiently. In Italy and the United Kingdom, the share of local government expenses covered by local revenues is less than 40 percent. In such cases, the budget constraint on local governments is weak, giving local politicians an incentive to campaign on promises of expanding services and enhancing quality rather than minimising costs.

To address these problems many countries have imposed requirements on local governments which either directly require them to improve efficiency or which harden their budget constraint so that they have a stronger incentive for efficiency. An example is the requirement in the US, which prohibits most local governments from running a budget deficit.

The US delegate presented a list of the factors, which affect the incentives on local government for efficient procurement and regulation. The first is the requirement for balanced budgets. This is usually imposed by the state government. A balanced budget requirement does not prevent the local government borrowing for capital improvement but it cannot, for an extended period of time, run a deficit. The second factor arises from capital market constraints on borrowing. Local governments borrow for capital improvements from the regular financial markets. The bonds issued by local governments are carefully rated by bond rating agencies according to the fiscal responsibility of that local authority. Local governments, which are not fiscally sound, will be punished by the bond markets. The third incentive for efficiency, based on the idea of Tiebout, is that local governments compete with one another for industrial location and citizens. There is a fair amount of research in the area of locational economics, which suggests that communities which have combinations of good services and low taxes are able to attract businesses and citizens. Fourth, in an extreme case, if a local government is not fiscally responsible it may be taken over by the state government. This has occurred in Washington, DC and in New York City. Fifth, efficiency in providing local services is politically important. There is a segment of the population, which sees efficiency in local government as a fundamental aspect of good political governance. The final factor relates to the manner in which transfers from central and state governments are paid. In the US there has been a move, at the federal level, towards block grants, which do not specify how the funds are to be used. As a result, if the local government is able to reduce the costs of a service, it can either provide more services or reduce local taxes. In addition, with many of the federal grants there is a matching revenue requirement, to ensure there is a local tax effort to reduce the incentive to chase after grants as a free good.

Of these factors, the balanced budget requirement is possibly the most binding. Whenever the US goes into recession there is a fiscal crisis in local governments, forcing the local government to reconsider how it provides local services. This periodic crisis leads to constant revisiting of what services are provided and how.

The Chairman noted that another form of discipline on local governments is the requirement on UK local governments to tender for the provision of certain local services. This requirement, which has been in place since 1986, is currently being replaced by a new requirement to look for "best value".

The United Kingdom responded that compulsory competitive tendering ("CCT") was intended to reduce costs in local government services. While it did reduce costs, it also brought about a reduction in the quality of the services over a period of time. "Best value" is an attempt to improve the quality of local services while still getting value for money. In the future there will be a presumption in favour of tendering, but it will be no longer mandatory. Under the new approach, the services of local governments will be audited to be sure they are achieving maximum efficiency, economy and value from the services. A body, which is part of the central government, known as the Audit Commission, will be responsible for examining the services of local governments. If they consider the services not to be of best value they will instruct the local government to improve those services. In the worst cases they will be able to step in and bring in an alternative service provider.

In the new system, as in the old, companies owned by the local authorities will be allowed to participate in the tendering processes. In a large number of cases local government-owned companies have won the tenders. In fact, in some local authorities there appeared to be a bias in favour of the local companies and this tended to discourage the private sector from competing.

The Chairman noted that the Italian government has also recently proposed to introduce a similar mandatory tendering procedure. France, also, has a law governing the tendering of local services, although this law does not impose the requirement that services have to be put out to tender.

The delegate from France explained that there are three approaches to the provision of local services in France. Under the first approach, called "*la régie directe*", the local authority provides the service using its own employees. This system is becoming more and more rare and is almost inexistent in regard to the treatment of waste because waste management involves specialised technical skills. Under the second approach, known as "*délégation du service public*", the local authority delegates the provision of a public service (such as the treatment of waste) to an enterprise, following a procedure which is governed by the law. There is a third system, known as "*marché public*" which involves the selection of an enterprise through a competitive tendering process. The difference between the "*délégation du service public*" and "*marché public*" is essentially related to the remuneration of the service. In the case of "*délégation du service public*" the selected enterprise is remunerated in a substantial part, either directly by the users, or by the local government in a system linked to the enterprise's turnover. In the case of "*marché public*" the local authority pays the enterprise directly for providing the service. In the waste sector both systems operate.

A law adopted in 1993 aims at increasing transparency and competition in the "*délégation du service public*". Under the previous system the contracts between the local authority and the enterprise were often very long with limited scope for competition. Under the new system, there is a specified procedure for competitive tendering, with requirements relating to publicising the terms and conditions of the tender and the criteria (including both price and quality of service) on which the enterprise will be selected. An independent commission examines the offers and makes a decision as to which enterprise offers the best quality/price combination for the service. Importantly, the Director-General of the DGCCRF participates in this commission with the purpose of detecting anti-competitive practices (such as agreements between enterprises), to ensure the legality of the procedure and to verify equal treatment amongst the bidding enterprises. The law also limits the duration of the resulting contracts, in relation to the length of time necessary for the depreciation of any initial investments. In addition, each year a report must be presented by the successful enterprise on the financial position of the public service and on the

quality of the service. This legislative system constitutes a significant progress in introducing competition into local services and enhancing transparency.

The new law does not require that local governments introduce competitive tendering in the rare case in which the local government itself provides the service, with its own employees (*la régie directe*). The local government may create its own enterprise (known as a *société d'économie mixte*) in which it has shareholding, but this enterprise must enter in competition with private firms if it wishes to provide a public service.

The Chairman noted that local governments in Ireland and the Netherlands also benefit from large transfers from central government and wondered whether these countries, also, have had concerns over local government efficiency. The Chairman also invited other countries to discuss the factors, which impinge on the decision as to the length of the contract and the procedures that are used to adjust the prices paid during the life of the contract.

Ireland responded that most local authorities in Ireland have contracted out the service of waste collection. This has led to gains in quality and efficiency, but not in the prices to consumers. Nevertheless consumers are satisfied because waste is collected when on schedule, even on public holidays, in dramatic contrast to previous system which was universally unreliable.

The Netherlands noted that the central government in the Netherlands has tried to improve the efficiency of local government by cutting the size of the transfers to local government. Competitive tendering and contracting out is increasingly common in the Netherlands.

In Switzerland, following the principle of subsidiarity, waste services are a responsibility of Cantons and not of the federal government. The federal government may grant subsidies for waste services but these are limited to funds for the construction of waste management facilities but not for the provision of the service itself. A Canton may choose to establish a regional monopoly in waste services and to prevent households and enterprises from choosing their own provider of waste services. This can lead to significant differences in prices for the provision of waste services across the different regions. There remains significant scope for liberalisation in introducing competition and efficiency in the provision of waste services.

In Norway, municipalities are free to choose the length of the contract that they would like. This allows them to fine-tune the contracts in order to stimulate competition. Larger, longer contracts are more valuable to the firm that wins the contract, enhancing the incentive to participate in the tender. But very large contracts may dissuade small firms from bidding. There is likely to be an optimal scale of the contract and that would depend on the services being put out to tender.

The US commented that the few cities that have thought about how long the length of the contract should be have focused on how long it takes for the capital required to provide the service to depreciate. The contract length is matched to the depreciation period. In refuse collection, the typical contract length is three-five years, reflecting the length of time it takes for the collection trucks to depreciate.

In France, the law of 1993 established a maximum length of the contract, which is variable as a function of duration of the depreciation of the assets. For waste incineration factories, for example, this could be as long as ten-15 years. In any case, all contracts are limited in duration to 20 years. The shorter the length of the contract, the more frequent are the opportunities for competition.

In the United Kingdom, the law on compulsory competitive tendering required those contracts for waste collection had to be between five and seven years (subsequently extended to six-ten years). Under

the new, "best value", approach, the length of the contract will no longer be specified. This allows the length of collection contracts to be linked to the length of contracts for disposal and treatment. Disposal and treatment contracts tend to be for much longer periods, up to 25 years, to allow for the large capital investment in the infrastructure, such as incineration plants.

2. Regulation and procurement of solid waste services

The Chairman noted that the background paper draws a distinction between household waste and commercial waste, with competition in the market only possible for commercial waste. This was confirmed in the submissions. In most countries household waste collection is collected by a local monopoly firm. This firm is often selected through some form of competitive tendering. The question is how best to structure these tendering processes in order to enhance competition and to lower the cost and raise the quality of the services provided. Other issues include how to adjust the price of the services during the life of the contract and how to address concerns about the effect on employment in the transition to contracting-out.

The US submission focused on Phoenix, Arizona, a city that illustrates US best practice in purchasing waste services. Phoenix has sought to enhance the competitiveness of the tendering process through a number of techniques. First, the city has encouraged additional bidders by widely announcing bid opportunities and actively seeking potential bidders. Second, it has reduced the geographic size of the contracts by dividing Phoenix into a number of zones so as not to limit the bidding to the largest firms. Third, it has levelled the playing field by setting up a system whereby the comptroller (the chief financial officer of the city), has to certify that the public bid (by the in-house provider) is realistic before the bid can be submitted. Fourth, Phoenix also chose to maintain some in-house production capability in addition to the external contracting. This partly reflected a concern about potential hold-up issues. It wanted to ensure that in the event of a strike against the private provider, they would have a fallback service. The number of contracts, which can be held by private contractors, is limited. Fifth, perhaps the most important technique for promoting competition was to make the tender contracts themselves clear with respect to contingencies, such as: How is quality going to be assessed? What are the penalties for not having high-quality service? What if there is an interruption of supply? What are the rights of the city under those circumstances to bring in an alternative provider?

Phoenix has also introduced innovations on how quality is assessed. The city hires monitors who go around the city verifying that property is not being damaged, that collection is occurring on schedule and so on. They have also established a consumer hotline (i.e. a 0800 number). In addition, they are thinking of using survey techniques to establish a baseline and to assess future improvements in quality.

In regard to adjustments to the price during the contract, Phoenix indexes the price for the service to a cost escalator other than actual costs the operator incurs in providing the service (using the cost of the service would be equivalent to rate-of-return regulation). In practice Phoenix indexes the contract to the rate of wage inflation in that region.

In regard to employment concerns, a requirement is imposed that if a private firm wins the tender, the firm must offer to the previous government employees the chance to work for the new provider. The new provider does not have to continue with an employee who turns out to be unsatisfactory, but the new provider must offer jobs on a first-refusal basis to the people who have been working in that function before. In addition, employees who weren't transferred to the new supplier have been offered a first right to other government positions on a preferred basis. If labour disruption is not minimised in this way the opposition to his whole process becomes so overwhelming that it becomes difficult to move forward at all.

The delegate from Norway reported that a 1998 study by the Norwegian competition authority showed that 65 percent of the municipalities in Norway had exposed their waste management to competition through competitive tendering. The study found that the cost per subscriber in those municipalities, which had used competitive tenders, was 3.5 percent lower than those municipalities, which did not use competitive tenders. In addition, the study found that costs were 8.1 percent higher in those municipalities which used in-house services compared to municipalities that had used services from private firms and as much as 27.3 percent higher for municipalities which used "inter-municipal companies" – that is, companies set up by municipalities. In addition, costs were lower for municipalities that had used open tenders compared to municipalities, which had used limited tenders or procurement after negotiation.

Italy reported on a study of the current regulatory framework for waste management. A part of the study included interviews with companies operating in this sector and an in-depth survey of three towns of average size (around 50 000 inhabitants) who provide waste services through competitive bidding. Around 24 percent of the cities in Italy provide waste collection services directly by employees of the municipality, 30 percent of cities provide waste services by enterprises controlled by the municipality, and 46 percent by private firms. The firms interviewed claimed that the main competition issue was that municipalities tended to contract out waste services in a non-transparent way. In many instances cities preferred to renew the franchise to the incumbent operator instead of engaging in competitive tendering. Furthermore in the cases when they used tendering, it was carried out in a non-transparent way. The firms pointed out that in most the successful bidder was chosen only on the basis of price, with no reference given to the quality of services provided or the capability of the firm to comply with environmental standards. In addition, municipalities do not supervise the quality of the services provided.

The same results came out in the three towns surveyed. In only one of these towns was the contract given out through true competitive bidding. 13 firms participated in the bidding and the firm, which won, was a firm from another region. In the second town the bidding was limited and only four companies participated. In the third town the municipality decided to just renew the license of the incumbent operator. In all three of these towns, no monitoring on the quality of the services was carried out whatsoever.

The Chairman noted that competitive tendering raises a number of complex issues, such as the control of quality, the completeness of the contract, and the possibility of hold-up. Because of the difficulty in addressing these issues it is important, especially when there is an obligation to engage in competitive tendering, that each local government should receive support from the region or the state government in the tendering process.

In Hungary, local authorities are required to conduct an open tender, giving an opportunity for several firms to make bids. In most cases the public enterprises owned by the local authority has won the right to continue the management of waste. There are many reasons for this. For example, there may be illegal conduct on the part of the local authority, such as setting the conditions in such a way that the public enterprise alone can comply with the terms of the tender. There is currently a complaint before the Tribunal of First Instance against a local authority who is alleged to have preferred its own enterprise. Under the current regulation there is no limit to the duration of the contract. In practice, contracts are signed for ten years. The requirements for a tender and several quality characteristics are enumerated by a Ministerial Decree. These important elements must be included in any tender contract, in order to guarantee a suitable level of quality of the services provided. The quality of services is verified by the local authority and the environmental protection authority.

The Chairman pointed out that although several countries have noted that the length of the contract is related to the time for depreciation of any necessary investment, this assumes that all investment is done at the beginning of the contract. This is not really the case. In many cases companies invest during

the time of the contract, because there are new innovations available or because there is an enlargement of the market. It could be that the sunk investment in equipment is quite limited (firms can lease any equipment they needed, or resell it after the contract has expired). If this is the case, the period of the contract could be quite short and could be irrespective of the period of the investment.

Another issue is that you have to have a system of incentives on the company to provide high quality. Such incentives can be maintained through monitoring and punishments or through a system of rewards, such as a reward for acquiring a reputation for providing high-quality services. These rewards might include a higher possibility for contract renewal or a higher possibility of winning new contracts elsewhere.

In Finland the national waste management legislation makes local governments responsible for the waste that is produced on their territory. According to the public procurement legislation (which applies below the EU thresholds) municipalities are obliged to organise competitive tendering for the provision of waste management services. In practice local authorities have organised waste management services in two ways – either by creating competition in the market, or by organising competitive tendering in the normal way for waste management services. There are also some municipalities which have chosen both ways and which have a mixed system of these two alternatives. This is the case, for example, in the Helsinki region.

There are very few in-house service providers in waste. Waste services are almost exclusively provided by private firms. A surprisingly large number of municipalities have chosen competition in the market (61 percent in 1997). Under this system the local government leaves waste management services to be organised directly between households and business customers and the waste services providers. The households and businesses pay directly for the services to the providers. The local government may, however, regulate the market. The local government may, for example, require that the private companies provide services in certain areas and may also set maximum prices if it finds this necessary. The system of competition in the market for waste services has a long tradition in Finland and seems to have worked quite well.

The other, and more usual system, is competitive tendering organised by the municipality itself. This system is used by 15 percent of municipalities in 1997. 24 percent used the mixed system of both competitions in the market and competitive bidding organised by the municipality. The length of the contracts in competitive tendering is not stipulated by the public procurement legislation. It can vary, but must be reasonable in relation to the investments made. The municipality can choose whether the customers pay for waste services directly to the municipality or to the waste companies themselves. Additionally both price and quality considerations are taken into account in the tendering process.

Recently there seems to be a trend towards competitive tendering. The reasons for this movement include the enforcement and organisation problems related to the privately arranged competition in the market system. There are risks related to possible non-payment by customers to the waste companies. In addition, a study in 1997 showed that waste collection fees were as much as 20-25 percent lower under competitive tendering compared to competition in the market. This might be due to the economies of density, which are discussed in the background paper. The issue as to which is the more efficient approach should be studied further, and may vary from municipality to municipality.

The delegate from Spain noted that competitive tendering for waste services was introduced in the largest cities in Spain twenty years ago. There were two reasons for this. First, because the municipalities wanted to give a better service and, second, because the private sector wanted to go into the market. In Spain it was the construction sector which wanted to enter this market. Currently, in the big cities there are seven or eight bidders, all belonging to the construction sector.

The US delegate noted that, as in Spain, one of the drivers for competitive tendering in waste services in the US was the political embarrassment arising from the fact that private companies were offering to provide the services for less than the in-house providers. In addition, as in Finland, there are areas of the US where there is competition in the market for waste services. Historically, since the population in the US was so spread out there was a period of time when everyone disposed of waste themselves either by burning it or burying it. In many rural areas today, many people get rid of waste in their own dump or with local entrepreneurs. Lastly, in the US there have been quite a few instances of the shedding of services – where municipalities simply cease to provide services, such as waste services, and rely on people's good sense that they should have their trash collected. This occurs in smaller rural areas.

In the United Kingdom, under the previous system of compulsory competitive tendering, the tender contracts specified in great detail the inputs that the contractors were to use. Under the new system of best value, the tender contracts will focus on the desired outputs and leave the determination of the mix of inputs to the contractor.

The Chairman responded that such a system introduces the possibility of entrepreneurship and innovation in the way that services are provided and even in what services are provided, although this opens up the problem of how to compare bids. In general, there is some value in allowing the bidders the opportunity to propose what services will be provided.

Sweden commented that it is easier to observe the quality of waste collection services than many other services. In Sweden, households are very ready to complain when the waste collector does not come or scheduled or when the waste company over-charges. Perhaps we can rely on citizens to complain to authorities in the event of non-compliance. Perhaps a lack of monitoring is less of a problem in this sector.

France explained the system of quality monitoring and enforcement in France. In the case of "*delegation du service public*", there are several steps involved in ensuring quality. First, at the time of the tendering, the tender documents specify criteria regarding quality. Second, once the enterprise is chosen on the basis of its offer, there is a negotiation over the terms of the tender contract and quality objectives which are determined. The enterprise, which provides the service, must submit an annual report on the execution of the service and whether or not these objectives have been attained. The local authority determines if the objectives it has set have been reached and whether to apply the penalty sanctions agreed in the beginning. The local authority always has the possibility of revoking a contract of this type, in the name of the public interest. If the contract is revoked due to fault on the part of the contractor, such as failure to meet the objectives, the obligation to indemnify the contractor is either reduced or eliminated.

In France, in order to exploit economies of scale and scope small villages are strongly encouraged to combine into associations in order to purchase local services jointly. There are different types of these associations of local authorities. The first type of grouping, known as "*à vocation unique*", are formed for the purpose of purchasing a single service, such as the provision of water or the collection of waste. The size of these groupings depends on the will of the local authorities. Other groupings "*à vocation multiple*" combine purchasing of the treatment of water and waste and other services. There is also a more fundamental kind of integration known as "*communauté de communes*" or "*communauté urbaine*" under which the member authorities must delegate certain responsibilities to the association.

3. Market structure and competition issues in solid waste collection

The Chairman raised the issue of how to ensure that there are a sufficient number of viable bidders on an on-going basis. This concern was raised by the US in regard to Phoenix, which has found the number of potential bidders dropping over time.

The US acknowledged that there has been considerable consolidation amongst the private waste providers so that there are now only a few. But each will typically be active in each local market, collecting waste from commercial and industrial establishments even if they are not participating in residential collection. Competition problems have particularly arisen in waste disposal, primarily due to the rise of the environmental concerns. Before environmentalism became an important consideration each municipality had its own waste disposal site. These have been discontinued and consolidated, giving rise to concerns over access to the remaining disposal sites.

Enforcement actions in the US have been in 3 separate areas:

- (a) First, there has been some hard-core cartel activity by private firms providing commercial and roll-off services in local markets. This has taken the form of price-fixing, market allocation and some bid rigging. ("Commercial services" refers to the collection of containers from one-ten cubic yards, while "roll-off services" refers to larger containers up to 40 cubic yards).
- (b) Second, there have been a couple of monopolisation cases against large national firms which provide solid waste services. As an illustration, in 1996 the DOJ brought a case against Browning-Ferris, which was the second largest company in the US in the small container market. This was considered a separate market from non-containerised waste collection and from roll-off services. Monopolisation was alleged to have occurred in two city markets. The company had a market share in excess of 60 percent and had maintained that share in excess of ten years. These are markets with substantial entry barriers derived from minimum efficient scale and the need to have a sufficient number of customers and a sufficient route density to provide an economic service. The particular conduct that was challenged in these cases concerned the contracts between Browning-Ferris and small customers. The contracts had certain clauses, which had the effect of excluding competitors by raising entry barriers.
 - the contracts required that the company had the right to collect all of the customers refuse (so that the customer could not use more than one waste services provider;
 - the contracts had an initial term of three years which was considered too lengthy;
 - there was an automatic extension of this three-year term unless the customer, writing 60 days in advance of the end of the contract, requested to change and end the contract. There were very onerous damage provisions if the customer changed earlier than the three years or did not use the 60 days written notice provision;
 - the format of the contract was such that all these onerous terms were in small print. The DOJ had evidence that when many of these small customers signed the contract they didn't know that they wouldn't be able to get out of the contract;
 - the consent decree in this case required changes in the existing contracts and changes in future contracting practices.
- (c) Third, there have been a number of mergers in this industry. The most recent merger, in July 1999, involved the acquisition by Allied Waste (the third largest company in the US) by Browning-Ferris (the second largest company) – a \$9.5 billion acquisition. This was reviewed by the DOJ and approved subject to the condition that the company divest some \$500 million worth of services in 18 metropolitan areas in 13 states in the small container hauling market and the disposal market. The DOJ found that in these 18 markets the acquisition would lead to a situation where there would be only two-three companies and a serious risk of co-ordinated

pricing. The DOJ noted serious entry barriers for hauling – with many long-term contracts and the possibility the incumbents could price-discriminate to keep out new entrants. In the disposal market the environmental concerns make new entry very difficult.

Japan discussed a case involving administrative guidance with respect to the prices of garbage bags. Some local governments in Japan oblige households to use specific garbage bags whose specification is determined by the local government. Some local governments also license sellers including retailers and wholesalers of these garbage bags. Some local governments also make recommendations on the retail and wholesale selling price. The JFTC considers that this induced retail price maintenance and so requested the local governments involved casing such administrative guidance.

Another case involved a violation of the Anti-Monopoly Act. This case involved the Sapporo environmental management association. That is a trade association comprising firms engaged in industrial waste management. The association decided that member companies should refrain from making sales to customers of other members. The JFTC issued a decision to the association in violation of section 814 of the AMA.

There was also a case of bid rigging in the procurement by local government of garbage incinerators for non-industrial waste. Five major companies in the field of manufacture of garbage incinerators for non-industrial waste conspired to fix bids in competitive bidding and in the submission of cost estimates to public entities regarding the cost of building garbage incinerators. Prior to submitting the bids they decided who would win the bidding. In August 1999 the JFTC issued a recommendation claiming a violation of section 3 of the AMA. The association did not accept the recommendation of the JFTC and a hearing procedure is now underway.

In the Slovak Republic, municipalities can provide public services either through the establishment of their own public utility (although this is rare) or through the selection of one or more private firms. The main regulation governing these matters is the law on public procurement. This law seeks to ensure that the procurement processes are as transparent as possible and that all bidders have the same rights and responsibilities. The most transparent method for choosing a firm to provide services seems to be a public tender. The law on waste management holds that a municipality is considered to be the producer of waste arising within its territory and is responsible for the management and disposal of that waste.

Norway noted that it was concerned about two practices – the favouring of local suppliers and cross-subsidisation. Cross-subsidisation can occur between protected and competitive activities and also, in the case of an in-house provider, between the competitive activity and other unrelated activities. The problem of local favouring is quite well documented by the Norwegian competition authority ("NCA"). In 1993 the NCA examined the procurement processes of Norwegian municipalities and found that 177 municipalities (about 75 percent) reported that they favoured local suppliers. In a 1996 study only 70 reported that they had changed their policies. This is still a grave problem. This might arise because the municipality wants to be seen to be exposing its services to competition (to assure citizens that it is trying to get the most out of the taxes), but at the same time also favouring local production, in order to maintain personal relations, avoid having to take the blame for unemployment, or perhaps as a result of vested interests in local companies.

The report of the Nordic countries on competition exposure of local services discussed three possible initiatives. One is to forbid the municipalities own production units from competing in competitive markets. The report considered that this was not wise advice because such companies might enhance competition in markets with imperfect competition. Furthermore, a restrictive position towards such entry might mean that municipalities refrain from exposing their in-house production to competition at

all. The Nordic Working Group however stressed that municipal production units must operate on equal terms with private competitors. In-house production should be organised as a separate limited liability company operating under the same conditions as a private company, meaning *inter alia*, that the company must be able to go bankrupt. In regard to the third initiative, the Working Group considered that the law on public procurement is an important means to ensure competitive neutrality. Competition authorities should try to strengthen the sanctions for transgressions of this law and should themselves be involved in the enforcement of this law.

France presented two cases brought by the Conseil de la Concurrence in the waste sector in 1998. The market for waste collection in France is very concentrated. The largest operator, *Compagnie Generale Des Eaux* (a subsidiary of Vivendi) has 49.9 percent of the market for waste collection in the Ile de France region, while *Lyonnaise des Eaux*, the second largest, has 33.5 percent. Three small operators have market shares of 2.8 percent, 5.5 percent and 1.7 percent respectively.

Decision 98/242 of the Conseil concerned a case of market division between the major operators. This agreement made use of the fact that local authorities typically sought little information about the organisation of the major waste collection groups. In this case the operators on the market submitted bids without informing the local government of their economic links to each other as part of larger groups.

The second decision, decision 98/261 of October 98, is related to the activities of a professional association which represented enterprises active in the waste treatment sector (of which there are relatively few). The association co-ordinated a rise in the price of waste disposal services by instructing its members to pay to it an additional surtax for waste treatment, in the amount of ten percent of the statutory tax. In addition, the Conseil determined that a subsidiary of Vivendi had abused its dominant position in the waste treatment market. This subsidiary alone treated 54 percent of the waste of the Ile de France region and 59 percent of the treatment of "controlled waste". The anticompetitive practices alleged include increasing the price and discriminating against firms which were not members of the group. The sanctions imposed in this case were large, running to several million francs.

Australia noted that the Australian Competition and Consumer Commission ("ACCC") is currently prosecuting two cases involving price fixing in waste collection and has investigations underway relating to price-fixing in waste disposal. The national, state and territory governments have agreed to promote the adoption of the National Competition Policy, which include the competitive neutrality principles. This involves reviewing the provision of services by local governments, leading to an opening up of the provision of these services.

4. Conclusions

The Chairman brought the roundtable to a close noting the important role of local governments in the economy. The first part of the roundtable addressed the incentives on local governments to organise their local services efficiently. This discussion highlighted that local governments do not necessarily have the right incentive to engage in procurement and contracting out efficiently. It appears that the higher the level of control that local governments have over their own revenues the higher their incentive to organise local services efficiently. When local governments have a soft budget constraint they have difficulty imposing a hard budget constraint on their own service providers. As a result these service providers do not necessarily have cost minimisation objectives – instead they seek to maximise employment, revenue, or rent sharing as we have seen with state-owned enterprises in the other sectors that we have studied (such as railways).

Waste services can be divided into two markets – household waste services, where competition is almost unknown and commercial and industrial services, where competition is quite common. Many countries have extensive experience with competitive tendering. In the light of the move of some countries (such as Italy) towards mandatory competitive tendering, the experience of the United Kingdom is important as it highlights that competitive tendering is not a simple solution or a cure-all, but must be handled carefully, with attention to the details of the tendering process and the tender contracts.

In particular, it is important that attention be given to how quality will be maintained. Once a service is contracted out to a private company that company will have a strong incentive to increase profits by reducing quality. One way to provide an incentive for quality is to include a reputation for quality as one of the criteria for selecting a service provider. In this way providing high-quality service would become an endogenous objective that the firm pursues in order to win other contracts. A difficulty with this approach is that it reduces the transparency and objectivity of the process of selecting a service provider.

Competition authorities have been active in this sector, both as enforcement authorities and also as advocates for competition in this sector. As competitive tendering becomes more common there will be an on-going role for competition authorities in the legislative process to ensure that tenders are organised in a manner which ensures a high level of competition and high-quality of services.

AIDE-MEMOIRE DE LA DISCUSSION

1. Le rôle des collectivités locales dans la régulation des services et la passation des marchés

Le Président souligne que les collectivités locales jouent un rôle important dans la régulation des services et la passation des marchés publics. Mais elles ne sont pas toujours suffisamment incitées à promouvoir la concurrence ainsi que l'efficacité et la qualité des services. La fiscalité locale n'est généralement pas leur seule source de recettes, ce qui affaiblit la pression exercée par les contribuables pour les inciter à utiliser efficacement leurs ressources. En Italie et au Royaume-Uni, la part des dépenses des collectivités locales couverte par leurs recettes propres est inférieure à 40 pour cent. Dans de telles conditions, la contrainte budgétaire pesant sur les collectivités locales est faible, ce qui incite les politiciens locaux à mettre l'accent, dans leurs promesses aux électeurs, sur le développement des services et l'amélioration de la qualité, mais non sur la réduction des coûts.

Pour remédier à ces problèmes, beaucoup de pays imposent aux collectivités locales certaines exigences qui, soit les obligent directement à se montrer plus efficaces, soit les y incitent en durcissant la contrainte budgétaire à laquelle elles sont soumises. Aux Etats-Unis, par exemple, il est le plus souvent interdit aux administrations locales de conserver un déficit budgétaire.

Le délégué des Etats-Unis présente une liste des facteurs qui peuvent inciter les collectivités locales à faire preuve d'efficacité en matière de passation des marchés et de régulation des services. Le premier est l'exigence d'équilibre budgétaire. Cet équilibre est généralement imposé par le gouvernement de l'Etat. Cela n'empêche pas la collectivité locale d'emprunter pour améliorer ses équipements mais elle n'est pas autorisée à conserver un déficit pendant une période prolongée. Le deuxième facteur est celui des contraintes auxquelles sont soumis les emprunts sur le marché des capitaux. Les collectivités locales empruntent, pour améliorer leurs équipements, sur les marchés financiers ordinaires. Les obligations qu'elles émettent sont notées avec soin par des agences de notation selon le degré de responsabilité budgétaire dont fait preuve la collectivité locale. Les collectivités qui n'ont pas des finances saines se trouvent ainsi pénalisées sur le marché obligataire. Le troisième facteur incitant à l'efficacité, qui découle de l'idée de Tiebout, est que les collectivités locales sont en concurrence les unes avec les autres pour ce qui est du choix par les entreprises et les citoyens de leur lieu d'établissement. D'assez nombreux travaux de recherche économique dans ce domaine montrent que les communautés qui offrent à la fois des services de qualité et une fiscalité réduite attirent les entreprises et les particuliers. Quatrièmement, dans les cas extrêmes, si une administration locale ne se comporte pas de façon responsable sur le plan budgétaire, elle peut être prise en main par le gouvernement de l'Etat. Le cas s'est produit à Washington et à New York. Cinquièmement, l'efficacité dans la fourniture des services locaux revêt de l'importance sur le plan politique. Tout un segment de la population y voit un aspect fondamental d'une bonne gestion politique. Le dernier facteur, enfin, concerne les modalités des transferts opérés par le gouvernement central et les gouvernements des Etats. Aux Etats-Unis, on tend à privilégier désormais, au niveau fédéral, le système de l'enveloppe globale. L'affectation des fonds versés n'est pas spécifiée, de sorte que si la collectivité locale parvient à réduire le coût d'un service, elle pourra offrir davantage de services ou alléger les impôts locaux. En outre, beaucoup de subventions fédérales sont assorties de l'exigence de recettes locales équivalentes, afin qu'un effort fiscal local vienne réduire l'incitation à quêter des subventions.

Parmi ces divers facteurs, l'exigence d'un budget en équilibre est sans doute la plus contraignante. Chaque fois que les Etats-Unis entrent dans une période de récession, les collectivités locales connaissent une crise budgétaire qui les oblige à reconsidérer la manière dont elles assurent les services locaux. Ces crises périodiques entraînent une constante remise en question de la nature et des modalités des services fournis.

Le Président relève qu'une autre forme de discipline imposée aux collectivités locales est l'obligation qui leur est faite, au Royaume-Uni, d'organiser des appels d'offres pour la fourniture de certains services locaux. Cette obligation, qui existe depuis 1986, est en voie d'être remplacée par une autre, qui est celle de la recherche du meilleur rapport qualité-prix ("*best value*").

Le Royaume-Uni précise que l'obligation d'appel d'offres visait à réduire le coût des services publics locaux. Certes, elle a eu cet effet mais elle s'est aussi traduite, au bout d'un certain temps, par une baisse de la qualité des services. L'exigence du meilleur rapport qualité-prix ("*best value*") a pour objet d'améliorer la qualité des services locaux tout en maintenant le prix le plus juste. Dans l'avenir, l'appel d'offres devra en principe être privilégié mais il ne sera plus obligatoire. Selon la nouvelle approche, les services des collectivités locales seront soumis à un audit, destiné à vérifier qu'ils répondent à des critères d'efficacité, d'économie et de qualité maximum. L'examen des services des collectivités locales sera confié à un organe relevant du gouvernement central, la Commission d'audit. Si cette commission estime que les services ne présentent pas le meilleur rapport qualité-prix, elle ordonnera à la collectivité locale de les améliorer. Dans les cas les plus graves, elle pourra intervenir et remplacer le prestataire du service par un autre.

Dans le nouveau système, comme dans l'ancien, il sera permis aux sociétés appartenant à la collectivité locale de participer à la procédure d'appel d'offres. Ces entreprises publiques locales remportent souvent les marchés. En fait, certaines collectivités locales paraissent manifester un préjugé en leur faveur, ce qui tend à dissuader les entreprises privées de concourir.

Le Président note que le gouvernement italien a également proposé récemment l'introduction d'une procédure similaire d'appel d'offres obligatoire. La France, de son côté, a une loi qui règle les appels d'offres relatifs à la fourniture des services locaux, mais n'impose pas l'obligation de recourir à cette procédure.

Le délégué de la France explique que, dans son pays, il existe trois modes de fourniture des services locaux. Le premier système est celui de la régie directe, selon lequel la collectivité locale assure elle-même le service en utilisant ses propres agents. Ce système devient de plus en plus rare, et il est presque inexistant dans le cas du traitement des déchets car la gestion des déchets exige des compétences techniques spécialisées. Selon le deuxième système, celui de la délégation de service public, la collectivité locale délègue le soin de fournir un service public (tel que le traitement des déchets) à une entreprise, suivant une procédure réglée par la loi. Il existe un troisième système, celui du marché public, qui comporte la sélection d'une entreprise par une procédure d'appel d'offres. La différence entre la délégation de service public et le marché public réside essentiellement dans le mode de rémunération du prestataire. Dans le cas de la délégation de service public, l'entreprise sélectionnée est rémunérée pour une part substantielle soit directement par les usagers, soit par la collectivité locale en fonction du chiffre d'affaires de l'entreprise. Dans le cas du marché public, la collectivité locale paie directement à l'entreprise le service fourni. Dans le secteur des déchets, les deux systèmes coexistent.

Une loi adoptée en 1993 vise à accroître la transparence et la concurrence dans les délégations de service public. Précédemment, les contrats conclus entre la collectivité locale et l'entreprise étaient souvent de très longue durée et ne laissaient qu'une place limitée à la concurrence. Selon le nouveau système, il est prévu une procédure précise de mise en concurrence, imposant certaines formalités quant à la publicité à

donner aux conditions et modalités de la délégation et aux critères – de prix aussi bien que de qualité du service – selon lesquels l'entreprise sera sélectionnée. Une commission indépendante examine les offres et décide quelle est l'entreprise qui offre le meilleur rapport qualité-prix pour la fourniture du service. Point important, le Directeur général de la DGCCRF participe aux travaux de la commission, son rôle étant de détecter les pratiques anticoncurrentielles (telles que les ententes entre entreprises) et de s'assurer qu'il y a bien égalité de traitement des candidats. La loi limite aussi la durée des conventions de délégation, en fonction du laps de temps nécessaire à l'amortissement des éventuels investissements initiaux. En outre, l'entreprise délégataire doit présenter chaque année un rapport sur la situation financière du service public qu'elle fournit et sur la qualité de celui-ci. Ce dispositif législatif représente un progrès important pour ce qui est de l'introduction de la concurrence dans les services locaux et de l'amélioration de la transparence.

Dans les rares cas où les collectivités locales fournissent le service elles-mêmes en régie directe, la nouvelle loi ne les oblige pas à recourir à la mise en concurrence. La collectivité locale peut créer sa propre entreprise (une société d'économie mixte, dans laquelle elle a une participation) mais cette entreprise doit entrer en concurrence avec les entreprises privées si elle souhaite fournir un service public.

Le Président note qu'en Irlande et aux Pays-Bas aussi les collectivités locales bénéficient de transferts importants du gouvernement central et se demande si la question de l'efficacité de leur gestion ne s'est pas également posée dans ces pays. Il invite d'autres pays encore à s'exprimer sur les facteurs ayant une incidence sur le choix de la durée du contrat et sur les procédures d'ajustement des prix en cours de contrat.

L'Irlande répond que la plupart des collectivités locales d'Irlande ont externalisé la collecte des déchets, ce qui a eu pour résultat d'améliorer la qualité et l'efficacité du service, mais non de réduire les prix pour le consommateur. Néanmoins, les consommateurs sont satisfaits parce que les déchets sont collectés au jour dit, y compris les jours fériés, ce qui contraste de façon spectaculaire avec le système antérieur, qui était absolument pas fiable.

Les Pays-Bas indiquent que le gouvernement néerlandais a essayé d'améliorer l'efficacité de l'administration locale en réduisant les transferts faits aux collectivités locales. L'adjudication sur appel d'offres et l'externalisation des services sont de plus en plus courantes aux Pays-Bas.

En Suisse, conformément au principe de subsidiarité, les services ayant trait aux déchets relèvent des cantons et non du gouvernement fédéral. Le gouvernement fédéral peut accorder des subventions dans ce domaine mais uniquement pour la construction des installations de gestion des déchets, à l'exclusion de la fourniture du service lui-même. Un canton peut choisir d'instaurer un monopole régional des services de déchets et empêcher les ménages et les entreprises de choisir leur propre fournisseur. Cela peut se traduire par des différences de prix appréciables entre les différentes régions. Il reste encore beaucoup à faire pour libéraliser la fourniture des services de déchets, en y introduisant des pratiques de concurrence et d'efficacité.

En Norvège, les communes peuvent choisir librement la durée des contrats attribués. Cela leur permet de moduler ces contrats de manière à stimuler la concurrence. L'attribution de contrats de longue durée couvrant un territoire étendu est plus avantageuse pour l'entreprise adjudicataire et constitue une incitation à participer à l'appel d'offres. Mais un territoire trop étendu peut dissuader les petites entreprises de soumissionner. Il existe sans doute pour chaque contrat une échelle optimale, qui dépend des services faisant l'objet de l'appel d'offres.

Les Etats-Unis font observer que les quelques villes qui ont réfléchi à la question de la durée des contrats se sont surtout interrogées sur le temps qu'il fallait pour amortir les équipements requis. La durée

des contrats est fixée en fonction de la période d'amortissement. Pour l'enlèvement des ordures, le contrat est habituellement de trois à cinq ans, durée qui correspond à la période d'amortissement des bennes.

En France, la loi de 1993 établit pour les conventions de délégation une durée maximum, qui est fonction de la période d'amortissement des actifs. Pour les usines d'incinération des déchets, par exemple, cette durée peut atteindre de dix à 15 ans. En tout état de cause, la durée des conventions est limitée à 20 ans. Plus le contrat est court, plus les occasions de mise en concurrence sont nombreuses.

Au Royaume-Uni, la loi établissant une obligation d'appel d'offres prescrivait pour les contrats de collecte des déchets une durée de cinq à sept ans (portée ensuite à six-dix ans). Selon la nouvelle approche, celle du meilleur rapport qualité-prix ("*best value*"), la durée du contrat ne sera plus spécifiée. Cela permet de lier la durée des contrats de collecte à celle des contrats d'évacuation et de traitement. Ces derniers contrats ont tendance à être conclus pour une période beaucoup plus longue, qui peut atteindre 25 ans, afin de tenir compte des importants investissements d'infrastructure requis, pour les installations d'incinération par exemple.

2. Régulation des services de déchets solides et passation des marchés

Le Président note que le document de référence établit une distinction entre les déchets ménagers et les déchets commerciaux, la concurrence "sur le marché" n'étant possible que pour ces derniers, ainsi que l'ont confirmé les communications présentées. Dans la plupart des pays, la collecte des déchets ménagers est assurée par une entreprise locale jouissant d'un monopole. Cette entreprise est souvent choisie selon un système d'adjudication d'une forme ou d'une autre. La question qui se pose est celle de savoir comment structurer au mieux le processus d'appel d'offres pour améliorer la mise en concurrence et pour abaisser le coût et élever le niveau de qualité des services fournis. D'autres questions concernent la manière dont il convient d'ajuster le prix des services en cours de contrat et de gérer les incidences de l'externalisation sur l'emploi.

La communication présentée par les Etats-Unis est centrée sur la ville de Phoenix, dans l'Arizona, qui offre une illustration des pratiques les plus performantes des Etats-Unis en matière d'achat de services de déchets. La municipalité a cherché par divers moyens de rendre le processus d'appel d'offres plus concurrentiel. Tout d'abord, elle a suscité de nouvelles soumissions en donnant une large publicité aux appels d'offres et en recherchant activement des candidats. En second lieu, elle a réduit la couverture géographique des contrats (en divisant la ville en plusieurs zones), de manière à ne pas attirer uniquement les grandes entreprises. Troisièmement, elle a placé les entreprises sur un pied d'égalité en instituant un système selon lequel le contrôleur financier (la principale autorité financière) de la ville doit certifier que l'offre de l'entreprise publique (le fournisseur maison) est réaliste avant qu'elle puisse être présentée. Quatrièmement, la municipalité a aussi veillé à conserver une certaine capacité de production interne, parallèlement à l'attribution de contrats externes, afin de se mettre à l'abri d'éventuelles pratiques de "hold-up". Elle voulait se ménager la possibilité d'assurer la relève en cas de grève contre le prestataire privé. Le nombre de contrats pouvant avoir pour titulaires des entrepreneurs privés est limité. Cinquièmement, le moyen, sans doute, le plus important de promouvoir la concurrence consiste sans doute à prévoir dans les contrats eux-mêmes diverses éventualités, en répondant clairement à des questions comme celles-ci : Comment la qualité sera-t-elle évaluée ? Quelles seront les sanctions au cas où la qualité du service ne serait pas satisfaisante ? Que se passera-t-il en cas d'interruption du service ? Dans quelle mesure la ville aura-t-elle le droit, en pareil cas, de faire assurer le service par un autre prestataire ?

La municipalité de Phoenix a aussi innové en matière de contrôle de la qualité. Elle emploie des inspecteurs qui parcourent la ville en vérifiant qu'il n'est pas causé de dégradations, que la collecte a lieu au moment prévu etc. Elle a aussi mis à la disposition des consommateurs un numéro d'appel gratuit pour

faire connaître leurs réclamations. En outre, elle envisage d'avoir recours à des techniques d'enquête par sondage pour déterminer un niveau de référence et évaluer les futures améliorations qualitatives.

En ce qui concerne les ajustements de prix en cours de contrat, le facteur de coût sur lequel la municipalité de Phoenix indexe le prix du service n'est pas le coût de fourniture effectif pour l'exploitant (indexer le prix du service sur son coût équivaldrait à régler les taux de rendement). Dans la pratique, les contrats sont indexés sur le taux d'inflation des salaires dans la région de Phoenix.

En ce qui concerne les préoccupations relatives à l'emploi, si le marché est attribué à une entreprise privée, celle-ci doit offrir aux anciens agents municipaux la possibilité de travailler pour elle. Le nouveau prestataire n'est pas tenu de garder à son service un ancien agent qui ne donnerait pas satisfaction mais il doit offrir en priorité à ceux qui exécutaient précédemment les tâches externalisées la possibilité de travailler désormais pour lui. En outre, les agents qui ne sont pas embauchés par le nouveau fournisseur sont prioritaires pour obtenir un nouvel emploi dans l'administration. Si l'on ne veille pas ainsi à réduire au minimum les perturbations provoquées au niveau de l'emploi, le processus d'externalisation des services se heurtera à une opposition telle qu'il risque d'en être complètement paralysé.

Le délégué de la Norvège signale qu'il ressort d'une étude réalisée en 1998 par l'autorité norvégienne de la concurrence que 65 pour cent des communes de Norvège ont adopté un système de mise en concurrence pour la gestion des déchets, sous la forme d'appels d'offres. L'étude montre que, dans les communes ayant ainsi adopté une procédure d'appel d'offres, le coût par usager est inférieur de 3,5 pour cent à ce qu'il est dans les communes n'ayant pas recours à cette procédure. En outre, on a constaté que dans les communes qui utilisent des services maison, les coûts sont de 8,1 pour cent plus élevés que dans celles qui font appel à des entreprises privées, et qu'ils sont jusqu'à 27,3 pour cent plus élevés dans les communes qui ont recours aux services de "sociétés intermunicipales", c'est-à-dire de sociétés créées par les municipalités. D'autre part, les coûts sont plus faibles dans les communes qui procèdent à des appels d'offres ouverts que dans les communes qui appliquent des procédures d'appel d'offres restreint ou de marché de gré à gré.

L'Italie rend compte d'une étude concernant le cadre réglementaire actuel de la gestion des déchets. Une partie de l'étude a trait à des entretiens conduits auprès de sociétés opérant dans ce secteur et à une enquête en profondeur portant sur trois villes de taille moyenne (environ 50 000 habitants) qui ont recours à des appels d'offres pour la fourniture des services de déchets. Environ 24 pour cent des villes italiennes assurent les services de collecte en régie directe, 30 pour cent ont recours à des entreprises contrôlées par la municipalité, et 46 pour cent font appel à des entreprises privées. Les entreprises interrogées ont déclaré que le principal problème de concurrence était celui du manque de transparence dans l'attribution des contrats. Dans bien des cas, les villes préfèrent renouveler la concession du titulaire plutôt que d'organiser un appel d'offres. Par ailleurs, lorsqu'elles procèdent à un appel d'offres, celui-ci ne se déroule pas dans des conditions de transparence. Les sociétés ont fait observer que, le plus souvent, l'adjudicataire était choisi uniquement sur la base du prix, sans qu'il soit fait référence à la qualité des services ni à la capacité de l'entreprise à se conformer aux normes de protection de l'environnement. En outre, les municipalités ne surveillent pas la qualité des services fournis.

L'enquête réalisée dans les trois villes a donné les mêmes résultats. Dans une de ces villes seulement, le contrat a été attribué à la suite d'un appel d'offres réellement concurrentiel. Treize entreprises y ont participé et le marché a été adjugé à une entreprise d'une autre région. Dans la deuxième ville, il s'agissait d'un appel d'offres restreint, auquel quatre sociétés seulement ont participé. Dans la troisième ville, la municipalité a simplement décidé de renouveler la licence de l'opérateur en place. Dans aucune des trois villes il n'a été procédé à un suivi quelconque de la qualité des services.

Le Président note que la procédure d'appel d'offres soulève plusieurs problèmes complexes, tels ceux du contrôle de la qualité, de la complétude du contrat et du risque de "hold-up". Du fait de la difficulté de ces problèmes, il importe, lorsque l'appel d'offres est obligatoire, que la collectivité locale bénéficie pour la mise en œuvre de cette procédure d'un soutien des autorités de la région ou de l'Etat concerné.

En Hongrie, les collectivités locales sont tenues de procéder à un appel d'offres ouvert, permettant à plusieurs entreprises de soumissionner. Dans la plupart des cas, c'est l'entreprise publique appartenant à la collectivité locale qui ren porte le droit de continuer à gérer les déchets. Les causes en sont multiples. Ainsi, cela peut tenir à une façon de procéder illégale de la collectivité locale, qui fixe par exemple des conditions telles que seule l'entreprise publique est en mesure de s'y conformer. Le Tribunal de première instance est actuellement saisi d'une plainte à l'encontre d'une collectivité locale qui aurait favorisé sa propre entreprise. La réglementation en vigueur ne fixe pas de limite à la durée des contrats. Dans la pratique, ceux-ci sont signés pour dix ans. Les conditions d'adjudication et diverses caractéristiques de qualité sont prescrites par décret ministériel. Ces éléments importants doivent figurer dans tout contrat d'adjudication, afin de garantir un niveau de qualité approprié des services fournis. La qualité des services est contrôlée par la collectivité locale et l'autorité de protection de l'environnement.

Le Président relève que plusieurs pays ont indiqué que la durée du contrat était liée à la période d'amortissement des investissements requis, le postulat étant que tous les investissements sont effectués au début du contrat. Cela ne correspond pas à la réalité. Dans bien des cas, les sociétés procèdent à des investissements en cours de contrat, à la suite d'innovations nouvelles ou d'un élargissement du marché. Les investissements à fonds perdus en équipement sont parfois très limités (les entreprises pouvant louer le matériel dont elles ont besoin selon une formule de crédit-bail, ou le revendre après l'expiration du contrat). En pareil cas, la durée du contrat pourrait être très brève et indépendante de la période d'amortissement.

Un autre point est qu'un mécanisme d'incitation est nécessaire pour obtenir de la société adjudicataire qu'elle fournisse des services de qualité. Il peut s'agir d'un système de contrôles et de sanctions, ou encore d'un système de récompenses, quand la société s'est acquise une réputation de qualité, par exemple : la récompense pourra consister alors en des chances accrues de renouvellement du contrat ou d'obtention de nouveaux contrats ailleurs.

En Finlande, la législation nationale sur la gestion des déchets attribue aux collectivités locales la responsabilité des déchets produits sur leur territoire. Selon la législation régissant la passation des marchés publics (applicable en deçà des seuils de l'UE), les communes sont tenues d'organiser des appels d'offres pour la fourniture des services de gestion des déchets. Dans la pratique, les collectivités locales assurent ces services de deux manières : soit en suscitant la concurrence sur le marché, soit en organisant des appels d'offres de la manière habituelle. Certaines municipalités, dans la région d'Helsinki, par exemple, ont un système mixte combinant les deux méthodes.

Les collectivités locales ont très rarement un prestataire maison. Les services de déchets sont fournis presque exclusivement par des entreprises privées. Un nombre étonnamment élevé de communes ont opté pour la concurrence sur le marché (61 pour cent en 1997). Selon ce système, la collectivité locale laisse aux clients (ménages et entreprises) le soin de s'entendre directement avec les fournisseurs pour l'organisation des services de gestion des déchets. Les ménages et les entreprises rémunèrent directement les fournisseurs. La collectivité locale peut toutefois réguler le marché. Elle peut, par exemple, exiger des sociétés privées qu'elles desservent certaines zones et peut aussi fixer des tarifs maximum s si elle le juge nécessaire. Ce système de concurrence sur le marché pour la fourniture des services de déchets a, en Finlande, une longue tradition et semble très bien fonctionner.

L'autre système, plus habituel, est celui de l'adjudication sur appel d'offres organisé par la commune elle-même. En 1997, ce système a été utilisé par 15 pour cent des communes. Vingt-quatre pour cent ont utilisé le système mixte combinant la concurrence sur le marché et l'adjudication sur appel d'offres organisé par la municipalité. La durée des contrats d'adjudication n'est pas stipulée par la loi sur la passation des marchés publics. Elle peut varier, mais elle doit être raisonnable au regard des investissements effectués. La municipalité peut décider si les clients paieront les services à la commune ou directement aux sociétés prestataires. Des considérations de prix et de qualité entrent également en jeu dans la procédure d'appel d'offres.

Il semble qu'il y ait depuis quelque temps une tendance à opter pour le système de l'appel d'offres. Cette évolution s'explique notamment par les problèmes de mesures d'application et d'organisation liés au système de la concurrence sur le marché, qui repose sur des conventions privées. Il existe un risque de non-paiement des sociétés prestataires par les clients. En outre, une étude de 1997 a montré que les redevances perçues pour la collecte des déchets étaient de 20 à 25 pour cent moins élevés quand il y avait appel d'offres. Cela s'explique peut-être par les économies de densité dont il est question dans le document de référence. La question de savoir quelle est l'approche la plus efficiente demande à être étudiée plus avant, la réponse pouvant varier d'une commune à l'autre.

Le délégué de l'Espagne indique que la procédure d'appel d'offres pour la fourniture des services de déchets a été introduite dans les principales villes d'Espagne vingt ans plus tôt, pour deux raisons : premièrement parce que les municipalités voulaient améliorer le service fourni et, deuxièmement, parce que le secteur privé souhaitait avoir accès au marché. En Espagne, c'est le secteur de la construction qui s'intéresse à ce marché. A l'heure actuelle, dans les grandes villes, on compte sept ou huit entreprises soumissionnaires, qui toutes appartiennent à ce secteur.

Le délégué des Etats-Unis signale qu'aux Etats-Unis, comme en Espagne, l'une des raisons qui conduisent les collectivités locales à organiser des appels d'offres pour la fourniture des services de déchets est le fait, embarrassant au niveau politique, que les sociétés privées offrent de fournir les services à moindre prix que les prestataires maison. Il y a aussi des régions des Etats-Unis où, comme en Finlande, plusieurs entreprises opèrent en concurrence sur le marché. Historiquement, du fait de la dispersion de la population, les Etats-Unis ont connu une époque où chacun se débarrassait soi-même de ses déchets en les brûlant ou en les enterrant. Aujourd'hui, dans nombre de zones rurales, beaucoup de gens ont leur propre décharge ou s'entendent avec des entreprises locales pour l'élimination de leurs déchets. Dernièrement, on a assisté, dans de petites zones rurales des Etats-Unis, à plusieurs cas de suppression de service, les municipalités cessant purement et simplement d'assurer certains services comme la collecte des déchets, en s'en remettant au bon sens des citoyens pour qu'ils s'occupent de faire enlever leurs ordures.

Au Royaume-Uni, dans l'ancien système d'appel d'offres obligatoire, les contrats d'adjudication spécifiaient de façon très détaillée les moyens que l'adjudicataire devrait mettre en oeuvre. Selon le nouveau système du meilleur rapport qualité-prix ("*best value*"), les contrats seront axés sur les résultats à atteindre et laisseront à l'adjudicataire le soin de décider de la combinaison de moyens à mettre en oeuvre.

Le Président répond qu'un tel système favorise l'esprit d'entreprise et l'innovation dans le mode de fourniture des services et même dans le choix des services fournis, encore qu'il pose le problème de savoir comment on comparera entre elles les soumissions. D'une manière générale, il y a intérêt à permettre aux soumissionnaires d'indiquer quels services ils proposent de fournir.

La Suède fait observer qu'il est plus facile de contrôler la qualité des services de collecte des déchets que celle de beaucoup d'autres services. En Suède, les ménages n'hésitent pas à se plaindre lorsque le préposé à l'enlèvement des ordures ne passe pas au jour dit ou lorsque la société prestataire facture un

prix excessif. Peut-être pourrait-on s'en remettre aux citoyens pour se plaindre aux autorités en cas de défaillance. L'absence de contrôle pose sans doute un problème évident dans ce secteur.

La France explique comment fonctionne le système de contrôle de la qualité et de sanctions en France. Dans les cas de délégation de service public, des mesures sont prévues à plusieurs niveaux pour garantir la qualité. Premièrement, au moment de l'appel d'offres, les documents de l'appel d'offres spécifient des critères de qualité. Deuxièmement, une fois l'entreprise choisie sur la base de son offre, les conditions de la convention de délégation et les objectifs de qualité font l'objet d'une négociation. L'entreprise qui fournit le service doit présenter un rapport annuel sur l'exécution de celui-ci et indiquer si elle a ou non atteint les objectifs convenus. La collectivité locale détermine si les objectifs qu'elle avait fixés ont été atteints et s'il y a lieu d'appliquer les pénalités prévues. La collectivité locale a toujours la faculté de résilier une convention de ce type dans l'intérêt général. Si le contrat est résilié à la suite d'une faute de l'adjudicataire, parce qu'il n'a pas satisfait aux objectifs par exemple, l'obligation d'indemniser ce dernier est réduite ou disparaît.

En France, dans le but de tirer parti d'économies d'échelle et de gamme, les petits villages sont vivement encouragés à s'associer pour grouper leurs achats de services locaux. Ces associations de collectivités locales sont de divers types. Le premier type de groupement, dit "à vocation unique", est formé pour l'achat d'un seul service, tel l'approvisionnement en eau ou la collecte des déchets. La dimension du groupement dépend du bon vouloir des collectivités locales. D'autres groupements sont "à vocation multiple", conjuguant l'achat de services de traitement des eaux ou de déchets et l'achat d'autres services. Il existe aussi une forme d'intégration plus poussée, la "communauté de communes" ou "communauté urbaine", dans laquelle les collectivités membres doivent déléguer certaines responsabilités à l'association.

3. Structure des marchés et problèmes de concurrence dans le secteur de la collecte des déchets solides

Le Président pose la question de savoir comment faire en sorte qu'il y ait toujours un nombre suffisant de soumissionnaires viables. Cette préoccupation a été exprimée par les Etats-Unis à propos de la ville de Phoenix, qui a constaté que le nombre de soumissionnaires potentiels allait en diminuant.

Les Etats-Unis reconnaissent qu'il y a eu beaucoup de regroupements d'entreprises privées de services de déchets, si bien qu'il ne reste plus maintenant que quelques fournisseurs. Mais chacun est généralement actif sur chaque marché local, assurant, s'il ne participe pas à la collecte des déchets ménagers, celle des déchets commerciaux et industriels. Des problèmes de concurrence ont surtout surgi dans le cas de l'évacuation des déchets, principalement par leffet de préoccupations environnementales. Avant que la protection de l'environnement ne devienne une considération importante, chaque commune avait sa propre décharge. Il a été procédé à un regroupement, et beaucoup de décharges ont été fermées, d'où certains problèmes concernant l'accès aux décharges restantes.

Les autorités ont eu à intervenir, aux Etats-Unis, pour sanctionner trois sortes de pratiques distinctes :

- (a) Premièrement, certains cas d'entente caractérisée ont été relevés chez des prestataires privés de services commerciaux et de services "roll-off" de collecte des déchets sur des marchés locaux, ententes se traduisant par la fixation des prix, une répartition des marchés et un certain truquage des offres. (Les "services commerciaux" sont ceux qui concernent la collecte des conteneurs d'une capacité de un à dix yards cubes (moins de dix mètres cubes), tandis que

les "services *roll-off*" concernent les conteneurs de grande capacité, pouvant atteindre 40 yards cubes (environ 30 mètres cubes).

(b) Deuxièmement, il y a eu quelques cas de poursuites contre de gros fournisseurs de services de collecte de déchets solides, accusés de monopoliser le marché. Par exemple, en 1996, le District of Jersey a intenté une action contre Browning-Ferris, deuxième société américaine de collecte des petits conteneurs. Ce marché a été considéré comme distinct de ceux de la collecte des déchets en vrac et de la collecte des conteneurs de grande capacité. La monopolisation a été alléguée dans le cas de deux zones urbaines, où la société détenait depuis plus de dix ans une part de marché supérieure à 60 pour cent. Il s'agit de marchés sur lesquels l'entrée se heurte à des barrières importantes, liées à l'échelle minimale efficace et à la nécessité d'avoir un nombre de clients et une densité de parcours de ramassage suffisants pour permettre un service économique. La pratique incriminée, dans les cas en question, concernait les contrats passés entre Browning-Ferris et les petits clients. Ces contrats stipulaient certaines conditions qui avaient pour effet d'exclure les concurrents en faisant obstacle à leur entrée sur le marché :

- les contrats reconnaissent à la société le droit de collecter la totalité des déchets du client (de sorte que celui-ci ne pouvait pas faire appel à plusieurs prestataires) ;
- les contrats étaient conclus pour une durée initiale de trois ans, durée qui a été considérée comme trop longue ;
- cette durée de trois ans était automatiquement prolongée si le client ne demandait pas, par écrit et au moins 60 jours avant l'expiration du contrat, à modifier celui-ci et à y mettre fin. Le client était tenu au versement d'un dédommagement très onéreux en cas de modification avant le terme des trois ans ou s'il ne donnait pas un préavis écrit de 60 jours ;
- la présentation du contrat était telle que toutes ces clauses léonines étaient imprimées en petits caractères. Le District of Jersey a eu la preuve que beaucoup de ces petits clients ignoraient, lorsqu'ils ont signé le contrat, qu'ils ne pourraient pas s'en dégager.

Le jugement d'expédition rendu dans cette affaire a imposé une modification des contrats existants et de nouvelles pratiques contractuelles.

(c) Troisièmement, il y a eu dans le secteur des déchets un certain nombre de fusions. La plus récente, datant de juillet 1999, a consisté en l'acquisition par Allied Waste (la troisième des sociétés de ce secteur aux Etats-Unis) de Browning-Ferris (venant au second rang), soit une acquisition de 9,5 milliards de dollars. Le District of Jersey a examiné cette acquisition et l'a approuvée, sous réserve que la société se désengage de quelque 500 millions de dollars de services de collecte de petits conteneurs, de transport par route et d'élimination des déchets, précédemment assurés dans 18 zones métropolitaines de 13 Etats. Le District of Jersey a estimé que sur ces 18 marchés l'acquisition conduirait à une situation où ne subsisteraient plus que deux ou trois sociétés, ce qui créerait un grave risque d'entente sur les prix. Le District of Jersey a relevé l'existence de sérieuses barrières à l'entrée sur le marché du transport routier, avec de nombreux contrats de longue durée et la possibilité pour les titulaires de pratiquer des tarifs discriminatoires pour écarter les nouveaux entrants. Sur le marché de l'élimination des déchets, les prescriptions environnementales rendent les nouvelles entrées très difficiles.

Le Japon évoque une affaire d'encadrement administratif des prix des sacs à ordures. Au Japon, certaines collectivités locales obligent les ménages à utiliser des sacs à ordures de type particulier dont elles fixent les caractéristiques. Certaines collectivités délivrent aussi des licences pour la vente au détail et en gros de ces sacs à ordures, émettant parfois des recommandations sur les prix de détail et de gros. Considérant que cela induisait une pratique de prix imposés, la JFTC a demandé aux collectivités locales concernées de mettre fin à ces mesures d'encadrement administratif.

Une autre affaire concerne une violation de la loi antimonopole. Cette affaire a mis en cause l'association de gestion environnementale de Sapporo, association commerciale d'entreprises de gestion des déchets industriels. L'association avait décidé que les sociétés membres devaient s'abstenir de vendre aux clients des autres membres. La JFTC a rendu une décision à l'encontre de l'association pour violation de l'article 814 de la loi antimonopole.

Il y a également eu une affaire de truquage des soumissions lors de la passation par une collectivité locale d'un marché relatif à des incinérateurs de déchets non industriels. Cinq grosses sociétés de construction d'incinérateurs de déchets non industriels se sont entendues lors d'un appel d'offres sur le montant de leurs soumissions et sur le devis présenté aux entités publiques pour la construction des incinérateurs. Avant de soumissionner, elles ont décidé qui ren porterait le marché. En août 1999, la JFTC a émis une recommandation affirmant qu'il y avait eu violation de l'article 3 de la loi antimonopole. L'association n'a pas accepté la recommandation de la JFTC et une procédure d'audition est actuellement en cours.

Dans la République slovaque, les communes peuvent assurer les services publics soit en créant leur propre entreprise de services publics (ce qui est rare), soit en sélectionnant une ou plusieurs entreprises privées. Cette matière est régie principalement par la loi sur la passation des marchés publics. Cette loi vise à faire en sorte que les processus de passation des marchés soient aussi transparents que possible et que tous les candidats aient les mêmes droits et les mêmes responsabilités. La méthode la plus transparente, pour le choix de l'entreprise qui fournira les services, semble être l'appel d'offres public. Aux termes de la loi sur la gestion des déchets, la commune est réputée être la productrice des déchets ayant leur origine sur son territoire et elle est responsable de leur gestion et de leur élimination.

La Norvège se déclare préoccupée par deux pratiques : la préférence donnée aux fournisseurs locaux et les subventions horizontales. Les subventions horizontales peuvent intervenir entre activités protégées et activités concurrentielles et aussi, lorsqu'il s'agit d'un fournisseur maison, entre l'activité concurrentielle et d'autres activités sans lien avec elle. Le problème de la préférence locale est clairement documenté par l'autorité norvégienne de la concurrence. En 1993, celle-ci a passé en revue les procédures de passation des marchés des communes norvégiennes et constaté que 177 d'entre elles (soit environ 75 pour cent) déclaraient favoriser les fournisseurs locaux. Lors d'une étude faite en 1996, 70 seulement ont déclaré avoir modifié leur politique. Cela demeure un grave problème. La raison en est peut-être que la commune veut être perçue comme soumettant ses services au principe de la concurrence (afin que les citoyens aient l'assurance qu'elle essaie de tirer le meilleur parti de leurs impôts), mais comme favorisant en même temps la production locale, afin de maintenir de bonnes relations personnelles et de ne pas se voir reprocher le chômage ou éventuellement parce qu'elle a des intérêts dans des sociétés locales.

Le rapport des pays nordiques sur la concurrence dans les services locaux fait état de trois façons d'agir possibles. L'une d'elles consiste à interdire aux unités de production appartenant à la commune d'intervenir sur les marchés concurrentiels. Les auteurs du rapport considèrent que cela n'est pas judicieux car ces entreprises peuvent éliminer la concurrence sur les marchés où elle est imparfaite. En outre, restreindre ainsi leur entrée pourrait signifier que la commune s'abstient totalement d'exposer sa production interne à la concurrence. Or, le Groupe de travail nordique souligne que les unités de production municipales doivent opérer dans des conditions d'égalité avec les entreprises concurrentes privées. L'unité

de production interne devrait être constituée en société distincte à responsabilité limitée opérant dans les mêmes conditions qu'une société privée, ce qui signifie notamment qu'elle ne doit pas être à l'abri d'une faillite. S'agissant de la troisième possibilité, le Groupe de travail considère que la loi sur la passation des marchés publics est un important moyen de garantir la neutralité concurrentielle. Les autorités de la concurrence devraient essayer de renforcer les sanctions applicables en cas de transgression de cette loi et être elles-mêmes associées à leur application.

La France présente deux affaires dont le Conseil de la concurrence a été saisi en 1998 dans le secteur des déchets. En France, le marché de la collecte des déchets est très concentré. Le plus gros opérateur, la Compagnie générale des eaux (une filiale de Vivendi), détient 49,9 pour cent du marché de la collecte des ordures ménagères dans la région d'Ile-de-France, tandis que la Lyonnaise des eaux, qui vient au deuxième rang, en détient 33,5 pour cent. Trois petits opérateurs ont des parts de marché s'établissant respectivement à 2,8 pour cent, 5,5 pour cent et 1,7 pour cent.

La décision 98/242 du Conseil concerne une affaire d'accord de partage du marché entre les principaux opérateurs. Profitant du fait que les collectivités locales ne cherchent guère en général à se renseigner sur l'organisation des grands groupes de collecte des déchets, les opérateurs ont présenté leurs offres sans informer la collectivité locale des liens économiques qui les unissaient au sein d'un même groupe.

La seconde décision, la décision 98/261 d'octobre 1998, a trait aux activités d'une association professionnelle représentant des entreprises de traitement des déchets (lesquelles sont relativement peu nombreuses). Cette association a organisé une hausse du prix des services d'élimination des déchets en ordonnant à ses membres de lui reverser le montant d'une surtaxe additionnelle de traitement des déchets s'élevant à 10 pour cent de la taxe légale. En outre, le Conseil a établi qu'une filiale de Vivendi avait abusé de sa position dominante sur le marché du traitement des déchets. Cette filiale traitait à elle seule 54 pour cent des déchets de la région d'Ile-de-France, et 59 pour cent des déchets "contrôlés". Les pratiques anticoncurrentielles alléguées étaient l'augmentation du prix et la discrimination à l'encontre des sociétés qui n'étaient pas membres du groupe. Les sanctions imposées dans cette affaire ont été lourdes, se montant à plusieurs millions de francs.

L'Australie indique que l'Australian Competition and Consumer Commission (ACCC) est saisie de deux affaires d'entente sur les prix dans le secteur de la collecte des déchets et a ouvert une enquête sur la fixation des prix dans le domaine de l'élimination des déchets. Les gouvernements, au niveau national, des états et des territoires sont convenus de promouvoir l'adoption de la National Competition Policy (politique nationale de la concurrence) qui comporte des principes de neutralité concurrentielle. Cela a obligé à un réexamen des services fournis par les collectivités locales, ce qui s'est traduit par une ouverture plus grande de ces services à la concurrence.

4. Conclusions

Le Président conclut la table ronde en soulignant l'importance du rôle des collectivités locales dans l'économie. La première partie de la table ronde a porté sur les moyens d'inciter les collectivités locales à organiser leurs services locaux de façon efficiente. Le débat a fait ressortir que les collectivités locales ne sont pas toujours incitées comme il le faudrait à faire preuve d'efficacité dans la passation des marchés et l'externalisation des services. Il apparaît que plus les collectivités locales ont la maîtrise de leurs recettes, plus elles sont incitées à organiser efficacement les services locaux. Lorsque la contrainte budgétaire qui pèse sur elles est faible, elles ont elles-mêmes du mal à imposer une contrainte budgétaire rigoureuse à leurs prestataires. De ce fait, ces prestataires n'ont pas nécessairement pour objectif de minimiser les coûts : ils s'efforcent plutôt de maximiser l'emploi, les recettes ou le bénéfice d'une situation

de rente, ainsi que nous l'avons vu pour les entreprises d'Etat des autres secteurs précédemment étudiés (tels que les chemins de fer).

Les services de déchets peuvent être divisés en deux marchés : celui des déchets ménagers, où la concurrence est presque inconnue, et celui des déchets commerciaux et industriels, où la concurrence est chose courante. Beaucoup de pays ont une grande expérience du système des appels d'offres. Eu égard à la tendance observée dans certains pays (tels que l'Italie) à rendre la procédure d'appel d'offres obligatoire, l'expérience du Royaume-Uni est importante car elle montre que l'appel d'offres n'est pas une solution simple ni une panacée mais qu'il faut l'utiliser avec précaution, en prêtant attention aux modalités de la présentation des soumissions et aux détails des contrats d'adjudication.

Il importe en particulier de veiller au maintien de la qualité. Une fois qu'un service est sous-traité à une société privée, celle-ci sera fortement tentée d'accroître ses bénéfices en réduisant la qualité. Un moyen d'inciter les prestataires à fournir des services de qualité consiste à faire de la réputation de qualité l'un des critères de sélection de l'adjudicataire. Ainsi, la fourniture d'un service de qualité deviendra un objectif endogène que poursuivra l'entreprise en vue d'obtenir d'autres contrats. Une difficulté de cette approche est qu'elle réduit la transparence et l'objectivité du processus de sélection.

Les autorités de la concurrence ont joué un rôle actif dans ce secteur, tant pour y faire respecter la réglementation que pour y promouvoir la concurrence. A mesure que le système de l'appel d'offres se généralisera, les autorités de la concurrence devraient être appelées à participer régulièrement au processus législatif pour veiller à ce que les adjudications soient réglées de manière à assurer un degré élevé de concurrence et la fourniture de services de qualité.