

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

WASTE MANAGEMENT SERVICES

-- Sweden --

28 October 2013

This note is submitted by Sweden to the Working Party No. 2 of the Competition Committee FOR DISCUSSION under Item VII at its forthcoming meeting to be held on 28 October 2013.

Please contact Ms. Cristiana Vitale if you have any questions regarding this document [E-mail: cristiana.vitale@oecd.org].

JT03345704

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

ROUNDTABLE ON COMPETITION ISSUES IN WASTE MANAGEMENT

– Sweden –

1. Introduction

1. The Swedish Competition Authority (“SCA”) has during the past few years investigated a number of cases concerning public undertakings in the waste management sector. These investigations have shown a number of ways as to how publicly owned enterprises can give rise to potential competition issues. In this paper we discuss three cases which illustrate three different kinds of competition issues that the SCA has investigated in the waste management sector.

2. In order to give a background to the cases discussed we also provide an overview of the Swedish waste regulation and a brief presentation of the national competition legislation which is relevant for the SCA’s investigations in the waste management sector.

2. The waste management sector in Sweden

3. The Waste Framework Directive¹ has been incorporated into Swedish law by the Swedish Environmental Code and the Swedish Waste Ordinance.² The Environmental Code has been applied in Sweden since 1999 and aims to promote a sustainable development which ensures present and future generations a healthy and sound environment.³

4. Many of the regulations in the Environmental Code are defined further in the Waste Ordinance. Principally, the Ordinance contains provisions regarding the duties of the municipalities with regard to waste disposal. Municipalities also have an obligation to develop a municipal waste management plan, local waste management regulations and a municipal waste management system. The Ordinance also provides general rules regarding management of waste and rules regarding responsibilities between different actors in the waste management sector.

2.1. *The responsibility for waste disposal is divided*

5. The responsibility for waste disposal in Sweden is divided among different stakeholders depending on the source and nature of the waste in question. Household waste is under the responsibility of municipalities, save for producer waste, which fall under the responsibility of the producers. When it comes to commercial waste, the enterprise where the waste is created has the responsibility for its disposal.

6. In the next section these divided responsibilities will be presented in some further detail.

¹ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.

² The Swedish Waste Ordinance (SFS 2011:927).

³ The Swedish Environmental Code (SFS 1998:808), Ch. 1:§1.

2.2. *The responsibility of municipalities*

7. Municipalities are responsible for the disposal of household waste and “waste similar to household waste”, that is waste from, for example, office canteens.⁴

8. In Sweden the right of municipal self-determination is laid down in the Swedish Constitution and therefore municipalities may themselves decide how to organize their waste management activities. There are several organizational forms available. Cooperation between municipalities is, for example, possible within a joint committee or local government federation. There are also local authorities which collaborate on specific matters such as joint procurements. Approximately 70 percent of the collection of household waste is outsourced by way of public procurement to private undertakings in accordance with the Swedish Public Procurement Act⁵, while other municipalities provide it as a public service. Municipalities are contracting authorities and are therefore obliged to apply the public procurement rules when they purchase goods and services and when they allow an external party to perform a part of their operational responsibility. Services that are commonly procured are collection and waste treatment.

9. Municipalities may also offer other services to households and enterprises which they are not obliged to provide by law and which are also provided by the private waste management sector. Many municipalities provide curbside collection of packaging and newspapers to apartment buildings as an extra service and at an extra cost. About 30 municipalities also provide the same service to single-family houses.

2.3. *The responsibility of producers*

10. Producers are responsible for waste that falls within the producer responsibility such as paper, packaging and electrical and electronic products. The responsibility covers the whole production chain. The responsibility lies in ensuring that the disposal of waste is done properly according to laws and regulations, and that national recycling targets are met.

11. The producers have met their responsibilities in this regard by creating so-called producer responsibility organizations (“PROs”). The PROs cover different types of waste fractions and take care of the practical responsibility of individual member companies' producer responsibility. The collection of packaging waste is funded by packaging charges while the collection of recycled paper is jointly funded by paper producers. The PROs mainly organize the collection of producer waste from households through their nearly 6000 recycling stations where households can dispose of newspapers, packaging, glass etc. These stations are placed within communities and provide a reasonable ease of access for households. There are also larger recycling facilities placed further away from city centers where households can drop off bulky waste, electronic waste and hazardous waste etc. There are around 630 recycling facilities throughout the country.⁶

12. Through cooperation between PROs, local authorities and/or private contractors, curbside collection of one or more packaging fractions and/or recycled paper is more and more often offered to households as an additional service. The curbside collection of packaging waste may be directly linked to the local government collection of food waste and/or combustible waste in combined collection systems which use bins with multiple compartments. Collected paper and packaging is thereafter transported for sorting and recycling.

⁴ The Environmental Code (SFS 1998:808), Ch. 27 §5.

⁵ The Swedish Public Procurement Act (SFS 2007:1091).

⁶ Swedish Waste Management 2012, Avfall Sverige, page 9.

13. About one third of the packaging waste is today collected through curbside collection. Property owners sign agreements for collection services with private contractors or the municipality. Currently, private entrepreneurs account for 75 % of the curbside collection. The expenses of the curbside collection operators are to some extent reimbursed by the producers, but also covered by fees paid by households. Curbside collection has primarily been expanded in apartment buildings where about 50 % of all households use this service. The private collection contractors have a market share of 80 % on the market for apartment buildings. Municipalities on the other hand dominate collection from single-family houses.⁷

14. Small businesses often use the same collection infrastructure as households for packaging waste. Larger businesses can often produce such large amounts and pure fractions that collection contractors pay them in order to collect packaging waste.

2.4. *The responsibility of enterprises*

15. Enterprises are responsible for disposal of the waste they produce. In practice, services for this purpose are purchased from the private waste management sector. A portion of the enterprises' waste which is "similar to household waste" is, however, under the responsibility of municipalities.

3. Some competition concerns regarding public undertakings vis-à-vis private undertakings

16. When public and private undertakings compete there is a risk that competitive conditions are distorted due to the differences between these two kinds of enterprises.

17. One key difference between private and public undertakings is that the latter cannot be declared bankrupt and that public undertakings also benefit from being financed through tax funding. Public undertakings commonly serve other purposes than maximizing profits for their owners and might therefore have differentiating incentives from private undertakings. Consequently, the public undertakings operate on the market under different conditions and their mere presence on the market may give rise to market distortions and act as a disincentive to private undertakings to expand or establish themselves.

18. It is common in Sweden for municipalities and county councils to engage in commercial activity in competition with the private sector. The municipalities and county councils, as well as companies they operate, are regulated by the Local Government Act ("LGA")⁸ and the Act on Certain Municipal Powers⁹, which sets out the conditions for municipalities to engage in commercial activities within certain sectors, e.g. employment of disabled people and tourism.

19. Municipalities and county councils may themselves attend to matters of general concern which are connected with the geographic area of the municipality or county council or with their citizens and which are not to be attended to solely by the state, another municipality, another county council or some other body (*The location principle (LGA §2:1) and municipalities' powers*). What constitutes matters of general concern has never been further defined in law and the municipalities' powers have thus been widened through case law.

20. Municipalities may not impose a fee or pricing which leaves the municipality in profit. The fee may not exceed the necessary costs for the operation (*The Prime Cost principle (LGA §8:3c)*). The purpose of the law is to prevent the emergence of monopoly profits in a market that does not have competition. The

⁷ SOU 2012:56, page 145.

⁸ The Local Government Act (SFS 1991:900).

⁹ The Act on Certain Municipal Powers (SFS 2009:47).

principle does not prevent the municipality from setting prices below the actual cost of the operation and the operation being subsidized by the taxpayer. The Prime Cost principle is not, however, considered applicable when the municipality operates in a sector which is generally reserved for the private sector.

21. Adhering to the Prime Cost principle in competitive markets can result in prices being charged at such a low level that private undertakings will find it difficult to compete. Although the prices may not necessarily be below cost and the intention of the public undertaking may not be to eliminate competition, the anticompetitive effect may in some cases be similar to predatory pricing by a dominant undertaking.

4. Sales activities carried out by public entities

22. In order to create similar conditions between public and private entities acting on the same competitive market a new provision was incorporated in the Swedish Competition Act as of 1 January 2010.¹⁰ The new provision may be applied to sales activities carried out by public entities and enables the SCA to request the Stockholm City Court to prohibit anticompetitive sales activities by public entities that are considered to distort or impede competition. A prohibition may be imposed under penalty of fine for default.

23. Conduct that is found to be justifiable on public interest grounds and activities carried out by county councils or municipalities which are compatible with applicable law may however not be prohibited.

24. This prohibition serves as a complement to the two general antitrust prohibitions, i.e. on anti-competitive agreements and abuse of a dominant position, which both remain applicable to public undertakings.

25. There are currently five cases regarding this provision pending in the Stockholm City Court and one in the Swedish Market Court which is the highest instance in competition law cases. So far only one case has been fully processed by the courts. None of the court cases involve the waste management sector.

5. Competition issues between public and private undertakings in the waste management sector

26. The SCA has for many years received complaints regarding activities carried out by public waste management undertakings. The complaints often concern cases where a public entity's pricing practice is questioned, either for being allegedly below cost or for being considered excessive.

27. Another typical case that gives rise to competition issues is where the public undertaking carries out activities under a legal state monopoly as well as activities that are subject to competition.

28. One problem that has been pointed out in the waste management sector is that municipalities have the possibility to use the local waste regulation and the waste tariff as an instrument for increased recycling of different categories of waste, some of which are collected competitively. A reduction in waste collection fees is quite often offered to those residents who choose to make use of municipal curbside collection services for the disposal of producer fractions. This puts at a disadvantage the local residents that source-separate their waste but leave it to a recycling station. It can also create competitive disadvantages for the private collection contractors which offer services for the disposal of producer waste to property owners because they find it difficult to compete with the municipality's offer.

¹⁰ The Swedish Competition Act (SFS 2008:579), Ch. 3 §27.

29. It has also been pointed out that municipal undertakings gain a competitive advantage over private operators in that they are often involved in the development of a municipal waste management plan and the waste management system.

30. During the past few years the SCA has investigated three cases in the waste management sector which highlight some of the competition issues that can arise when public and private undertakings compete in the waste management sector. These three cases are discussed in further detail in the following section.

5.1. *Nordvästra Skånes Renhållnings Aktiebolag (NSR)*

31. The SCA received a complaint regarding NSR, a municipal waste management company, from the Swedish Recycling Industries' Association. The Association questioned several different business conducts practiced by NSR. We will focus on one of these.

32. The complaint alleged that NSR had a department for market services whose costs were covered by the household waste tariffs rather than the price in the commercial waste market where the costs were incurred. This, it was argued, resulted in a cross-subsidy which was detrimental to competition.

33. The SCA investigated these claims. Contacts with NSR clarified the costs of the market service department were distributed according to NSR's overall turnover, of which about two-thirds was related to household waste and the remaining one-third to commercial waste. NSR also confirmed the majority of work conducted by the market service department was directed towards commercial waste, in other words that the department's costs could be considered to be incurred primarily in the commercial waste market.

34. Such a situation gives rise to cross-subsidization, as costs incurred in the competitive market are covered by household waste tariffs, which is a monopolized service and subject to a mandatory fee for inhabitants. The analysis by the SCA considered whether this allocation of cost had the potential to distort competition. The SCA's primary concerns were that the shifting of costs from the competitive to the monopolized market could result in below cost pricing in the competitive market, resulting in predatory pricing. In this instance the investigation did not lead the SCA to believe this was the case and it discontinued its investigation concerning the market service department.

35. The NSR case, however, exemplifies one possible concern where public undertakings operate in both competitive and monopolized markets. As this case showed, undertakings might shift costs between the competitive and monopolized parts of their businesses. These shifts can potentially be sizeable and give rise to adverse situations where costs incurred in the competitive market are covered by increased prices in a monopolized market. This can distort competition in the competitive market and give rise to below cost pricing by the public entity in the competitive market.

5.2. *Norra Åsbo renhållnings AB (Nårab)*

36. Nårab is a municipal waste management company in the south of Sweden. A private contractor complained that Nårab was using a rebate scheme which hindered competitors from offering curbside collection of packaging waste to apartment buildings.

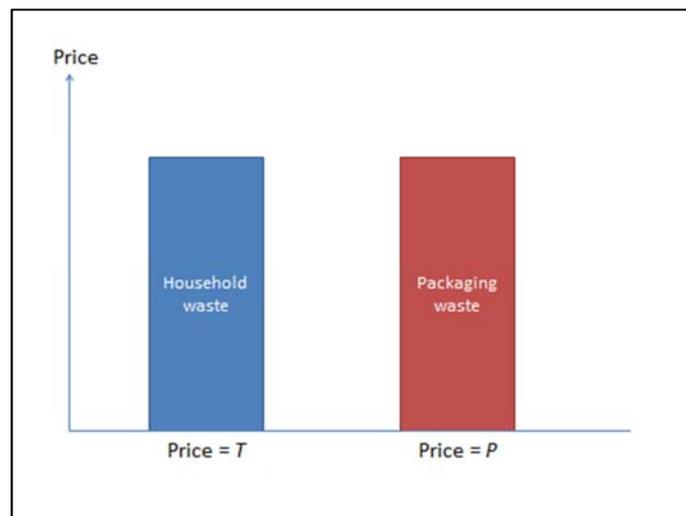
37. The SCA investigated the rebate scheme operated by Nårab. The scheme allowed for two different tariffs for household waste dependent on whether households were source-separating newspaper and glass packaging. For households which did not source-separate these fractions the household waste tariff was increased by around 30 per cent. From the investigation the SCA found that in order to be eligible for the lower price on household waste the households were in fact obliged to hold a curbside collection contract regarding newspapers and glass packaging with Nårab in order for Nårab to consider

the household waste to be source-separated. The lower tariff was thus conditional on households contracting with N rab for curbside collection of packaging waste.

38. This setup resulted in a lowering of the effective price of curbside collection of producer waste offered by N rab as the rebate applied to the household waste fraction, in which N rab held a monopoly position. N rab could thus leverage this monopoly position to lower its effective price in the producer waste market.

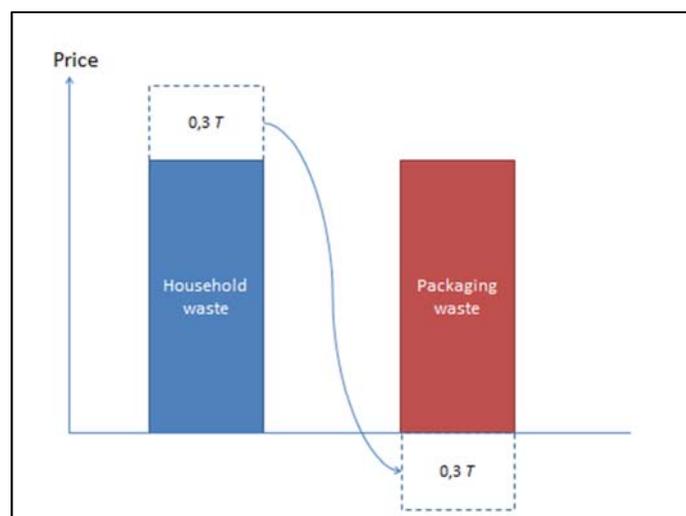
39. The effect is illustrated in the figures 1-3 below.

Figure 1. N rab's offer



40. In this example we assume that the price of household waste and packaging waste is the same. In reality this will most often not be the case, rather it will be that household waste is more expensive.

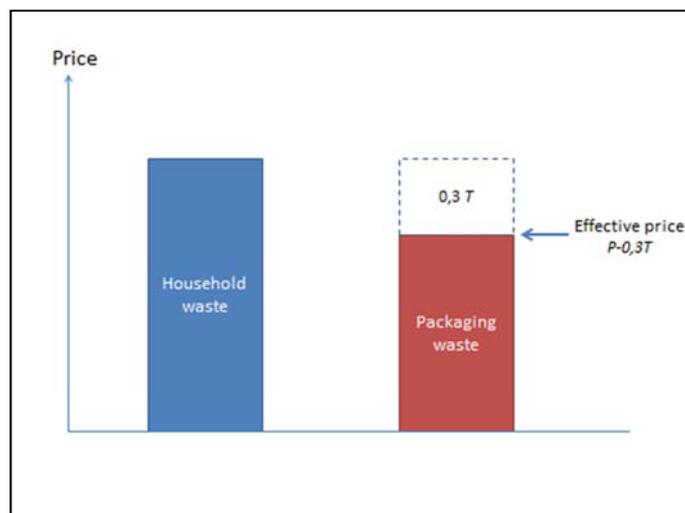
Figure 2. Rebate effect



41. The rebate effect means that the price of the household waste fraction is increased by around 30-35 % when someone other than N rab collects the packaging waste. This is something that a competitor

to N rab in the market for curbside collection of packaging waste will have to take into account for their offer to the customer to be comparable to N rab's offer.

Figure 3. N rab's effective price



42. The rebate leads to an effective price which is lower than N rab's listed price for curbside collection of packaging waste. The effective price is the price that an as-efficient competitor would have to offer in order to be competitive.

43. The SCA's calculations showed that the drop in effective price was substantial. This was due to the fact that household waste as a rule was far more expensive than packaging waste. In one instance the SCA found that the effective price was some 300 % below the listed price, i.e. that a competitor to N rab would have to *pay* a household twice what N rab charged in order to be competitive. The SCA's overall conclusion was that the rebate scheme operated by N rab led to effective prices which were substantially below costs.

44. During the investigation N rab elected to broaden the scope of those eligible for the rebate on household waste to also include those households which chose a private contractor for curbside collection of packaging waste. This broader interpretation was stated on N rab's public information webpage and shortly afterwards was included into the local waste regulation framework. This put an end to the SCA's competition concerns over the rebate scheme and the complainant also confirmed that the issue from their perspective was at an end. Since the competition issue was resolved the investigation was discontinued.

45. This case highlights the issues that can arise when a public undertaking leverages a monopoly position in one market into another, competitive, market segment. In this case, N rab claimed the rebate was used to incentivize households to source separate but as the SCA's investigation showed this also led to exclusionary effects by lowering the effective price of N rab's competitively supplied curbside collection of packaging waste.

5.3. * stra G inge Renh llningsaktiebolag ( grab)*

46.  grab, a municipal waste management undertaking, has a legal monopoly to collect household waste. In addition,  grab also offers curbside collection of packaging and newspapers to single houses.

47. The complainant in this case held that Ögrab offered single households curbside collection of packaging and newspapers together with the collection of household waste without any additional cost. The SCA's investigation aimed to clarify whether such a conduct was contrary to the new provision in the Swedish Competition Act regarding anticompetitive sales activities carried out by public entities.¹¹

48. A system where the cost of collecting producer waste is included in the tariff set for the collection of household waste can potentially lead to distortions of competition in the market for collecting producer waste.

49. When public entities act on a market where it has a legal monopoly as well as a on a competitive market they must separate the costs incurred to avoid the risk of cross-subsidization from the monopoly to the competitive market. This is necessary for competition conditions between public and private undertakings to be as similar and neutral as possible.

50. In its investigation the SCA observed that public waste management undertakings offer curbside collection of packaging and newspapers to some 40,000 individual houses in Sweden. Furthermore, private undertakings only rarely offer the same service to individual households and in many municipalities this service is not offered at all. This situation can be contrasted against apartment buildings, where more than a million households use a curbside collection service. Through contacts with market actors the SCA found that one reason for the limited interest from the private undertakings to offer curbside collection to single houses was due to the low reimbursement from the PRO. Curbside collection of packaging and newspapers from single houses is also relatively expensive compared to collection from apartment buildings. A further reason for the low interest of the private undertakings was that parties were awaiting the outcome of the Government inquiry regarding the waste management sector. Private undertakings also expressed doubts as to the willingness of single houses to pay for this kind of service. Based on the fact that the SCA found that there was no market where competition could be inhibited the SCA terminated its investigation.

51. This case is an example of how cross-subsidization between monopolized and competitive segments can potentially give rise to competition concerns. Even though the SCA did not find anticompetitive effects in this instance the case shows the risk of possible anticompetitive effects when public undertakings do not properly separate the costs resulting from competitive and monopolized activities.

6. Final Remarks

52. The SCA's investigations in the waste management sector during the past few years have shown a number of different ways as to how public undertakings' activities might lead to competition concerns. In the three cases discussed the municipal waste management company has been active in both competitive and monopoly markets. In all three cases there was a concern that the municipal company in one way or another utilized the monopoly market in order to gain an advantage in the competitive market.

53. In the NSR case the SCA uncovered that some of the costs resulting from NSR's commercial activities were shifted to the monopoly market and covered by the mandatory fees for household waste. However, the SCA did not find that the magnitude of this cost shift was substantial enough to also result in below cost pricing by NSR in the commercial waste market.

54. In the N rab case N rab used a rebate on household waste which was conditional on households buying curbside collection of packaging waste from N rab. This resulted in substantial reductions in N rab's effective price of packaging waste and the effective price was found to be below costs.

¹¹ The Swedish Competition Act, Ch. 3 § 27.

55. In the Ögrab case the SCA saw an instance where costs in the competitive and monopoly markets were not separated by the municipal waste management company. This led to costs for both packaging waste, which is collected competitively, and household waste being covered by the household waste fee and thus resulted in cross-subsidization from the monopoly market to the competitive market. However since the SCA found that competition was not inhibited due to the low interest from private undertakings in this market the investigation was terminated.

56. Public waste management undertakings obviously have to be careful and attentive when they operate in both competitive and monopolized markets. Sweden's national regulation on anti-competitive sales activities by public entities reinforces this point as being highly relevant in the waste management sector in Sweden. At the intersection between monopoly and competitive markets there are several different ways as to how a failure by public waste management undertakings to take full consideration of their operation and conduct can lead to potentially anticompetitive effects.