

## ANALYSIS OF DEFRA PROPOSALS TO INTRODUCE COMMERCIAL WASTE COLLECTION FRANCHISING IN ENGLAND

### 1. INTRODUCTION

1.1 Between 18 February 2019 and 13 May 2019, the Department for Environment, Food and Rural Affairs (**DEFRA**) carried out a consultation on “*Consistency in household and business recycling collections in England*”<sup>1</sup> (**Consultation**). Part 2 of the Consultation set out measures to improve recycling by businesses and other organisations that produce municipal waste (i.e. waste which is similar in nature to household waste). The proposals included a number of measures that DEFRA believes could be used to minimise the costs of waste collection and recycling, including the local franchising of waste services.

1.2 The Consultation commented (on page 58) as follows on the local franchising of waste services:

#### **“Local franchising of waste services**

*This model would allow local authorities or other operators to issue contracts for the collection of commercial waste in a particular area of a town or city. This would give exclusive rights for the operator concerned to collect waste. This would reduce the number of operators and hence vehicles involved in collecting waste and also make it more efficient for the waste collectors by maximising the number of pick-ups they could make in a particular area. It would operate in a similar way to business-based collaborative contracts but be managed by local authorities and cover all businesses in a defined area. This approach would require further development and assessment and may require legislative change to be operational.”*

1.3 DEFRA published its response to the Consultation on 23 July 2019. In relation to the proposals on options to manage the impact of any new costs of waste management for small and micro firms, it responded:

*“On the specific options proposed to reduce costs, there was support for greater collaboration and sharing of services, as well as support for zoning or waste franchising. On the other hand, some operators thought that such approaches had the potential to be anti-competitive and wanted more information on how the options might work in practice.*

*Government will give further thought to the development of measures to reduce costs of waste collection for businesses and will speak further to industry stakeholders on how best to support small and micro firms especially to recycle more.”*

1.4 The proposals on local franchising of commercial waste collection services raise significant legal issues from regulatory, competition, and commercial perspectives. This note highlights those issues and has been prepared for a consortium of independent waste collection companies comprising First Mile Limited, BPR Group Europe Limited, Camo Limited (trading as Simply Waste Solutions), F & R Cawley Limited (trading as Cawley’s Waste & Resource Management), Grundon Waste Management Limited, K.P. Waste Company Limited, Devon Contract Waste Limited and National Resource Consortium Limited.

### 2. REGULATORY ISSUES

2.1 The current regulatory framework for commercial waste collections is contained in Part II of the Environmental Protection Act 1990 (**EPA 1990**). Section 45(1)(b) EPA 1990 imposes a duty on waste collection authorities, if requested by an occupier of premises in their area to collect any commercial waste from its premises, to arrange for the collection of that waste. Under Section 45(4) the producer is liable to pay a reasonable charge to the authority for the collection and disposal of

---

<sup>1</sup> Available at: [https://consult.defra.gov.uk/environmental-quality/consultation-on-consistency-in-household-and-busin/supporting\\_documents/recycleconsistencyconsultdoc.pdf](https://consult.defra.gov.uk/environmental-quality/consultation-on-consistency-in-household-and-busin/supporting_documents/recycleconsistencyconsultdoc.pdf)

the waste, and the authority has a duty to recover the charge unless it considers it inappropriate to do so. The introduction of exclusive franchising would require local authorities to always use the appointed franchisee for their area for commercial waste collections in order to avoid breaching their duty in Section 45(1)(b).

- 2.2 There is no corresponding duty on commercial waste producers to have their waste collected by a particular person. The only constraint on them as regards their choice of waste collector is that contained in Section 34(1)(c), namely that a producer of waste must transfer its waste only to an “authorised person”. An authorised person is a waste disposal authority, a waste collection authority, the holder of an environmental permit for a waste operation, any person carrying out an exempt waste operation, or a registered waste carrier.
- 2.3 There is therefore flexibility under the current regulatory framework for commercial waste producers to choose who collects their waste. Introducing a new statutory duty on commercial waste producers to have their waste collected only by an exclusive franchisee would therefore be a significant regulatory constraint. While DEFRA may consider that the introduction of exclusive franchising might reduce the number of vehicles on the roads, it would not necessarily result in higher recycling rates, as appointed franchisees would not necessarily achieve higher recycling rates than collection contractors formerly operating in a particular area.
- 2.4 A duty on commercial waste producers to have their collected only by an exclusive franchisee would also be more onerous than the position in relation to household waste. While waste collection authorities have a duty under Section 45(1)(a) EPA 1990 to arrange for the collection of household waste in their areas, there is no corresponding duty on households to actually use the service provided by their waste collection authority (although in practice almost all households will do so because they pay for the service through their council tax and there is usually no reason not to use the service). That said, there are cases reported in the press of households arranging private waste collections in areas where their waste collection authority has reduced collection frequencies, for example:

*‘Mick George launches residential waste collection service’* – letsrecycle.com, 9 March 2017<sup>2</sup>;

*‘Would YOU pay for your bin collection? Furious locals shell out as service turns MONTHLY’* – Daily Express, 15 August 2017<sup>3</sup>.

- 2.5 If there is no legal barrier to households using an authorised person other than their waste collection authority to collect their waste (subject to the duty of care in Section 34(2A) EPA 1990), particularly where the service provided by the waste collection authority is inadequate, it would be nonsensical to require commercial waste producers to use only one exclusive franchisee in a particular area, as they would have no other lawful option for having their waste collected if the service provided by that franchisee was inadequate for their needs.

### 3. **COMPETITION ISSUES**

- 3.1 The Consultation has indicated that any franchising model would involve local authorities or other operators awarding exclusive rights for the collection of commercial waste in a particular area of a town or city.
- 3.2 A waste collector appointed on an exclusive basis would, by definition, enjoy a monopoly position in the area in which it had been appointed. This begs the question what legal protections would be in place to ensure that commercial waste producers were able to procure waste collection services on value for money terms, recognising that franchising would remove their ability to benefit directly from the rivalry that currently exists between commercial waste collectors.
- 3.3 As noted in paragraph 1.3 above, DEFRA’s response to the Consultation recognised that franchising could raise competition concerns.

---

<sup>2</sup> <https://www.letsrecycle.com/news/latest-news/mick-george-launches-residential-waste-collection-service/>

<sup>3</sup> <https://www.express.co.uk/news/uk/840991/manchester-council-bin-collections-cut-private-collection-council-tax>

- 3.4 It is self-evident that supply contracts between waste producers and exclusive franchisees could not be agreed on the basis of ordinary commercial negotiations. The relative bargaining positions of a waste producer and an exclusive franchisee would be hugely disparate, since both parties would know that the waste producer required its waste to be collected (non-collection would not be an option) and that the franchisee was its only choice of waste collector.
- 3.5 Whilst exclusive franchisees would be subject to competition law – and would almost certainly hold dominant market positions in their appointed areas, such that they would be subject to the prohibition of the abuse of dominance (the Chapter II prohibition under the Competition Act 1998) – the reality is that competition law would not be a sufficient (let alone efficient) mechanism to ensure that franchisees would collect waste on appropriate value for money terms. First and foremost, competition law would be a blunt (and likely ineffective) instrument for protecting waste producers' positions. For example, whilst "excessive pricing" is a recognised form of abuse of dominance, excessive pricing claims are notoriously difficult to prove (and, in any event, there is a potentially significant gap between waste collectors not charging "excessive" prices and waste collectors applying prices and other terms that might reasonably be expected in a competitive market).
- 3.6 Further, as a practical matter, reliance on competition law would place a significant burden on waste producers, who would potentially need to resort to costly and complex court proceedings to protect their rights under competition law. It is to be assumed that the Competition and Markets Authority (**CMA**) would not be willing or able meaningfully to protect waste producers through enforcement activity, given in particular the breadth and factual specificities of individual circumstances.
- 3.7 Responsibility for protecting the commercial interests of waste producers, as customers of the exclusive franchisees, would presumably need to lie with the local authorities (or other operators) who would appoint the franchisees. Local authorities would presumably seek to appoint franchisees through competitive tendering processes. In this way, in principle, local authorities would seek to introduce competition "for" the market in place of the competition that currently takes place "in" the market. The CMA and its predecessor, the Office of Fair Trading (**OFT**), have conducted a number of assessments of public sector bodies seeking to procure services on competitive terms, including in the waste management sector<sup>4</sup>. Those assessments recognise the inherent challenges faced by public sector bodies in this regard.
- 3.8 The underlying concern identified by the CMA and OFT is that local authorities' procurement processes can restrict or distort competition, leading to sub-optimal outcomes for customers. In particular, considerable care needs to be taken to ensure that the most competitive terms are obtained from suppliers, not only in the short-term, but also in the longer term (which, for example, requires consideration of maintaining bidders' incentives to stay in the market and compete for future contracts), whilst recognising that running a sufficiently nuanced procurement process can impose considerable administrative burdens on the procuring authority. Those considerations would need to be considered and managed by DEFRA in the context of developing any franchise model and by local authorities in implementing any such scheme, with appropriate engagement with the CMA (which we anticipate may well express reservations about any such proposed model, given the challenges to competition that it inherently raises).
- 3.9 In fact, franchise arrangements in the commercial waste collection sector would present a number of additional – and likely unique and unprecedented - challenges, over and above those that have previously been identified by the CMA and OFT. In particular, local authorities would be seeking to evaluate and select waste collectors in circumstances where the local authorities were not customers of the services in question (and, indeed, where the customers – being commercial waste producers – would constitute a diverse range of businesses with disparate waste collection requirements). It is very difficult indeed to envisage on what basis local authorities could seek adequately to protect the positions of all waste producers through an upfront competitive tender process.

---

<sup>4</sup> See, for example, the OFT's report "*More competition, less waste - Public procurement and competition in the municipal waste management sector*" (OFT841, May 2006) and the CMA's report "*Local authorities and competition*" (December 2017), as well as the OFT's "*Assessing the impact of public sector procurement on competition*" (OFT742a, September 2004) prepared by .econ

3.10 The alternative to seeking to protect the commercial interests of waste producers, as customers of the exclusive franchisees, through competitive tendering processes would be to appoint a regulator with appropriate supervisory powers with regard to pricing and other terms of supply. A broad parallel might be drawn, for example, with the periodic price reviews conducted by Ofwat. As Ofwat notes on its website:

*“Most water and sewerage services in England and Wales are not provided in competitive markets. Most people receive their water services from a licensed monopoly company. Only business customers are able to choose their supplier. Because competition is limited, there is a risk that these companies will not deliver the services their customers want. They may also charge higher prices to increase their profits. This is why they need to be regulated. And it is why Ofwat was created when the water and sewerage sectors were privatised in 1989.”<sup>5</sup>*

3.11 Aside from the inherent administrative and cost burdens associated with establishing and operating a new regulator for the sector, the reality is that any price review process in the commercial waste collection sector would inevitably be hugely complex and burdensome. Whereas Ofwat, for example, ultimately determines a single price limit for each supplier (recognising the customers are households with broadly equivalent requirements), commercial waste producers constitute a disparate group of customers, including in terms of their varying volumes and types of waste produced.

3.12 Overall, adopting a franchise model in which a commercial collection contractor would be appointed on an exclusive basis in a given area would inherently raise a plethora of competition challenges. Competition law would not be an effective tool to protect customers against monopoly suppliers. Rather, the onus would be on local authorities or another regulator to protect the interests of waste producers, but the diverse nature of waste producers and of their waste collection requirements would present considerable challenges in this respect. At best, such challenges would be hugely burdensome and costly for local authorities (or an appointed regulator) to manage successfully; at worst (and probably more likely) they would simply be impossible to manage. The practical reality is that any franchise model would present a very significant risk of waste producers, as customers of the services in question, losing the benefits that competition is widely accepted as bringing, resulting in higher prices, lower quality standards and less innovation.

#### 4. **COMMERCIAL ISSUES**

4.1 There are many significant legal, practical and commercial implications of implementing and operating exclusive local franchises in the UK commercial waste collection sector. These material implications would arise from the very start of the planning and implementation of any such scheme in determining how the franchises would be awarded and by whom, and on what terms the franchises would operate. Further significant issues would also arise in relation to the treatment of existing collection contracts and whether those contracts would be terminated, transferred or allowed to continue.

4.2 We have set out below our analysis of each of these issues.

##### How could a local exclusive franchising programme would be structured?

4.3 If a local exclusive franchise arrangement was to be set up and mandated by law, there would need to a single point of coordination and implementation. As a DEFRA initiative, we assume that DEFRA would seek to put in place an exclusive franchising programme across England (as waste is a devolved matter) in a similar way to which it and other government departments have implemented public private partnership initiatives.

4.4 Commonly, however, these previous initiatives have been set up to deliver national capital investment programmes, such as DEFRA’s Waste Infrastructure Development Programme or the government’s Building Schools for the Future programme. In these cases, government intervention (and, in some cases, direct support e.g. through PFI credits) was considered necessary to support and accelerate capital investment in much-needed waste processing and treatment infrastructure.

---

<sup>5</sup> <https://www.ofwat.gov.uk/regulated-companies/price-review/>

Such programmes are considerable enterprises and require very significant investment in time and cost for both the public and private sector to develop and deliver. In the case of these large, capital-intensive programmes, that cost and time was generally seen as proportionate to the size and level of investment under the entire programme.

4.5 In these circumstances, however, such a programme would not seem an appropriate or proportionate solution to address the problems that it would be seeking to address. Large government programmes also naturally tend to favour the largest players in a market with the resources available to participate successfully in such a scheme.

4.6 There is also the separate but key structural question as to whether local authorities or some other operator such as DEFRA would be best placed to procure centrally on behalf of commercial waste producers.

Who would be responsible for procuring the exclusive contractor for a particular area and entering into the services/concession agreement under which the services would be provided to businesses in that area?

4.7 If a local exclusive franchise arrangement was to be set up and mandated by law, and delivered through a DEFRA-led programme, any such programme would need to be delivered in each area through a nominated entity, who would be responsible for procuring the local franchisee. Waste producers in an area would then presumably be required to enter into a contract with the exclusive franchisee for that area, based on terms of contract agreed through the procurement (see comments on this issue in paragraphs 4.12 to 4.13 below).

4.8 It is unclear who the procuring entity would be but, as a government initiative, it would seem likely that the entity would be a local authority in respect of a particular area. If so, franchisees for each area would need to be procured by the relevant nominated authority in a consistent manner through separate regulated procurements under the Public Contracts Regulations 2015 (PCR). Given the complex financial, technical and legal nature of such exclusive franchise arrangements, it is highly likely that any procurement would need to be undertaken using the “competitive dialogue” procedure under the PCR.

4.9 Even when managed efficiently, these procurement processes are time-consuming and costly for both the private sector participants and the procuring authority. To justify the time and cost in procuring and putting in place such arrangements, it is likely that any such franchise arrangements would need to be medium/longer term arrangements.

4.10 Consistent with our comments above in relation to the structuring of any franchising programme, this likely delivery model strongly favours large operators with the resources to participate in lengthy and cost-intensive procurement processes. Such procurement processes also tend to favour large, national and international operators that can cite the relevant experience to be short-listed and then have the resources and experience to prepare the detailed bid submissions required to win large public procurements.

4.11 As noted above, it is also highly questionable whether local authorities or some other operator such as DEFRA would be best placed to procure centrally an exclusive franchise on behalf of commercial waste producers.

Terms of the procurement documents and waste producer/franchisee agreement

4.12 Commonly, any programme that is coordinated by a public authority will rely heavily on the standardisation of the procurement and contractual documentation. This is for a number of reasons.

4.12.1 Efficiency. It should lead to efficiencies in delivery, as procuring authorities will not have to re-invent the wheel in producing the documentation.

4.12.2 Risk management. Using standard contract terms (see paragraph 4.13 below) should ensure that the allocation of risk between the contractual parties is consistent from area to area and customer to customer.

- 4.12.3 Level playing field. Standardisation should enable any procuring body to make robust comparisons between parties bidding for any franchise.
- 4.13 While standardisation of any procurement documents will bring normal challenges around ensuring that the documents reflect the specific requirements and characteristics of that area, standardisation of the terms of the contracts between the individual waste producers and the respective area franchisees – i.e. a “one size fits all” approach – creates significant concerns.
- 4.13.1 Services. Any contract would need to cater for all of the waste collection services required by all waste producers in the relevant area. Inevitably, this would place pressure on the standard contract, with derogations being sought and negotiated to deal with “deal specifics”, thus undermining the benefits of standardised documentation noted above.
- 4.13.2 Pricing. It would not practical for pricing to be standardised given the range of services that would be required, and given the range and size of waste producers. Conversely, however, and consistent with our comments on competition law in Section 3 of this note, if the pricing was not determined through the competitive tension of the procurement exercise, it would be very difficult for waste producers to be sure that they were receiving a competitive price.
- 4.13.3 Innovation and efficiency. Although the franchise agreements with the nominated local authorities/DEFRA may contain obligations to consider new ways of working and to develop and introduce innovative solutions to deliver the services more efficiently, experience suggests that such obligations would be far less effective in delivering innovation than a competitive waste collection market. Standardised contracts for service delivery would be unlikely to deliver the same levels of innovation and efficiency in waste collection.

Impact on existing collection contracts and arrangements

- 4.14 Even if the challenges of putting in place exclusive franchise agreements were managed in terms of future contracts to be entered into between waste producers and area franchisees, there are a number of major issues arising and questions to be answered in terms of the impact on existing contracts and waste producers’ collection arrangements.

How would the new rules apply to businesses that operate across a number of local authority areas with a single, multi-site collection contract? Would they be forced to use multiple collectors under the new regime?

- 4.15 If franchises were to operate and be awarded on a local basis, it is likely that there would be several hundred franchisees across England. Waste produced in a certain area would need to be collected by the franchisee for that area. But waste producers do not operate their businesses on an area by area basis. They want to be able to negotiate nationwide arrangements or arrangements by region where they set the geographic boundaries to suit their own businesses, not geographic boundaries stipulated by DEFRA.
- 4.16 An exclusive franchising arrangement would force the hand of commercial waste producers to enter into separate contracts on terms that (for the reasons set out above) they may not be entirely happy with, with different waste collection contractors across the UK. This may provide local efficiencies at one level, but removes business freedom of choice and competition.

Would existing collection contracts be transferred to exclusive franchisees, or would there be a transitional period during which any existing contracts were allowed to continue, but any new or renewal contracts had to be made with the franchisee?

- 4.17 It seems highly unlikely that commercial waste producers and their current collection contractors would be obliged to terminate their existing contracts so that the waste producers could enter into new arrangements with the appointed local franchisee. On the other hand, it is not clear how “legacy” contracts and the new franchise regime would sit side by side.
- 4.18 If there was to be a transitional period, a waste producer could have an existing legacy contract and a new contract with the appointed franchisee on very different terms. If a waste producer’s existing contractor was awarded an exclusive franchise then it would have two contracts with the same

contractor on different terms. In either case, this would create operational and delivery issues both for waste producers and waste collection contractors.

- 4.19 The basis of any transitional period would also need to be clearly defined, and the impact of the new regime taken into account – it is easy to envisage longer term contracts being put in place in advance of any new regime as an avoidance mechanism if both parties wanted to continue to work together.
- 4.20 Although unlikely, if such a regime required the termination or transfer of legacy contracts to the franchisee for an area, this would raise a plethora of issues that would need to be addressed and create significant potential liabilities both for waste collection contractors and waste producers, including:
  - 4.20.1 the process through which any “transfer” would be implemented and the timing of that process;
  - 4.20.2 whether any compensation or damages would be payable to existing waste collection contractors who lost customers to exclusive franchisees and, if so, how it would be calculated and who would be liable for it – the franchisor or the procuring authority. It is our view that any compulsory termination or transfer of legacy contracts without payment of compensation or damages would amount to a breach of Article 1 of the First Protocol of Part II of Schedule 1 of the Human Rights Act 1998 (protection of property);
  - 4.20.3 TUPE and pensions liability issues arising from the transfer of the provision of services from one contractor to another;
  - 4.20.4 the transfer and/or redundancy of waste collection and waste transfer equipment and assets;
  - 4.20.5 unsuccessful bidders for franchises would, in spite of the possible availability of compensation for the compulsory termination or transfer of contracts, be at risk of insolvency; and
  - 4.20.6 there would be consequential effects on unsuccessful bidders’ other contracts, for example contracts to supply feedstock to recycling facilities and energy from waste facilities. They would be at risk of being in breach of those contracts if they were unable to procure sufficient waste supplies from producers.

Shoosmiths LLP

Jan 2020