

**PRIVILEGED**

**Date:** 11 April 2014

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**Re:** **Danish Environmental Protection Agency's potential liberalization of parts of the waste handling in Denmark**

**A. Background**

The Danish Environmental Protection Agency (DEPA) is considering whether to liberalize parts of the waste collection in Denmark (i.e. collection and treatment of commercial waste would be subject to competition whereas collection and treatment of household waste would still be the responsibility of the local authorities). This raises different questions on the application of the procurement rules to the treatment of the waste subject to competition. In Denmark most incineration plants are owned by the local municipalities. One specific question therefore is how to apply the "in-house"-exception in a scenario where the plants can receive both waste subject to competition and waste not subject to competition.

**B. Assignment**

DEPA is seeking advice to examine how certain other EU-countries organize their waste treatment, hereunder which models for organizing waste incineration are used in order to comply with the public procurement rules. Therefore, we have been asked to gather information on the following countries:

- Germany;
- the Netherlands;
- Sweden; and
- the UK.

We have been provided with a questionnaire from Kammeradvokaten Jacob Pinborg with questions to 1) the national authorities (depending on the national set up) and 2) the waste incineration plants, in order to get the requested information.

Further, we have been provided with a report commissioned by DEPA<sup>1</sup> ("Danish Report") with supplementary information, where we have been requested to take into concern certain information for each of the four concerned countries in accordance with the following. In Germany, there are 72 plants and the waste for incineration covers about 18,5 million tons. Privately owned plants covers 6 million tons, PPP plants covers 7 million tons and 5,6 million tons in public plants. Since waste can only be handled in house by a wholly owned entity, 70 % of the German capacity will not be able to receive waste as in house. In the Netherlands, there are 12 plants. The total capacity of 7,2 million tons is divided in 60 % burned in public plants and 40 % in private plants. Even though burning more

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<sup>1</sup> Opdatering Af udvalgte Europæiske Landes Erfaringer med organiseringen af affaldsforbændingssektoren, Copenhagen Resource Institute 2013.

than 20 % foreign waste the local government has just not to tender the waste. In Sweden, waste for incineration covers 2,2 million tons household waste and 2,7 million tons other waste and that only 20 % of municipalities have their own plant, while 80 % use either private plants or plants belonging to other municipalities. Further, there are 25 municipal owned plants, 4 privately owned plants, 2 PPP plants and 1 state owned plant. Thus, in practice almost no one can send its waste to its own plant without public tender. In the UK, the municipalities decide where the waste has to be burned and most incineration plants are privately owned why most contracts should be tendered. However, PFI-plants are owned by the municipality, but built and operated for 25 years by a private entity. The incineration of this waste apparently does not have to be tendered out. For the purpose of our responses, we have assumed that the mentioned information in the Danish Report is accurate.

Finally, we have been informed that there is no preferred way of gathering the information and that it is not necessary to get a comprehensive and detailed description of the relevant national rules etc. Instead, focus should be on gathering an overview on how the sector is organized and the interplay with the public procurement rules. Thus, in each country it will be sufficient to interview the most relevant authority and one of the major incineration plants.

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## 1. Questions to the national/local authorities

### 1.1 How is the collection and management of household waste and commercial waste regulated in the relevant national/local legislation?

#### Germany

The collection and management of waste is highly regulated on both federal and on state level.

Under German law, all household waste must be handed over to the responsible local authority. Only very few exceptions apply with regard to certain bio waste that is managed on the private premises of the respective citizens. But all in all it is accurate to say that practically any and all household waste must be handed over to the responsible local authority and may not be handed over to private companies. Therefore, in Germany, household waste can be regarded as waste not subject to competition on the outset. It has to be noted however that it is debated in Germany what exactly falls under the definition of household waste. In particular, it is debated whether paper (e.g. old newspapers) must be handed over to the responsible local authority.

Commercial waste must be handed over to the responsible local authority if the waste is destined to be thrown away/permanently discarded. Under certain circumstances, it is permitted to discard/process commercial waste at the installations of the respective company on their own. However, under German law, even this can be prevented, that is in case it is deemed necessary due to public interests to have the commercial waste handed over to the responsible local authority only. A public interest in this meaning is accepted, for example, if the commercial (private) collection and management of waste would have a significant negative economic impact on the responsible local authority/public waste management company. In consequence, a considerable part of the commercial waste in Germany as well must be handed over to the responsible local authority and is therefore not subject to competition on the outset.

Commercial waste need not be handed over to the responsible local authority if the waste is destined to be recycled. Commercial waste for recycling can therefore be described as waste subject to competition. This also applies to certain special forms of waste such as certain hazardous waste or bio-waste, unless the local regulation stipulate otherwise. In addition, certain household waste destined to be taken back/recycled by the original producers (e.g. certain bottles/cans) need not be handed over to the responsible local authority.

### The Netherlands

The Environmental Management Act (In Dutch: Wet Milieubeheer), the Waste Collection Decree (In Dutch: Besluit inzamelen afvalstoffen) and Waste Collection Scheme (In Dutch: Regeling inzamelen afvalstoffen) regulate the collection and the processing/treatment of household and commercial waste in the Netherlands.

Based on article 10.21 of the Environmental Management Act, the collection of household waste is the responsibility of the municipality. The municipality is obligated to collect household waste at least once a week. Subsequently, the municipality may introduce more specific rules with respect to the collection of waste. The municipalities are prohibited to instruct third parties to collect household waste, unless this third party is authorized to collect such waste

The collection of commercial waste is not the responsibility of the municipality. Following article 10.37 of the Environmental Management Act, companies are prohibited to dispose commercial waste or provide a third party with waste, unless this third party is authorized to collect such waste.

For the processing/treatment of waste, the Environmental Management Act provides that for household waste (article 10.36) and commercial waste (article 10.37) companies and the municipalities are prohibited to dispose household / commercial waste or provide a third party with waste, unless this third party is authorized to process or remove such waste.

This means that the processing/treatment of household and/or commercial waste is left to the free market. However, a party that wishes to process/treat household and/or commercial waste will have to fulfill all (environmental) requirements under Dutch law. An incineration plant needs a license for the treatment of waste.

### Sweden

The collection and management of household and commercial waste is primarily regulated in the Swedish Environmental Code (1998:808). The general rule is that each holder of commercial and/or household waste is responsible for such waste. There is, however, an exception for household waste as well as an exemption for producer responsibility for certain goods.

The municipality is responsible for all collection and management of household waste within their territory. Household waste is defined as "waste generated by households and comparable waste from other sources". All municipalities shall adopt a municipal waste management regulation containing the rules on waste disposal that are applicable in the municipality as well as a waste disposal plan. The 290 local regulations from the municipalities contain rules on inter alia to what extent and under which circumstances household waste may be managed privately by a property owner and how the municipality will manage different household waste. The waste disposal plan contains information concerning waste in the municipality and concerning the municipality's measures to reduce the quantity and hazardousness of such waste. Due to the obligation of the municipalities household waste cannot be handed over to private undertakings. The collection and management of household waste is therefore from the outset not subject to competition.

Commercial waste is subject to the general rule of the Environmental Code. This responsibility means that the holder of the waste ensures that the waste is managed in a healthy and environmentally

sound manner, and in accordance with the applicable rules on waste. The Government or the authority appointed by the Government may furthermore issue rules requiring persons whose professional activities generate waste other than household waste or who professionally handle such waste to supply information about the nature, composition and quantity of the waste and about its origin and where the waste is deposited.

The Ordinance on Waste Incineration (2013:253) provides for certain rules in regard of the receiving of waste as well as the carrying out of incineration. The Waste Regulation (2011:927) contains requirements for the disposal of certain sensitive products such as electrical and electronic products, quicksilver etc. The regulation further provides for a permit requirement and prior declaration for transportation of waste on professional basis as well as transportation of waste arising from professional activities.

#### The UK

The collection and management of "controlled waste" (household, industrial and commercial waste) is regulated in the UK by the Environmental Protection Act 1990 and the Environment Act 1995, in addition to a number of subordinate national regulations, including:

- the Environmental Permitting (England and Wales) Regulations 2007 (SI 2007/3538);
- the Environmental Permitting (England and Wales) Regulations 2010 (SI 2010/675);
- the Waste (England and Wales) Regulations 2011 (SI 2011/988); and
- the Controlled Waste (England and Wales) Regulations 2012.

The Environment Agency (EA), a non-departmental Government body partly funded by the Department for Environment, Food and Rural Affairs (DEFRA), is the authority responsible for regulating waste activities nationally. All waste operations e.g. waste collection and waste disposal, require an environmental permit, which operators obtain by applying to the EA. Some exempt or excluded operations e.g. a homeowner disposing of waste on their property, do not require an environmental permit.

Any entity that transports, buys, sells or disposes of waste regularly as part of their business must register with the EA. "Specified persons", such as Waste Collection Authorities (WCAs) and Waste Disposal Authorities (WDAs), are also exempt from the registration requirement (see our response to question 2 below for more on WCAs and WDAs).

Any operator holding an environmental permit is required to complete a waste return form and file it with the EA. This return records what waste the operator has received or had removed from their site. The frequency of such returns (i.e. quarterly, annually) is set out in the operator's environmental permit.

When waste is transferred from one party to another, a waste transfer note is produced to provide a clear audit trail from production to disposal of the waste.



Anyone handling controlled waste has a duty of care to take all reasonable steps to ensure that the waste:

- is not disposed of unlawfully, without a permit or in breach of any permit, or treated, kept or disposed of in a way that causes pollution or harm;
- does not escape from a person's control; and
- is only transferred to an authorised person and accompanied with a written description that enables the transferee to know enough about it to deal with it properly and avoid breaching their permit.

It is an offence to breach this duty of care and a statutory code of practice has been issued to support the duty of care.

## **1.2 Is the collection and processing/treatment of such waste the responsibility of the authorities or is it a free market?**

### Germany

Generally the municipalities are the responsible local authorities to undertake the collection and management of household waste and commercial waste. In that respect, the federal states/municipalities have the right to direct the responsibility for the local collection and management of household waste and commercial waste to specific state-owned entities. From time to time, municipalities will designate a joint undertaking, wholly owned by these municipalities, to be the responsible waste management company for an area covering all the participating municipalities. The responsibility is transferred to the state-owned entities by statutory act or similar, i.e. not by contractual agreement, which is why this very step need not be tendered in a competitive tender procedure. Competitive tender procedures can apply to the award of contracts only. In consequence, to the extent that household waste and commercial waste must be handed over to the responsible local authorities or the respective designated state-owned entity, the collection and processing/treatment of such waste is not a free market.

However, in case the responsible local authorities/entities or the designated state-owned waste management companies are either not willing or not capable of performing the task of the collection and processing/treatment of waste on their own, they will look for contractors to perform the tasks. In Germany, every company that fulfils certain statutory criteria is generally permitted to offer such services in the area of the collection and processing/treatment of waste. In that respect, there is a certain free after-market in case the responsible local authorities/entities wish to make use of this market. The subject of the respective contracts can encompass any and all aspects of the collection and processing/treatment of waste. The specific demand can range from none, to sourcing out specific services/supplies only, and to contracting out practically the entire waste management.

In that context it has to be noted that, by law, contracting out such services no longer relieves the responsible local authorities/entities of their responsibility to ensure the proper waste management in the relevant area. Also, it has to be noted that both the local authorities/entities and the designated

state-owned waste management companies fall under Public Procurement Law. The same can apply to incineration plants that are owned/controlled by the state. This means in particular, at least as a starting point, all services/supplies/works purchased by the local authorities/entities and the designated state-owned waste management companies need to be put out to tender above the relevant thresholds.

On basis of the figures mentioned in Danish Report, only one third of the incineration plants in Germany are held completely by the state/the municipalities. According to the strict case law of the European Court of Justice ("ECJ"), only these incineration plants could qualify as an in-house entity. The remaining two third of the incineration plants could thus not qualify as an in-house entity. This should be a common result for all reporting Member States.

The designation by statutory order outside the procurement rules is restricted to state-owned entities/entities wholly owned by municipalities. In consequence, the designation outside the procurement rules is generally not permissible if the designated entity is wholly or partly owned by private companies. Therefore, from our point of view, the fact that two third of the incineration plants in Germany could not qualify as an in-house entity does not run against the description that authorities can designate plants by statutory order outside of the procurement rules, as long as these plants are indeed wholly state-owned: "If the authority does have a designated state owned Waste Management Company, this company will generally be selected by statutory law (i.e. without tender procedure) to handle the waste" (please see our answer to question 2.3).

#### The Netherlands

The collection and treatment of all commercial waste will be performed on the free market. However, a third party must be authorized to process or remove such waste. (Please refer to our answer to question 1.1).

#### Sweden

The collection and management of household waste is the responsibility for the local municipalities. The municipalities have different ways of exercising their responsibility. There are municipalities which have a wholly owned undertaking that deals with the waste collection and management. Some municipalities by consortium agreement designate a joint undertaking (wholly owned by the municipalities together) to be responsible for the collection and/or management of household waste within their municipalities. Some exercise their responsibility directly and others conclude agreements with private or partly owned undertakings.

In all situations that the municipalities do not directly exercise its responsibility the collection and management of waste is subject to the rules on public procurement and shall therefore be put out to tender. In regard of wholly owned undertakings by one or several municipalities the tendencies are that the collection of waste is put out to tender by the municipalities, while the incineration of waste is directly awarded the wholly owned undertaking on basis of the "in-house"-exception.

The collection and processing/treatment of commercial waste is the responsibility of the commercial actor (i.e. free market). Thus, the holder of commercial waste is responsible for that the waste is being taken care of in a proper manner. Furthermore, the Government or the authority appointed by the Government may further issue rules concerning the duty of producers to ensure that waste is

collected, recycled, reused or removed in a manner that satisfies the requirements for acceptable waste management in terms of health and environment contained in the Environmental Code. Such rules may be issued in respect of waste from objects or packaging manufactured, imported into Sweden or sold by the producers and to waste generated by professional activities which requires special measures. Such so called producer's responsibility has been invoked for inter alia plastic bottles, electricity products and light bulbs (non-directional household lamps).

Where a municipality or a producer is responsible for removing waste, it must not be composted or buried or otherwise recycled or removed by the owner or tenant of a property. However waste that can be disposed of on the property without any risk of detriment to human health or the environment is exempted. In individual cases the municipality may, in the case waste would otherwise have been disposed of by the municipality, allow owners or tenants of properties to dispose of waste generated on their premises themselves if they can do so in a manner that is safe for human health and the environment and there are special reasons for granting such an exemption.

### The UK

The collection and processing of waste is the responsibility of the WCAs and WDAs, which they can contract out to private entities via competition. WCAs have the responsibility to collect household waste (and commercial/industrial waste, if requested) in their area. In England, a WCA can be a district, metropolitan or city council or a unitary authority. WCAs must deliver this waste to a place specified by a WDA. In England, a WDA can be a county council, district council or unitary authority. In certain areas, the WCA and the WDA may be the same authority.

Different authorities deal with this responsibility in different ways, for instance some authorities arrange for waste collection and disposal to be completed by a company that they own. There are examples of private company wholly owned by a WDA which is made up of representatives from several boroughs for which it is responsible. Its primary function is to arrange for the transportation and disposal of waste in those boroughs and the disposal is mostly handled by the company on the WDA's behalf.

In this regard the company disposes of waste in an incinerator, of which it is the owner. This contract was awarded pursuant to the in-house exception. The WDA does not handle waste collection for the boroughs: the individual boroughs manage their own waste collection. Certain boroughs, put contracts for waste collection up for tender, subject to the public procurement rules and other boroughs, conduct it in-house and therefore do not use the procurement process.

The company is contracted to provide waste management services to the boroughs but it also serves commercial businesses. As it is owned by a WDA, the company is also a public authority for procurement purposes.

Some councils appoint a private contractor to carry out their duties. These contracts will have been awarded via a public procurement process. Finally, some councils create a partnership with private contractors, using a Private Finance Initiative project.

There is a political context to waste management which should be noted - under the Conservative government in the 1980s, local authorities in particular were encouraged to outsource as many services as they could and competitively tender for them. This continued (though was slightly more

relaxed) under the next government, but the emphasis remains on private enterprises carrying out services for local authorities. This is evident in the waste management sphere, therefore the majority of the services performed will have been the subject of a competitive tender at some stage.

### **1.3 Who owns the incineration plants (local authorities, private entities or a combination thereof)?**

#### Germany

Incineration plants are owned by local authorities (municipalities), state-owned entities, private entities and a combination thereof. All combinations are used depending on historic developments and the financial situation of the municipality at the time when the incineration plant was built (e.g. many municipalities needed private partners/shareholders in order to be able to finance the construction of the plant).

#### The Netherlands

Most incineration plants in the Netherlands are owned by private entities. However, municipalities often own the shares in such private entities.

The incineration plants in question were until recently owned by a Municipality. The incineration plants are now privatized. Nevertheless, the respective Municipality is a 100% shareholder of the incineration plants and could therefore still be seen as the owner.

#### Sweden

There are thirty-two incineration plants in Sweden, the majority of which is wholly owned by one local authority (municipality) through a wholly owned undertaking, this often due to the distance heating systems of the municipalities. There are also examples of several municipalities which together own the incineration plant, such as Renova (eleven municipalities jointly) and SYSAV (fourteen municipalities jointly). The number of privately owned incineration plants is minimal (approximately 2-3). One incineration plant is owned by a municipality in combination with a private undertaking. There is also one state owned incineration plant.

#### The UK

There are approximately 32 operating incineration plants in the UK, the vast majority of which are operated by private entities (for example the plant at Ellesmere is owned and operated by Veolia). Some e.g. the plant on the Isle of Man, are owned by the government (though this is operated by a private entity, SITA). A couple of the plants, located in remoter locations in the UK, are operated by a public body, e.g. the local council and a couple of plants are operated by bodies established by PFI/PPP. It should be noted, that incineration is not the main form of waste disposal in the UK. The UK's main waste disposal method remains landfill. As with incineration plants, the majority of landfill sites appear to be owned and managed by private entities.

WCA:s and WDA:s are public bodies – local authorities – meaning they are part of the local government of the UK. WCA:s are legislatively appointed bodies which provide the collection services for waste. Waste collected by WCA:s will be transported to a site which is specified by a WDA.

Very few incineration plants are owned by local authorities. Therefore, the vast majority of waste management contracts must be put out to tender. Although it is not possible to provide exact figures (especially given that some contracts will have been put to tender decades ago), the majority of the services performed will have been the subject of a competitive tender at some stage. Our conclusion is that most waste must be subject to tender because of the lack of publicly-owned incineration plants.

When PFI:s are no longer available, which is going to be the case, then more and more waste will be subject to tender. However, since the majority of our incineration plants are not PFI:s, the actual impact on the amount of waste going to tender which was not previously going to tender, may not be significant when PFI:s are no longer available.

As regards the future of the market, there is, broadly, a push for greater recycling and less incineration in the UK. Therefore we may see a general decline in incineration as this becomes more prominent. To give you an idea:

- The household waste recycling rate reached 43.2% in England in 2012/13 with much variation across local authorities (compared to 15% in 2002/2003) however this rate has plateaued in recent years and is unexpected to reach 50% by 2020
- Local authority managed waste going for incineration with energy recovery rose 13% to 5.5 million tons in 2012/13 and has more than doubled in the last ten years
- However this represents only 39% of the household waste not being recycled: the majority of local authority-managed waste in 2012/2013 went to landfill rather than incineration.

There may be an increase in incineration because of the landfill tax which many authorities seek to avoid, but alternatively recycling may take a greater market share. It is important that all statistics (and our advice above) should be read in the context of the statistic in the final bullet point though – that landfill is still the preferred method of waste disposal.

In terms of public procurement, the introduction of legislation in the UK to implement the new EU procurement rules will bring the biggest change, however this legislation is unlikely to come into force until next year.

**1.4 If a local authority owns the plants in question, in whole or in part, and the plant treats both waste not subject to competition (i.e. the authorities are responsible/have a monopoly on the collection) and waste subject to competition, does the authority put all or part of the waste management (incineration) out to tender?**

### Germany

Whether an authority will put all or part of the waste management (incineration) out to tender will depend on various factors. If the local authority owns the plant in question in whole, the local authority will most likely rely on the "in house"-exception, if the incineration plant performs the majority of its services for the local authority and if it is controlled by the local authority (for state-ownership that will usually be the case). If a local authority owns the plant in question only in part (i.e. together with a private partner), in the past, many German authorities also relied on the "in house"-exception and entered into long term contracts with the incineration plants. However, since the European Court of Justice decided that the "in house"-exception cannot be applied if a private partner is involved, the local authorities increasingly put all or part of such waste management (incineration) out to tender. For example, the designated Public Waste Management Company of Hamburg announced in late 2012 in the Official Journal of the European Union (TED No. 2012/S 247-407474) that they will need to restructure their waste management in particular with respect to the incineration plants currently used. They plan to conduct a competitive dialogue to put the relevant services out to tender.

### The Netherlands

Some municipalities have granted exclusive rights to companies to process all waste that has been collected by or on behalf of the municipality. One right has been granted pursuant to the Regulation Provision Exclusive Right (in Dutch: Verordening verlening uitsluitend recht d.d. 9 May 2013) and in conformity with article 11 of Directive 2004/18 and art. 10a of the proposed procurement directive) on 13 December 2013 (Exclusive Right).

The municipality in question considers the company to be a contracting authority under article 10a of the proposed procurement directive, since it would qualify as a body governed by public law: as, (i) it is established for the specific purpose of meeting needs in the general interest, (ii) the company has legal personality, and (iii) the company is subject to management supervision by the Municipality as it owns 100% of the shares.

As per this Exclusive Right, the municipality awards service contracts to the company for waste treatment without the need of following a tender procedure. Note that not only this company has been granted an exclusive right for the waste treatment. Also other waste incineration companies elsewhere in the Netherlands have been granted such Exclusive Right. In this perspective, the Dutch Supreme Court decided on 18 November 2011 that collection and treatment of waste is a general interest of a non-commercial or industrial nature, as meant in art. 1 lid 9 Directive 2004/18/EG en art. 1(q), Bao.<sup>2</sup>

<sup>2</sup> Dutch Supreme Court (18 November 2011, 10/00804).

The legal basis for not applying the procurement rules on waste disposal lies according to the company in question in the fact that it has been awarded an exclusive right in conformity with article 2.24 of the Dutch Procurement Act 2012 - which is based on article 18 of Directive 2004/18 ("Directive"). Note that this article 2.24 has been kept as article 10 a in the proposed directive.

The relevant article stipulates that the procurement rules do not apply to public service contracts awarded by (1) a contracting authority to (2) another contracting authority or to an association of contracting authorities (3) on the basis of an exclusive right which (4) they enjoy pursuant to a published law, regulation or administrative provision which is (5) compatible with the Treaty on the Functioning of the European Union ("Treaty").

The company considers that it fulfills all requirements under this clause:

1. The Municipality is contracting authority;
2. it is a contracting authority under article 18 of the Directive, since it fulfills the three cumulative conditions to qualify as a body governed by public law: as, (i) the company is established for the specific purpose of meeting needs in the general interest; (ii) the company has legal personality; and (iii) the company is subject to management supervision by the Municipality as it owns 100% of the shares;
3. The Municipality granted the company an exclusive right to process all waste that has been collected by or on behalf of the Municipality;
4. The exclusive right was granted pursuant to the Regulation Provision Exclusive Right (in Dutch: Verordening verlening uitsluitend recht d.d. 9 May 2013) and in conformity with article 18 of Directive 2004/18); and
5. The company considers that this exclusive right is compatible with the Treaty. Please note that, according to case law, the rules laid down in articles 18, 49 and 56 Treaty do not apply in case:

"the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities' with the controlling local authority or authorities".

Therefore, the company considers that articles 18, 49 and 56 Treaty would not apply to its waste processing, since it is subject to management supervision by the local authority that owns 100% of the shares in it.<sup>3</sup>

The company has an agreement in place with the Municipality and companies with respect to the tariffs charged for processing household waste. For the processing of commercial waste a separate agreement is in place - as per which various tariffs apply - and which amounts will be invoiced separately. The commercial waste and the household waste are being processed by the company as separate as possible.

The subsidizing of commercial waste treatment under the Exclusive Right is only allowed to the extent that such subsidies would not affect the trade between member states of the EU and distort or threaten to distort competition by favoring certain undertakings or the production of certain goods (article 107 Treaty). In this respect subsidies are available e.g. for organizations that generate renewable energy such as wind, sun and biomass.

<sup>3</sup> Court of Appeal Arnhem-Leeuwarden, 3 September 2013, ECLI:NL:GHARL:2013:6675, recital 4.18.

The grant of an exclusive right for waste treatment will constitute a breach of the EU state aid rules, if a contracting authority would be favored by an administrative measure, on a non competitive manner and this measure affects trade between Member States and distorts or threatens to distort competition.<sup>4</sup>

EU state aid rules could further be breached if a local authority pays such a high price to the contracting authority that the contracting authority earns a profit that could be used for commercial activities, such as processing commercial waste.<sup>5</sup>

### Sweden

It seems like most of the municipality owned plants are treating both waste not subject to competition and waste subject to competition. The municipalities owning their own plants do not to any greater extent put the management of waste out to tender. We have been informed that this is due to the "environmental impact" of transporting waste outside the territory of the municipality. Thus, municipality owned local plants are to a large extent directly awarded contracts on incineration of household waste on basis of the "in house"-exception.

The arguments of environmental impact of transporting waste to another municipality does not fit with the procurement rules. Avfall Sverige has not been willing to discuss any plants or municipalities in specific. However, it has confirmed that this way of argumentation may be constructed through certain directives. Avfall Sverige has also explained that its engagement towards its members is limited to giving account of the current framework and that it leaves the execution of waste treatment to be decided by the members.

To our knowledge the only directive applicable for such an argumentation would be the waste framework directive.<sup>6</sup> Article 16 of the directive has been interpreted by the ECJ in the case of Ragn-Sells AS v. Sillamäe Linnavalitsus,<sup>7</sup> where the ECJ stated that articles 35 TFEU and 36 TFEU, and the provisions of Regulation No 1013/2006 on the on shipments of waste<sup>8</sup>, read in conjunction with Article 16 of Directive 2008/98, must be interpreted as "*permitting a local authority to require the undertaking responsible for the collection of waste on its territory to transport mixed municipal waste collected from private households and, as applicable, from other producers, to the nearest appropriate treatment facility established in the same Member State as that authority*". We have not received any answers as to whether the municipalities do in fact rely upon this form of argumentation.

In this regard it ought to be mentioned that during years 2008 - 2010 the municipalities' management of public procurement in regard of collection and management of waste was reviewed by the Swedish Competition Authority. Since then, municipality owned companies are undergoing, to some extent, a new structuring as to fall within the "in-house"- exemption.

<sup>4</sup> Article 107 of the Treaty and Court of Appeal Arnhem-Leeuwarden, 3 September 2013, ECLI:NL:GHARL:2013:6675, recital 4.26.

<sup>5</sup> Court of Appeal Arnhem-Leeuwarden, 3 September 2013, ECLI:NL:GHARL:2013:6675, recital 4.30.

<sup>6</sup> Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste.

<sup>7</sup> Case C-292/12, in particular section 68 and the prior reasoning related to section 68.

<sup>8</sup> Regulation (EC) No 1013/2006 Of the European Parliament and of the Council of 14 June 2006 on shipments of waste.



Two of the largest municipality owned incineration plants, have solved the situation of treatment of both waste subject and not subject to competition by multiple undertakings. The municipality owned parent company only conducts incineration of waste not subject to competition (household waste from its own municipalities). The wholly-owned subsidiary manages the incineration of waste subject to competition (commercial waste and waste from other municipalities that have been awarded through tender). In this regard the waste is divided also in the plants in question and after the incineration. This solution was constructed due to the risks with conducting incineration of both types of waste under the same municipality owned undertaking as in regard to the public procurement regulations.

Other incineration plants manages the treatment of waste subject to competition and the treatment of waste not subject to competition in different ways. One plant has explained to us that it does tender for household waste, and hence it is not directly awarded the incineration. Four of the interviewed plants have explained to us that no changes have taken place within these plants due to the review of the market by the Swedish Competition Authority. Another plant has explained to us that it keeps waste separated during the process of incineration and that there is thus no problematic aspects with the combination of household and commercial waste.

### The UK

As noted above under our answer to question 1.3, very few incineration plants are owned by local authorities, therefore the vast majority of waste management contracts must be put out to tender. We have only identified a couple of examples where the government owns and operates the plant.

In the case of company management of waste mentioned under our answer to question 1.3, the waste not subject to competition is not competitively tendered, as that waste is disposed of by the company pursuant to the contract it has with the DWA under the in-house exception. This includes waste which has been collected by boroughs using private entities. The company does also have contracts with commercial businesses and other public sector companies. In respect of the public sector companies, these contracts will be competitively tendered.

The States of Jersey run their own incinerator and therefore handle disposal, but the collection is conducted by the 12 parishes of Jersey, some of which also collect commercial waste. As the states run the incinerator, they only let certain contracts out to tender such as removal of the residues, scrapyards contracts and the disposal of anything that cannot be disposed of on the island such as fridges, which gets shipped to the mainland. The incinerator on Jersey also disposes of commercial waste from businesses.

The incineration plant on the Isle of Man is owned by the Isle of Man government and it is operated by SITA Isle of Man, an independent private company. It appears that the Isle of Man government puts all the waste disposal management out to tender, as SITA Isle of Man operates the entire incineration facility.

**1.5 In the affirmative, to what extent and how often does the authority put the waste incineration carried out at the plant out to tender?**Germany

To what extent and how often the authority puts the waste incineration carried out at the plant out to tender will depend on various factors. One of the main factors is the specific demand of the authority for the respective capacities. Usually, the authorities will enter into long term agreements (currently at least 4 years and sometimes in the past up to 18 years) with incineration plants in order to secure a certain capacity needed to process the waste. In case specific ancillary services are put to tender the contracts are usually much shorter.

The Netherlands

Please refer to our answer to question 1. 4.

Sweden

The municipalities which do not have any "own" incineration plant do put the waste management out on tender on a regular basis. The contract term vary from approximately 2-3 years with additional option on 1 + 1 year to 5 years with additional options on 1 + 1 year.

The UK

The duration of contracts can and does vary from location to location; there is no set term. For example, the Isle of Man government and SITA Isle of Man have a 25 year contract.

**1.6 In the event that not all of the waste treatment is put out for tender (e.g. because the waste is considered subject to the "in house"-exception), is control carried out with respect to whether the waste received by the plant in question is "in-house" waste or not?**Germany

In the event that not all of the waste treatment is put out for tender (because the waste is considered subject to the "in house"-exception), we would assume that the local authority will keep record on whether the waste received by the plant in question is "in-house" waste or not. However, we have not yet been able to receive confirmation from a local authority. In that respect, however, we note that rejecting waste subject to competition might be problematic due to long term framework contracts with waste producers.

The Netherlands

The waste treatment is subject to an Exclusive Right. Therefore, the procurement law (including the "in house" exception) would not be applicable (Please refer to our answer to question 1.3).

Sweden

We have been informed that those municipality owned plants which do not put waste treatment out to tender due to the "in house"-exception, are conscious as to fulfilling the criteria set for the exemptions, including thresholds. Two of the larger plants have divided the incineration of household waste (not subjected to competition) and "other waste" (subject to competition) into different undertakings. (Please refer to our answer to question 1.4).

One plants has informed us that the allocation of costs and income deriving from the different types of waste is done on basis of a calculation of the shares of received waste belonging to the parent company (i.e. from waste not subject to competition) and the subsidiaries (i.e. from waste subject to competition). Furthermore, the parent company separately owns a part of the incineration plant in which the incineration of waste not subject to competition is taking place (please refer to our answer to question 1.4). The two types of waste are thus kept separately.

In regard of another plant, the allocation and control of waste subject/not subject to competition is done on basis of the weight of the received waste. All waste received by the plant is weighted and then registered as waste subject to competition or not subject to competition. Afterwards the two types of waste are kept separate during the entire process.

The UK

We have only identified a few public exceptions where waste treatment is not put out to tender. In the vast majority of cases, the plant is operated by private entities which have won contracts through a tender process. For the few plants owned and operated by public entities, we have not been able to definitively confirm whether any such control is carried out.

**1.7 In this respect, is control carried out with respect to whether the individual plant receives waste subject to competition, which exceeds the limit of approx. 20 % (the level suggested in the proposed new procurement directive)?**

Germany

Please refer to our answer to question 1. 6.

The Netherlands

The limit of approx. 20% is not applicable to waste treatment subject to an Exclusive Right. Therefore, there is not control carried out with respect to whether the individual plant receives waste subject to competition, which exceeds the limit of approx. 20 %.

Sweden

The incineration of waste subject/not subject to competition is managed under different undertakings and is held separate during the entire process why the 20 % threshold will not be applicable. Please refer to our answer to question 1. 6.

The UK

Please refer to our answer to question 1. 6.

**1.8 Further to question 6 and 7, how does the authority handle a situation where the treated amount of waste subject to competition starts below 20 % and subsequently increases beyond 20 %?**

Germany

In a situation in which the treated amount of waste subject to competition starts below 20 % and subsequently increases beyond 20 %, the authority will generally not need to terminate any existing long term contract that was entered into under the "in house"-exception, because a duty to put out such contract to tender can only be determined on the basis of the information available at the time of its conclusion. However, with respect to follow-up contracts we have not yet been able to receive information from a local authority how they would choose to react.

The Netherlands

The limit of approximately 20% would not be applicable to waste treatment that is subject to an Exclusive Right. Therefore, the municipality allows the situation where the treated amount of waste subject to competition starts below 20% and subsequently increases beyond 20%.

Sweden

Please refer to our answers to questions 1.6-7.

The UK

We have not been able to receive information from a local authority about how they would choose to react.

**1.9 In this case, is part of the waste subject to competition rejected or does the authority demand that the waste not subject to competition be put out to tender and at what deadline?**

Germany

Please refer to our answer to question 1.7.

The Netherlands

Not applicable, the waste treatment is subject to an Exclusive Right. Therefore, the municipality does not reject waste subject to competition nor demand that the waste not subject to competition should be put out to tender.

Sweden

Please refer to our answers to questions 1.6-7.

The UK

Please refer to our answer to question 1.8.

**2. Questions to the waste incineration plants**

**2.1 What waste is brought to the plant (waste subjected to/not subject to competition) and what is the ratio between subject/not subject to competition?**

Germany

In the case of Hamburg, Hamburg uses in total four incineration plants.

- The largest of the four plants has dedicated its entire capacity to the designated Public Waste Management Company of Hamburg until 2014.
- One plant has dedicated its entire capacity to the Waste Management Company of Hamburg until 2019.
- Another plant is wholly owned by the Waste Management Company of Hamburg, but has dedicated approximately 60 % of its capacity to two other local authorities (most of their demand, however, will also relate to waste not subject to competition) until 2015.
- One plant has dedicated approximately 60 % of its capacity to the Waste Management Company of Hamburg until 2016, and also manages waste from other municipalities (most of their demand will relate to waste not subject to competition). The contract has been terminated due to lesser demand by the Waste Management Company of Hamburg effective from 01.01.2017.

- According to an ad-hoc estimate of a representative in the administration of the city of Hamburg most (i.e. more than 80%) of the waste received by the incineration plants is not subject to competition. However, we have not yet been able to confirm this with any of the plants.

### The Netherlands

30% household waste (waste not subject to competition) and 70% commercial waste (waste subject to competition) is brought to the plant.

### Sweden

Both waste subject and not subject to competition is brought to the plants. On basis of the interviewed plants the general ratio between them seems to be approximately 40 percent not subject to competition and 60 % subject to competition.

### The UK

Both waste which has been collected by an authority directly/indirectly, waste collected by private entities and waste collected from commercial businesses by private entities can be brought to the same plant for incineration. The EA publishes waste management data on its website annually, broken down by region but not by individual plant. The 2012 data is available at <http://www.environment-agency.gov.uk/research/library/data/150326.aspx>, [here](#). DEFRA publishes statistics on waste managed by local authorities in England. The 2012/2013 data is available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/255610/Statistics\\_Notic\\_e1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255610/Statistics_Notic_e1.pdf), [here](#). It also published data in 2010 about commercial and industrial waste, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85947/ci-statistics-release.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85947/ci-statistics-release.pdf), [here](#), however some caution should be exercised as there is some overlap between the DEFRA statistics.

Individual operators generally publicise the volume of waste they process on their own websites and in promotional materials etc., but not necessarily the source of the waste, beyond a general reference to the geographic region. DEFRA noted that in 2010, businesses generated approximately one quarter of all waste in England, however this is collected by local authorities and also commercial waste management companies, it is therefore difficult to answer this question definitively.

One company states that the amount of waste it receives varies, therefore it is not possible to provide a ratio (we therefore also presume that it would be difficult for them to apportion their annual turnover in these terms). The plant do however as noted above, it receives waste from the responsible authority and commercial businesses.

We suspect that this will be the same for the few other incineration plants owned/operated by local authorities. However, as the majority of the incineration plants are owned by private entities, local authorities will procure these contracts for waste disposal. This tends to be part of an integrated services contract and will include other services such as recycling and processing the waste.

**2.2 Is the treatment of waste (incineration) carried out on the basis of partnership-like contracts or framework contracts with the authorities and/or major waste-producing businesses?**Germany

Yes, the treatment of waste (incineration) is usually carried out on the basis of partnership-like contracts or framework contracts with the authorities and/or major waste-producing businesses.

The Netherlands

The treatment of waste is carried out on the basis of cooperation agreements with the municipalities and waste-producing businesses. Furthermore treatment of waste is also carried out based on instructions of the Municipality.

Sweden

Between these plants and the municipality there is generally an agreement in regard of the treatment of waste which has been directly awarded. In regard of the relationship between the incineration plant and commercial actors the treatment of waste follows a commercial agreement. Some incineration plants furthermore have agreements with other municipalities on treatment of household waste (which do not have access to "own" incineration plant). These agreements are foregone by public procurement.

The UK

The type of contract varies, however partnership-like contracts appear to be more common. This is part of the trend to provide integrated solutions for waste, including waste disposal and waste prevention.

**2.3 On what basis do the authorities decide who is to receive the waste (national/local rules, tenders, according to the in house-exception etc.)?**Germany

There is no single answer to the question on what basis the authorities decide who is to receive the waste, i.e. who will manage the waste. As stated in our answer to question 1.4, under German law, all household waste and a considerable part of commercial waste must be handed over to the responsible local authority on the basis of statutory laws. This is the same in all municipalities. However, from thereon, it will depend on various factors on what basis the authorities decide who is to receive the waste. If the authority does have a designated state-owned Waste Management Company, this company will generally be selected by statutory law (i.e. without tender procedure) to handle the waste. If that Waste Management Company is unable to process all waste/ensure all

management by itself, it will generally (have to) put out for tender the relevant waste management services in a competitive tender procedure. Only if the Waste Management Company wholly owns an incineration plant/service provider that performs the majority of its services for the Waste Management Company and if it is controlled that company, is it likely to rely on the "in house"-exception.

#### The Netherlands

The authority has granted a company the Exclusive Right to waste treatment (art. 11 of Directive 2004/18 and art. 10a of the proposed procurement directive) taking into regard the proximity principle.<sup>9</sup> The incineration plant is the plant that is closest to the household waste that is collected by the Municipality.

#### Sweden

The municipalities are in this regard subject to the public procurement rules why the choice of incineration plant is not totally free. However, the municipalities normally prefer to let the waste be managed at incineration plants within the municipality, due to environmental impact of transporting waste to another municipality as well as the local distance heating systems, why in situations where the municipality has its "own" incineration plant the decisions to refer the waste to that incineration plant is done on basis of the "in-house"-exception. Thus, the municipalities to a large extent, decide themselves which plant receives the waste through directly awarded contracts.

#### The UK

This depends on the solution the authorities choose. As noted in our answer to question 1.2 in section 1 above, authorities choose to handle this in different ways. Public authorities which choose to contract with independent private entities tender contracts pursuant to the UK Public Contracts Regulations 2006, which implement the EU public procurement regime. To the extent that an authority lets contracts to companies which they own, from what we have seen these contracts are let subject to the "in-house"-exception.

### **2.4 How is a situation where the treated amount of waste subject to competition starts below 20 % and subsequently increases beyond 20 % handled?**

#### Germany

Please refer to our answers to questions 1.6-9.

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<sup>9</sup> Note that the European Court of Justice (12 December 2013, C 292/12, Ragn-Sells) decided that municipalities and local authorities are allowed to obligate collectors to transport household waste to the nearest incineration plant (the proximity principle prevails over the general principles of procurement law).



The Netherlands

The limit of approx. 20% is not applicable to waste treatment that is subject to an Exclusive Right. Therefore, the Municipality allows the situation where the treated amount of waste subject to competition starts below 20% and subsequently increases beyond 20%.

Sweden

Please refer to our answers to questions no.1.6-7.

The UK

Please refer to our answers to questions 1.6-9.

**2.5 In this case, is part of the waste subject to competition rejected or does the authority demand that the waste not subject to competition be put out to tender and at what deadline?**

Germany

Please refer to our answers to questions 1.6-9.

The Netherlands

The waste treatment is subject to an Exclusive Right. Therefore, the Municipality does not reject waste subject to competition nor demand that the waste not subject to competition should be put out to tender.

Sweden

Please refer to our answers to questions 1.6-7.

The UK

Please refer to our answers to questions 1. 6-9.

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