

Compulsory Competitive Tendering of Council Housing Management

Research Paper 94/40

March 1994



It is the Government's intention that all English local authorities will have tendered out the management of their housing stock by 1999. This paper discusses why compulsory competitive tendering (CCT) is being applied to housing management services and outlines how it will be implemented on the basis of guidance issued by the Government to date.

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CONTENTS

	Page
A. Introduction	1
B. Why CCT?	2
C. The market for housing management CCT	7
D. Implementation of CCT	9
1. The defined activity	9
2. The timetable for implementation	10
3. <i>De minimus</i>	14
4. Rate of return	14
5. Anti-competitive behaviour	14
6. The pilot CCT authorities	15
7. Voluntary competitive tendering	17
E. Tenant participation and CCT	19
1. Tenant consultation	19
2. The right to manage	21
F. European legislation and CCT	25
1. The Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE)	25
2. The EC Service Directive [Council Directive 92/50/EEC 18 June 1992]	29
G. CCT in Wales and Scotland	32
Appendix 1	33
Appendix 2	35
Appendix 3	40

A. Introduction

The Citizen's Charter White Paper stated:

"The job of councils is to choose the best way of providing what people want. Some councils still patronise their tenants, apparently believing that only the council itself can provide the required service. But other authorities have shown that aspects of housing management can be performed best by those outside the council's employ. Compulsory competitive tendering will be introduced into the field of housing management."¹

While there is no standard accepted definition of housing management it is generally assumed to cover the landlord activities of local housing authorities. This broadly includes those estate management services which are attributed to the Housing Revenue Account. Compulsory competitive tendering (CCT) will require local authorities to split their housing departments into two components comprising client and contractor sides in preparation for the tendering process. Bids will then be invited from bodies interested in carrying out the housing management functions of local authorities on a contractual basis. In-house bids will also be permitted. Local authorities will retain their strategic and policy functions whilst the successful contractors will assume the role of day to day management. In practice the client and contractor split may be slightly blurred after the tendering process is completed; some local authority officers will perform both client and contractor roles and the Government recently announced that only 95 per cent of the 'defined activities' need be subjected to competition (this is explained later in the paper).

The Government's initial proposals for the progressive introduction of competition into the field of housing management were published in June 1992.² A further consultation paper was issued in December 1992, this set out the Government's proposals for tenant consultation and involvement in the tendering process.³ Following on from the initial consultation exercise detailed proposals concerning some core aspects of the CCT of housing management were published in June 1993.⁴ It is the Government's intention that the first housing management contracts will be operational from 1 April 1996.

¹ *Citizen's Charter White Paper*, Cmnd 1599, July 1991

² Department of the Environment (DOE) and Welsh Office consultation paper "*Competing for Quality in Housing*" June 1992

³ DOE and Welsh Office consultation paper "*Tenant Involvement and the Right to Manage*" December 1992

⁴ DOE consultation paper "*Compulsory Competitive Tendering of Housing Management*" June 1993

Research Paper 94/40

The statutory framework for CCT is mainly contained in the *Local Government Act 1988*. An Order under s.2(3) of this Act will be introduced to include housing management as a "defined activity" which will be subject to CCT. This Order and also regulations setting out the implementation timetable for individual authorities are expected to be laid by 1 April 1994. Provisions in the *Leasehold reform, Housing and Urban Development Act 1993* concerning tenant consultation on housing management agreements came into effect on 11 October 1993. Separate regulations will apply these provisions to housing management CCT.

It is the aim of this paper to set out how local authorities will be expected to implement CCT in respect of their housing management services on the basis of guidance issued so far and to outline some of their responses and highlight those areas which have proved controversial.

B. Why CCT?

The June 1992 consultation paper⁵ gave the following reasons for extending CCT to council housing management functions:

"The Government proposes to extend it [CCT] to housing management as a further stimulus to efficiency, as a means of ensuring that councils examine their performance and seek maximum value for money. It offers the prospect of breaking down entrenched monopolies and generating large gains in efficiency through competition. It has already worked well in certain other local authority services. Research carried out for the Departments suggests that average savings in annual costs of around 6% have been achieved in the services subject to the 1988 Act, with savings in some services as high as 10-15%."

In their responses to the consultation paper the Association of District Councils (ADC) and the Association of Metropolitan Authorities (AMA) endorsed the drive to improve the quality of housing management but expressed their opposition to the compulsory element of competitive tendering. Both the ADC and AMA rejected the assumption that CCT was necessary to stimulate improvements in the efficiency and effectiveness of housing management and questioned whether it would in fact produce any positive results:

"The Association is not persuaded that CCT will stimulate more effective or efficient service delivery. There are distinct risks that CCT will lead to a stifling of innovation, the erosion of quality in service delivery, fragmentation of service

⁵ DOE and Welsh Office consultation paper "*Competing for Quality in Housing*" June 1992

delivery to tenants and increased rather than reduced costs which will have to be borne by tenants."⁶

In 1991 the DOE commissioned a study of models of market organisation, empirical evidence on existing CCT experience, and the views of housing professionals about CCT for housing management, the results of which were published alongside *Competing for Quality in Housing*.⁷ This study came to the following general conclusions about CCT and housing management:⁸

7.2 There is nothing inherent in housing management, viewed as a mix of services, which implies that it should be produced by public bureaucracies. Equally, there can be no firm presumption that market provision will always be more effective. But it is clear that local authorities have not always had a considered approach, based on efficiency criteria, in drawing the line between in-house and I 'outsourced' service provision, but have generally assumed in-house provision to be desirable. In such a context there might be a strong presumption that introducing competition, with local authority DSOs allowed to compete for services, would increase efficiency. There is, therefore, a strong economic case for proceeding to develop CCT.

Recent research into the impact of local housing management initiatives concluded that the decentralisation of housing management and maintenance functions to an estate level had succeeded in improving the standard of most aspects of the housing service, most notably short term repairs.⁹ The Institute of Housing (IOH) welcomed this report as an indication of what can be achieved in housing management terms without CCT;¹⁰ The Institute also suggested that some of the report's recommendations, such as the need for flexible management and regular staff training programmes, could be jeopardised by CCT.¹¹ In principle there is no reason why the sort of flexible management and staff training programmes advocated by the report could not be achieved under CCT; however, they would have to be built into the tender requirements.

⁶AMA "DOE consultation paper *Competing for Quality in Housing:Response of the AMA*" September 1992, see also the ADC's response to *Competing for Quality in Housing*

⁷ DOE "*The Scope for Competitive Tendering of Housing Management*" 1992

⁸ Ibid, p.43

⁹ DOE "*Estate Based Housing Management:An Evaluation*" 1993

¹⁰ *Inside Housing* "Competition plans undermined by DOE estates management report" 5.11.93

¹¹ Ibid.

Research Paper 94/40

A further study commissioned by the DOE examined housing management performance in 1990/91 under the new financial regimes for local authorities and housing associations which were introduced by the *1988 Housing Act* and the *1989 Local Government and Housing Act*. This survey found that important changes in housing management practice had occurred since 1984/85:¹²

14.3 For example, decentralisation of housing management functions was significantly more widespread in 1990/91 than it was in 1984/85. More organisations in the present survey were using a range of different methods to keep their tenants informed of changes in housing management matters. The use of recognised good practices in the prevention and recovery of rent arrears had also increased significantly since the Audit Commission (1986b) and Glasgow studies were carried out. Similarly, there has been a substantial rise in the proportion of local authorities and housing associations using formal methods for assessing tenant satisfaction with the repairs service.

However, this study was not able to identify a straightforward relationship and between good housing management practice and good performance. The explanation given for this was that in some cases good practices count towards intangible, qualitative dimensions of housing management which do not improve performance as such. In other cases good practices were deemed to be simply insufficient to outweigh the factors which were helping to produce relatively low management performance. The factors mitigating against good practice initiatives were identified as the level of social deprivation amongst the landlord's tenants and the size and location of the stock. The study specifically identified a "London effect" resulting from concentrations of residents with high levels of unemployment coupled with other social problems who tend to live in high rise and large flatted estates. The London effect reportedly manifests itself in the greater degree of difficulty experienced by housing management staff in these areas and is apparently not outweighed by progressive management policies and the implementation of good practices.¹³

These findings would tend to support the local authority associations' claims that housing management is a complex area which will not necessarily yield the benefits which CCT is expected to achieve. However, the study also noted that many social landlords do not collect information on some aspects of housing management which are essential to a full awareness of performance; the study found deficiencies in the monitoring of repair requests and completions and also gaps in the monitoring of lettings and transfers.¹⁴ Some commentators

¹² DOE *"Managing Social Housing"* 1993

¹³ Ibid, pp 161-162

¹⁴ Ibid, p.163 para 14.17

may argue on these grounds alone that CCT will produce beneficial results. Alternatively, the Institute of Housing's response to *Competing for Quality in Housing*¹⁵ expressed strong doubts about the likely effectiveness of CCT given the difficulty of defining quality within the context of a person's home and the special features of the relationship between a landlord and tenant:

"Defining what quality means involves the recognition that social housing is not a market commodity but involves a very special and longer term customer relationship. Tenants are tied to their homes and face difficulty in reducing or changing consumption when prices rise. It is also a system constrained by the fact that it is a commodity in short supply and tenants do not therefore have the same "choice" as the customers of traditional commodities."¹⁶

The Institute supports the establishment of an independent standards agency to monitor the performance of all social landlords¹⁷ and is of the view that CCT should not be introduced until adequate mechanisms for the setting and monitoring of standards of housing management are in place.¹⁸

To date there is little indication that local authority tenants actually want the management of their homes to be subject to CCT. Tenants gained the right to opt for an alternative landlord with the introduction of Tenants' Choice under the *1988 Housing Act*; however, by November last year only two such transfers had taken place in England involving a total of 830 dwellings.¹⁹ The apparent reluctance of tenants to take advantage of Tenants' Choice and other initiatives, such as the early Housing Action Trust proposals, has led commentators to suggest that most tenants would prefer to stay with the landlord they know rather than opt for the unknown.²⁰

One of the central concerns of respondents to *Competing for Quality in Housing*²¹ was the potential impact of CCT on the development of a comprehensive housing service. This

¹⁵ DOE June 1992

¹⁶ IOH "*Competition in the Provision of Housing Management*" September 1992

¹⁷ IOH White Paper "*Housing: The First Priority*" June 1992

¹⁸ IOH "*Competition in the Provision of Housing Management*" September 1992

¹⁹ HC Deb 1.11.93 cc3-4W

²⁰ IOH "*Position Statement on CCT for Local Housing Management*" November 1991

²¹ DOE June 1992

concept, which has been actively promoted by the Government, implies control of capital and current expenditure allocations by those responsible for key managerial and investment decisions affecting housing. It also implies close coordination with other departments which deal with tenants and high standards of staff training. It is the Government's view that there is no reason in principle why CCT should undermine moves towards a comprehensive housing service. *Competing for Quality in Housing* states:

"The significance of a comprehensive service is that senior management are responsible for a specific range of related landlord functions. Concentrating on providing a full specification forces authorities to consider carefully the standards of service they should be providing, and the extent to which those standards are met. A small number of identifiable managers is answerable to the tenant for the quality of service he receives; they cannot disclaim ultimate responsibility for the actions of junior staff. That responsibility is not lost if all or part of the housing function is delegated to contractors. Nor is accountability. The elected councillors to whom senior managers answer are ultimately accountable to their electors and the courts for the actions of their managers. With CCT, the burden of the senior management's job lies in contract specification, monitoring, and if necessary, coordination. The comprehensive service is not lost because it is being provided by an agent or agents. The service to the tenant may be comprehensive - meet all the tenant's needs - and yet be provided from several sources."²²

Problems perceived by the ADC in respect of maintaining a comprehensive service while implementing CCT include the difficulties which may arise where the housing stock is managed by a series of contractors whose performance in areas such as transfers and exchanges will be highly interdependent; inadequate performance by one contractor may adversely effect the ability of others to deliver acceptable services. Split contracts may also make it difficult to provide "one stop" advice to tenants and housing applicants.²³ It seems reasonable to presume that the survival of the comprehensive housing service will depend heavily on precise contract specification and monitoring by the client side.

In addition to stressing the opportunities offered for efficiency savings under CCT the Government views it as an enhancement of the enabling role of local authorities; instead of being involved in direct provision they will define, procure and monitor services. An alternative approach is to view CCT as the latest in a long line of Government efforts designed to transfer housing services away from local authority control.

²² Ibid, para 2.10

²³ ADC "Response to DOE consultation paper: *Competing for Quality in Housing*" September 1992

C. The market for housing management CCT

*Competing for Quality in Housing*²⁴ recognised the likelihood of local authorities' own staff winning most of the housing management contracts created in the initial stages of CCT. The DOE's survey which looked at the potential for market provision reached the following conclusions:²⁵

7.8 The success of CCT will largely depend upon there being a significant, competitive supply side response. The range of possible providers includes Housing Associations, residential agents and other specialist providers. Many of these providers, particularly Housing Associations, believed they could provide effective, comprehensive and participative services. Others thought in terms of the types of general management service currently provided in the private sector. Still others saw the possibility of providing specific functions.

7.9 Most providers had little difficulty in their relationships with their clients. Contracts were often very general with simple fee structures. Their main concerns in translating their experience to local authorities were the length of contract period (a minimum of 2 to 3 years was required), the development of performance indicators, and the difficulties in meeting the requirements likely to be imposed to meet public accountability. Their general lack of concern about the nature of the contracting process perhaps reflects lack of experience rather than detailed consideration of the likely problems.

7.10 Residential agents expressed some concern about broadening their range of services and coping with those housing estates that had major social and physical problems. Housing Associations, which were regarded as the most likely competitors by local authority Officers, had some concern about the scale of contracts since contracts to provide services for large number of dwellings could swamp their present ethos and organisation in the short term. Housing Associations were also concerned about the levels of service they would be expected to provide and thought that their involvement would be unless local authorities specified service levels comparable to their own. This raises questions about the possibility of evolving identical minimum service standards for tenants of local authorities and Housing Associations.

7.11 More immediately, Housing Associations were concerned that their involvement in local competition for services could sour the 'enabling' partnership with local authorities.

7.12 Providers were particularly concerned about the triangular relationship between the local authority as client, the tenant as customer, and themselves.

²⁴ DOE June 1992 para 5.8

²⁵ DOE "*The Scope for Competitive Tendering of Housing Management*" 1992

Research Paper 94/40

They recognised the importance of tenant involvement - particularly as the main form of primary monitoring. On the other hand they feared that contracts would not be detailed enough to clarify both the extent and limits of their responsibilities.

7.13 The number of providers currently in the market is very limited in relation to the potential local authority market and few private providers have significant experience of dealing with the public sector. Profitability is low so expansion would inevitably be slow unless financial incentives were to increase. A particular cause for concern was the fear that there would not be a flat playing field between DSOs and outside bidders and that the details of contracts, their size and range of activities would inhibit the supply side response.

7.14 These views were consistent with the scepticism expressed by local authority officers who believed that alternative providers would confine themselves to the less problematic areas or functions, and that the 'market' was likely to avoid sparse rural areas and estates with major social and physical difficulties. These views also fuelled their optimism that DSOs would win the majority of contracts if they were well-organised.

7.15 One particularly important aspect of the discussion with both providers and local authorities is that it took place without respect to constraints - in particular what service levels were to be provided, at what cost, and by whom. The general emphasis appeared to be on best practice and perhaps on higher quality cost services which would satisfy both sides

Housing associations are viewed as the most obvious competitors to local authority housing departments owing their proven track record in the field of housing management; however, a number of factors may persuade associations not to become involved in the tendering process, particularly in the initial stages. Chief amongst these considerations is the desire not to damage their relationship with "enabling" local authorities. In addition, associations are aware that a successful bid could have substantial implications for their overheads although the contracts themselves are relatively short term; there is no guarantee that associations will be successful when the contracts come up for renewal. There is also the issue of how the inclusion of penalty clauses in CCT contracts may impact upon existing housing association tenants in the event of the client authority enforcing such a clause.

Possible incentives behind housing association involvement include the benefits to be gained from preparing a tender in terms of costing services and increasing management accountability within the organisation. There is also concern within the movement that if associations do not get involved in CCT early on they may miss out on future opportunities. The National Federation of Housing Associations (NFHA) has not yet issued policy guidance to its members on whether they should become involved in CCT; early reports indicated that the

NFHA felt associations should only become involved in CCT where there is a willing landlord and willing tenants.²⁶

Evidence of private sector interest in CCT has been noted from the experiences of the Liverpool Housing Action Trust (HAT), which recently put the management of its stock out to tender, and authorities taking part in CCT pilot schemes. The Liverpool HAT apparently received 80 expressions of interest from which 27 tenders were invited.²⁷ One of the successful private sector bidders in Liverpool, CSL Managed Services, has also been awarded housing management contracts with Rutland DC, the Development Board for Rural Wales and an interim housing management contract with Brent LBC. Private sector interest appears to be at an embryonic stage; however, if housing management CCT follows the same pattern as that of the manual services it seems likely that the future will see much higher levels of bidding from this sector.

D. Implementation of CCT

After considering the responses to *Competing for Quality in Housing*²⁸ and *Compulsory Competitive Tendering of Housing Management*²⁹ the Government issued its conclusions on how CCT would be introduced and implemented in November 1993.³⁰ This section outlines these key decisions and local authorities' responses.

1. The defined activity

This sets out those services which local authorities must make subject to CCT. The Government has decided that local authorities' strategic, policy and enabling functions should not be put to the test of competition. Those services which will be subject to CCT are summarised below:

- rent and service charge collection;

²⁶ *Housing Associations Weekly* "Federation sees little in CCT for associations" 31.7.92

²⁷ *Inside Housing* "Lining up for the big race" 27.8.93

²⁸ DOE June 1992

²⁹ DOE June 1993

³⁰ DOE Press Release "*Compulsory Competitive Tendering for Housing Management: Key Decisions Announced*" 26.11.93

Research Paper 94/40

- letting properties;
- vacant properties;
- tenancies;
- repairs and maintenance; and
- caretaking and cleaning.

A fuller description of the tasks which fall under these headings can be found in Appendix 1.

The Government proposes that the defined activity will apply to properties provided for the purposes of Part II of the *Housing Act 1985*, that is all the housing stock, including properties sold on long leases under the right to buy, but excluding hostels as defined in the Act. The annual value of the defined activity which must be subject to competition is to be set at 95%.

This list of defined activities has generally met with a favourable response from the local authority associations and the IOH. The fact that only 95% of each defined activity needs to be exposed to competition has been welcomed on the basis that it gives authorities some degree of flexibility. The IOH had requested a threshold of 90% to meet the need for the client side to establish policy in particular areas of housing management and to give them the ability to intervene in contentious cases.³¹

2. The timetable for implementation

The Government is proposing that housing management CCT will be phased in over a period of three years "to allow the largest authorities time to complete several tendering exercises, and to allow the market for housing management services to develop."³² Authorities have been placed into bands reflecting their size and readiness and the speed at which they can be expected to implement CCT. Five bands for the introduction of CCT have been drawn up using, *inter alia*, the results of a questionnaire which authorities were asked to complete in February 1993. Details of the five bands are set out below:

³¹ IOH's response to "*Compulsory Competitive Tendering of Housing Management*" July 1993

³² DOE "*The Compulsory Competitive Tendering of Housing Management*" November 1993

Band I : authorities with less than 15,000 stock; CCT effective for the whole of the defined activity from 1 April 1996;

Band II : authorities with less than 15,000 stock; CCT effective for the whole of the defined activity from 1 April 1997;

Band III : authorities with 15,000-30,000 stock; CCT effective for the first 60% of the defined activity from 1 April 1996, the remainder a year later;

Band IV : authorities with 15,000-30,000 stock; CCT effective for the first 60% of the defined activity from 1 April 1997, the remainder a year later;

Band V : authorities with over 30,000 stock; CCT effective for the first 40% of the defined activity from 1 April 1996, the remaining 30% in each of the subsequent two years.³³

A list of the authorities which have been placed in each band is given in Appendix 2. Some authorities have asked to be moved to a different band, the DOE is considering these requests and will notify each authority of the outcome separately. The reasons for placing authorities in their respective bands were set out in *Compulsory Competitive Tendering of Housing Management*.³⁴

- a. whether the authority is divided into areas/estates for management purposes. This would be the primary factor as without any decentralization an authority would probably be unable to let a number of contracts. If this is the case the authority should automatically go in Band II or IV, whichever is appropriate.
- b. the number of management functions performed at an area/estate level. The more of these there are, the more likely the authority would be in Band I or III. Some functions, perhaps accounting and IT systems, would be more important than others and would be weighted accordingly.
- c. progress towards a client/contractor split and suitable arrangements for tenant involvement would move an authority forward.

A table summarising the timing implications of each of the bands for authorities preparing for CCT can be found in Appendix 3.

³³ Ibid.

³⁴ DOE June 1993

Research Paper 94/40

In March last year the Government announced that authorities likely to be affected by the Local Government Review would be exempt from implementing CCT for a period of up to 18 months following the Order establishing the new authority.³⁵

Mr. Lester: To ask the Secretary of State for the Environment whether local authorities in England which are to undergo a structural reorganisation following the Local Government Commission's recommendations will also be required to seek tenders for work under the compulsory competitive tendering legislation.

Mr. Robin Squire: This Government are committed to efficient, effective local government. The work of the Local Government Commission in England, and the compulsory competitive tendering-CCT-regime, both have an important part to play in achieving this aim. Reorganisation of boundaries and responsibilities is bound to put extra pressures on local authorities. Moreover existing arrangements for the provision of services will not necessarily be appropriate for the reorganised authority structure. We therefore intend that local authorities which, following a review by the Local Government Commission, are about to undergo a structural reorganisation, or have recently undergone such a reorganisation, will be exempt for a short period from the obligatory requirements of CCT. In doing so, we also intend to protect the interests of contractors engaged by the local authority.

For those services already subject to CCT under the Local Government Act 1988, local authorities will be seeking to retender work throughout the period over which the commission will be conducting reviews of English authorities. We intend that the local authority undergoing restructuring will be exempt from the statutory requirement to seek competitive tenders before the work can be awarded to their own direct services organisation-DSO. This exemption will start from the date at which Parliament approves the statutory instrument making the structural change. New authorities will then be required to start CCT tendering as soon as possible after their setting-up, so as to have new contracts in operation within 18 months of reorganisation, or sooner.

Similar exemption provisions will apply to services subject to CCT under the Local Government Planning and Land Act 1980.

My right, hon. and learned Friend announced on 10 November 1992 *Official Report, column 743*, the Government's intention to extend CCT to local authority construction-related and corporate services. We intend that these services will be brought into the CCT regime from 1995-96, and a detailed timetable will be announced shortly.

The Government recognise that it is particularly important for the arrangements for the key corporate services to reflect the structural organisation of the authority concerned.

We therefore intend that, as with services already subject to CCT, any local authority which is undergoing a structural change will similarly be exempt, for the period immediately before and after reorganisation, from the statutory requirement to seek competitive tenders for these services before work can be awarded to their own DSO. The provisions I have described will not apply to metropolitan districts and London boroughs. Nor will they apply to those authorities which, following review, are not subject to structural reorganisation.

My Department will give careful consideration to the position of authorities which do not fall to be considered by the Commission until after the date at which new services become subject to CCT. The general exemptions described above will not apply to these authorities, but it may nevertheless be inappropriate to introduce competition for new services where a reorganisation may shortly follow.

These general exemptions are intended to allow for a smooth transition to successor authorities and the continued elective operation of CCT thereafter. I anticipate they will affect only a relatively small proportion of the contracts let by English local authorities at any one time. They will relieve both local authorities and contractors tendering for this work from the uncertainties surrounding the reorganisation process.

While these arrangements remove the mandatory requirement on the authorities concerned, authorities will have the freedom to continue competitive tendering throughout the reorganisation period, where they judge this to be sensible, and with appropriate consultation with shadow successor authorities.

There are a number of technical issues relating to the reorganisation of DSOs and the protection of existing contractual arrangements. My Department will issue more detailed advice on the operation of CCT where local authorities are undergoing structural change in due course.

³⁵ HC Deb 29.3.93 cc55-57

The Secretary of State has now decided that the local government review will be completed by the end of this year but the 18 month exemption will still apply to housing management CCT.³⁶

The proposed timetable for CCT has proved highly controversial. District councils affected by the local government review are currently unclear about their individual timetables for implementation; there are fears that housing departments will prepare strategies for CCT which will be abandoned when unitary councils are formed. The AMA is concerned that metropolitan authorities may be the first to face competition.³⁷

A key area of concern amongst housing organisations is the lack of time available for the development of appropriate information technology systems prior to the introduction of CCT. A joint ADC/AMA policy paper submitted to the DOE in November 1993 argued that the industry had yet to develop systems to meet the needs of CCT and that even if the technology was available further time would be needed for the installation and modification of these systems. The paper called for the introduction of CCT to be delayed for one year to take account of these difficulties.³⁸ The ADC is of the view that contracts could be let under CCT without adequate monitoring if effective systems are not in place.³⁹ Evidence on the progress made by local authorities in preparing for CCT, including the development of appropriate computer and monitoring systems, was gathered in the DOE's 1990/91 survey of housing management performance. The survey's conclusions are reproduced below:⁴⁰

14.20 The present study suggests that social landlords have much work to do in order to prepare the way for CCT. Many social landlords had relatively aggregated cost accounting systems, which often do not enable them to distinguish consistently between their expenditure on the various aspects of the service. Moreover, the devolution of budgets to estate level was not found to be very widespread. The evidence from some of the case studies suggested that existing computer systems were unable to provide estate based budgeting information and that the high costs of new computer systems was seen as a deterrent to the acquisition of ones that could provide this level of information.

14.21 In order to adequately manage housing management contracts under CCT, landlords will need to develop systems for monitoring aspects of the service other than just cost and workload. It will also be necessary for them

³⁶ HC Deb 15.12.93 c 733-3W

³⁷ *Inside Housing* "Calls for delay ignored as tendering deadline is fixed" 3.12.93

³⁸ *Inside Housing* "Technology will not be ready for tendering deadline say authorities" 5.11.93

³⁹ *Housing Associations Weekly* "CCT timetable could hit monitoring" 3.12.93

⁴⁰ DOE "Managing Social Housing" 1993, p.164

Research Paper 94/40

to develop indicators of housing management *outputs*, including the quality of service provided, and to set standards of performance for each of the indicators that are used. Further, it will be necessary for landlords to acquire expertise in housing management service evaluation if they are to monitor performance levels against the standards set for each of the indicators that are used. The evidence of the present study is that local authorities and housing associations have made some progress in this direction since the Glasgow study was carried out. None the less, It is apparent that they still have some way to go before they are in a position to adequately monitor and assess the housing management service which is provided to their customers.

Other arguments which have been used to support calls for a delay in the implementation of CCT include the following:

- the complexity of the specification task;
- the need to learn from the experiences of the authorities piloting CCT;
- the need to fulfil European competition requirements;
- the lead-in time between appointing a contractor and starting the contract; and
- the desire not to saturate the market with lots of tenders being advertised within a very short period.

3. *De minimis*

The Government is proposing that authorities where the annual value of the defined activities is less than £500,000 will be exempt from the CCT process. It is thought that this threshold will exempt most district councils with fewer than 3,000 homes in management. Local authority organisations have welcomed this announcement.

4. **Rate of return**

The Government is proposing that all white collar CCT defined activities, including housing management CCT, will be obliged to ensure that they break even after allowing for a 6% rate of return on capital employed. The ADC is seeking advice from the DOE on how capital should be defined.

5. Anti-competitive behaviour

DOE Circular 10/93⁴¹ gives guidance on the statutory competition framework for local authority services which are already subject to CCT. The local authority associations criticised this guidance on the basis that it was wholly inappropriate for professional services; it was felt that authorities drawing up housing management contracts could be accused of acting anti-competitively unless the guidance was changed.⁴²

The IOH's response to *Compulsory Competitive Tendering of Housing Management*⁴³ noted several areas of concern about existing guidance on anti-competitive behaviour and made the following suggestions:⁴⁴

- authorities which want to package together on an area basis a wider range of housing services other than those prescribed on the defined list should be free to do so;
- authorities should be able to require contractors to operate with established, integrated IT systems;
- authorities should be allowed to require contractors to have appropriately trained staff, professionally qualified at senior level, with on-going training arrangements;
- the Institute's *Housing Management Standards* should be treated as an acceptable basis for specifications.

The Government has now reviewed Circular 10/93 and issued new draft guidance for white collar services on 21 January 1994. On publication Sir George Young stated that "the guidance seeks to ensure that authorities can continue to deliver comprehensive and estate-based housing services and at the same time ensure that there is free and fair competition for their delivery. The wide-ranging guidance is designed to balance the needs of housing authorities and contractors, and safeguard the interests of tenants."⁴⁵ Consultation on this guidance ended on 4 March 1994.

⁴¹ "Local Government Act 1992, Section 9: Competition in the Provision of Local Authority Services" 14.6.93

⁴² *Inside Housing* "New CCT rules may pose threat to council services" 18.6.93

⁴³ DOE June 1993

⁴⁴ IOH "*Compulsory Competitive Tendering of Housing Management* " July 1993

⁴⁵ HC Deb 21.1.94 cc872-873W

6. The pilot CCT authorities

Competing for Quality in Housing stated that "the Government plans to invite some authorities to conduct experimental tendering exercises, in advance of extending the tendering system on a statutory basis"⁴⁶ The six authorities which were invited to take part in pilot CCT exercises were Newham, Westminster, Rochdale, Derby, East Staffordshire and Mid Suffolk.⁴⁷ Brent and Mansfield were subsequently added to this list.

The stated purpose of setting up these pilot schemes was to inform the development of Government policy on housing management CCT and to assist authorities in their CCT preparations. The Government has attracted much criticism for its decision not to delay the implementation of CCT to allow sufficient time for the lessons of the pilot schemes to be learned. The Chair of Westminster's Housing Committee, Alan Bradley, is reported to have made the following statement during his speech to a Housing Choice conference in December:

"If we are to maximise the learning experience from the pilots, then the Government must look long and hard at its current timetable for CCT for housing management."⁴⁸

In addition to working through a tendering exercise, each of the pilot authorities are looking in detail at one aspect of CCT with the assistance of consultants provided by the DOE. The subjects which the pilot authorities are looking at are:

- **Rochdale** : tenant consultation before a management agreement
- **Westminster** : monitoring of management agreements
- **Derby** : the scope of the defined activity and the client/contractor split
- **Brent** : the development of contract specifications

⁴⁶ DOE, June 1992, para 3.2

⁴⁷ HC Deb 15.7.92 c851W

⁴⁸ *Inside Housing* "Westminster chair calls for CCT delay to learn lessons" 10.12.93

- **East Staffs** : the need for management and cultural change because of CCT

- **Newham** : the interface with capital programmes

- **Mansfield** : the effect on warden services

- **Mid Suffolk** : the potential impact of CCT on small housing authorities.

Brent LBC became the first local authority in the country to contract out part of its housing competitively in December 1992. The six month interim contract to manage two council estates, consisting of 1,468 homes, was won by CSL Managed Services from a short list of three. Most recently, staff at Newham LBC won the management contract let under its pilot scheme after three private companies dropped out of the competition; although savings of around £120,000 are expected to result from a reorganisation within Newham reports indicate that these savings will be more than offset by the cost of preparing the tender.⁴⁹

The experiences of the pilot authorities to date illustrate that there is no single successful route to CCT; an approach applied to one authority will not necessarily work when applied to another. Each authority has had to individually identify the implications of CCT for their housing services with reference to the local situation, as well as taking account of general policy and process issues.⁵⁰

7. Voluntary competitive tendering

A number of local authorities have opted to put the management of their stock out to tender on a voluntary basis. The reasons for doing this vary; however, there is a suggestion that some authorities regard this as a means of avoiding CCT under the system which will exist from April 1994. Others may feel that there are genuine benefits to be gained from competitive tendering which make its early implementation worthwhile.

⁴⁹ *Inside Housing* "Newham staff victorious as private sector pulls out" 11.2.94

⁵⁰ *Inside Housing* "Compulsory Tendering" 26.3.93

Research Paper 94/40

The DOE has issued guidance for local authorities considering voluntary competitive tendering ahead of CCT.⁵¹ The guidance advises that the two principal tests against which the Secretary of State will consider management agreements are tenant involvement and value for money. Local authorities must demonstrate that there has been full and meaningful tenant consultation and also that proper regard has been given to the value for money of the proposed agreement. Where work is awarded in-house authorities will not be required to re-tender immediately CCT comes into effect if they can show to their auditors that the process which has resulted in them carrying out the work involved equivalent rigour to CCT, and that they have followed the principles for CCT set out in the legislation. The exemption from CCT for these voluntary arrangements will last for a maximum of five years, reflecting the time limit likely to be set for CCT.

If a local authority chooses to contract out its housing management services without going through the competitive process the CCT provisions do not apply. Some discussion has taken place over whether and authority which opts to create a 'service contract' with external providers, rather than a management agreement, can avoid the relevant legislative provisions relating to tenant consultation. The guidance issued in November states, 'Any agreement by which these functions [Housing Management] are delegated, ... will, in the Secretary of State's view, be a management agreement and will be subject to the requirements of sections 27 and 27A of the Housing Act 1985.'⁵²

Some of the authorities which have taken part in voluntary competitive tendering include:

Rutland DC : Invited five housing associations and two private sector firms to discuss bids for a contract covering the council's entire housing management service;⁵³

Wandsworth LBC : Planned to contract out management of two tower blocks, two estates and one of its districts. Bids were received from six estate agents and property managers for all but one of the estates which was not contested. The council awarded itself four out of the five trial contracts;⁵⁴

⁵¹ DOE "Voluntary competitive tendering and voluntary delegation of housing management: guidance to local authorities" 23.11.93

⁵² Ibid, para 7

⁵³ *Inside Housing* "Rutland invites private tenders" 11.9.92

⁵⁴ *Inside Housing* "Contracts stay in-house in Wandsworth trial" 22.1.93

Bexley LBC : Invited six associations to bid to manage its housing stock for four years;⁵⁵

Dartford DC : Plans to invite six associations to bid for a five year contract to manage its 5,5000 homes towards the end of this year.⁵⁶

E. Tenant participation and CCT

1. Tenant consultation

*Competing for Quality in Housing*⁵⁷ stated that "the prime consideration [in the introduction of CCT] will be the welfare of tenants."⁵⁸ However, the arrangements for tenant consultation in the CCT process have proved highly controversial.

Section 105 of the *1985 Housing Act* gives council tenants the right to be consulted on housing management issues that affect them. Section 27A(5) of the same Act provides that the Secretary of State must not give his approval to proposals to delegate housing management to an agent if it appears that a majority of the affected tenants do not wish the proposal to proceed. *Competing for Quality in Housing* stated however "it is not proposed that tenants should be able to veto the authority's decision to go out to tender for the management of their particular estate."⁵⁹

Amid much opposition from tenants' organisations and local authority associations the Government subsequently included provisions in the *Leasehold Reform, Housing and Urban Development Act 1993* (s.130(1)) to allow the Secretary of State to issue a general consent to housing authorities to set up management agreements and removed the tenants' right to veto management changes made via CCT. These provisions came into effect on 11 October 1993.

⁵⁵ *Inside Housing* "Bexley in two-stage transfer" 4.6.93

⁵⁶ *Inside Housing* "Dartford looks for management bids" 10.9.93

⁵⁷ DOE June 1992

⁵⁸ *Ibid*, para 3.2

⁵⁹ *Ibid*, para 4.7

Research Paper 94/40

During the Second Reading of the *1993 Leasehold Reform Bill* the then Secretary of State defended the decision to remove tenants' power of veto over management delegation.⁶⁰

I come now to our proposals on the delegation of housing management. Our purposes here are twofold. We want to pave the way for the introduction of competitive tendering as a spur to efficiency in housing management and we want to give tenants real and direct influence over the management of their homes. Local authorities should have nothing to fear from competitive tendering. Where they are best able to provide the services, the competitive framework will enable them to continue to do so, but where those services can be better provided by others it must be in the interests of tenants that they should be.

However, as we have always emphasised, compulsory competitive tendering must go hand in hand with an enhanced role for tenants. The present tenants' veto power on management delegation is no longer relevant in a competitive framework.

Mr. Jack Straw (Blackburn): Why?

Mr. Howard: I shall tell the hon. Gentleman why, he will contain himself.

In its place, local authorities will have new obligations to consult their tenants fully on the way in which their homes are to be managed. Tenants will also have a new role in monitoring the performance. Some tenants, however, may want to go further. Our Bill therefore provides a new right to manage for tenant organisations. Local authorities will be required to pass over the management of estates to tenant organisations, where tenants are able and willing to take it on. The proposals thus represent the most important extension of the rights of tenants to influence the management of local authority housing ever put before the House,

Local authority and tenants' associations argued that if the Government really believed that CCT would benefit tenants there would be no problem with retaining their right of veto over management changes. The ADC made the following comments on this aspect of the Government's proposals:

"By denying tenants the right to choose whether CCT applies to the management of their homes, or to choose which contractor wins the tender, the Government is taking the paternalistic view that it, rather than the tenants themselves, is best placed to

⁶⁰ HC Deb 3.11.92 c158

judge what is in their interest. The Association considers that this approach contradicts the notion of citizen empowerment advocated in the Government's Citizens' Charter."⁶¹

In addition to abolishing the right of veto the 1993 Act amended the *1985 Housing Act's* provisions relating to tenant consultation on housing management agreements. It is intended that separate regulations will apply these provisions to housing management CCT. The DOE's note, *The Compulsory Competitive Tendering of Housing Management*,⁶² states that "regulations will require authorities to consult tenants, including leaseholders, on the terms of any contract specification, the identity of contractors and the arrangements for monitoring contracts. The provisions will also require local authorities to take into account the views of tenants before reaching any decisions with regard to these matters."⁶³ Ministers have also indicated that they expect local authorities to involve tenants in the process of contractor selection.

Local authorities are to be left to make their own arrangements for ensuring that the tenant consultation requirements are met; however, the Government does intend to issue guidance which will draw on the experiences of the two pilot authorities who are concentrating on tenant involvement in CCT.

2. The right to manage

In *Competing for Quality in Housing*⁶⁴ the Government also announced its intention to give tenants "the right to manage" their own estates. Section 27 of the *1985 Housing Act*, which was inserted by the *1986 Housing and Planning Act*, gave tenants the right to establish tenant management organisations (TMOs) with the agreement of their local authorities. The organisations which have developed as a result include tenant management co-operatives (TMCs) and estate management boards (EMBs); 70 of these organisations had obtained approval as at 18 October 1993.⁶⁵ Sir George Young set out the Government's reasons for introducing the right to manage during a conference speech last year:

⁶¹ ADC "Response to DOE consultation paper *Competing for Quality in Housing*" September 1992

⁶² DOE November 1993

⁶³ Ibid, para 23

⁶⁴ DOE June 1992 para 3.12

⁶⁵ DOE Press Release "*Sir George Young urges local authorities to give tenants more control*" 18.6.93

Research Paper 94/40

"The Government recognises that not all local authorities are willing to devolve estate management to tenants. There are some who do not make it easy for their tenants to get external advice - even though much of that advice is freely available through central government grants. There are others who pay lip service to tenant management but who use every opportunity to obstruct the process. That is why we have put forward measures in the *Housing and Urban Development Bill* which, I believe, amount to the single most important extension of the rights of tenants to manage local authority housing."⁶⁶

Section 132 of the *Leasehold Reform, Housing and Urban Development Act 1993* added s.27AB to the *1985 Housing Act* under which regulations will be introduced to give tenants the right to manage. This section places a requirement on local authorities to enter into management agreements with TMOs when certain conditions are met. TMOs will not be subject to CCT as they are not "defined authorities" under Part 1 of the *1988 Local Government Act*.

The Government issued a consultation paper in December 1992⁶⁷ in which the proposed content of regulations governing the right to manage and its operation were discussed. Draft regulations for the right to manage were first issued in August 1993⁶⁸ and revised in December 1993.⁶⁹ A summary of the proposed right to manage procedure set out in the December 1993 draft is reproduced below:

Summary of Right to Manage procedure

3. The Regulations provide that a Right to Manage notice may only be served by a TMO, defined as an organisation whose constitution conforms to a model provided by the Secretary of State (the **Model Constitution**). This will require a TMO to be a representative and accountable organisation serving a defined geographical area with a membership of at least 20% of tenants in its defined area.
4. The **Model Constitution** requires that a decision to serve a Right to Manage proposal notice must be taken democratically, through a vote on a resolution at a General Meeting of the tenants' organisation (the "TMO") or a door to door survey or ballot.

⁶⁶ Speech by Sir George Young BT MP at PEP/CCT Conference 18.1.93

⁶⁷ DOE "*Tenant Involvement and the Right to Manage*" December 1992

⁶⁸ DOE "*Draft Housing (Tenant Management Organisations) Regulations 1994*" 16.8.93

⁶⁹ DOE "*The right to manage: consultation on draft regulations and guidance circular*" 6.12.93

5. Authorities will be able to refuse to accept a Right to Manage notice if the constitution of the TMO does not conform to the approved model.

6. If the notice is accepted, the TMO will select a training agency (an 'approved person') from an **Approved List** drawn up by the Department, and a feasibility study ('initial feasibility study') will commence. The policy of the Department is that this should be funded through grant made available by the Department under Section 429A of the Housing Act 1985 (inserted by Section 16 of the Housing and Planning Act 1986) ("Section 16" grant) or by the Welsh Office under Housing Options Wales. The use by approved persons of the **Approved Framework for TMO Feasibility Studies** in accordance with the Secretary of State's guidance should ensure that all, TMOs have available to them a broadly consistent training programme.

7. If the approved person concludes in his report the initial feasibility study that it is reasonable to proceed with a full feasibility study, he will organise a ballot or poll. If this is successful, a TMO development programme ('full feasibility study') will begin. Tenants will select a development agent ("approved person") from the Department's **Approved List**. The development agent will, in accordance with the Secretary of State's guidance, use the **Approved Framework for TMO Development Programmes** as a basis for the TMO's training programme, linking the training modules to the range of management functions the TMO wishes to take on. Development agents are required by the guidance to certify that a TMO has reached the required level of competence for each of the responsibilities it wishes to take on.

8. A core element of the TMO's development programme will be determining the management agreement which the approved person will present to the local authority as the basis for a formal delegation of management under section 27 of the Housing Act 1985. The new **TMO Modular Management Agreement** provides a broad and flexible framework from which the approved person can construct a package of management responsibilities consistent with the aspirations and capabilities of the TMO.

9. If the ballot at the end of a TMO's development stage is successful, the authority will be required to enter into a management agreement with the TMO on the terms proposed. Disputes which arise at specific points in the Right to Manage procedure will be handled using the **Arbitration Procedure** referred to in the Secretary of State's guidance.

The underlying principle of the right to manage is widely supported by housing authorities and tenants' organisations; however, some aspects of its proposed operation and its relationship with CCT have given rise to concern.

The draft guidance states that "once a properly-constituted tenants' organisation has served a proposal notice on its authority, the authority is then required to comply with written requests from the TMO for training and office accommodation and facilities, providing such requests are reasonable and consistent with the stage of development the TMO has reached".⁷⁰ The

⁷⁰ Ibid, para 21

Research Paper 94/40

IOH's response to the August 1993 draft regulations pointed out that the success of the right to manage will be heavily dependent on training and development but noted that Government commitment on funding for TMOs had been "equivocal".⁷¹ The IOH requested a clear statement on how the funding of TMOs would be met by authorities, or advice on whether these costs would be spread across all housing revenue account (HRA) tenants or levied solely on tenants exercising the right to manage.⁷² The December draft does not cover these issues.

The Institute also felt the regulations to be overly restrictive and rigid and is of the view that a positive and flexible partnership approach, with certain guidelines, would produce more effective management agreements.⁷³

Concern has been expressed over the absence of any reference in the draft regulations to equal opportunities⁷⁴ and the lack of detailed advice on how TMO management agreements will interface with other CCT contracts. The guidance states that all management agreements entered into with organisations other than TMOs after 1 April 1994 must contain "break-clauses." These clauses will allow for the variation or termination of agreements within 3 months of a local authority notifying the organisation concerned. This provision is designed to give TMOs the opportunity to takeover from a private contractor prior to the end of their contract. It has been suggested that the insertion of break-clauses will be off putting to potential contractors; the lack of detail on whether and how contractors should be compensated in these circumstances has also been highlighted.⁷⁵

It is envisaged that TMOs which are in their development phase on 1 April 1994 will have the option of using the TMO Modular Management Agreement (a standard agreement drawn up by the DOE) or continuing to negotiate with the local authority to produce a different form of agreement. In the latter case the Secretary of State's approval will be needed before the agreement can be entered into. Fully established TMOs with agreements approved by the Secretary of State will be unaffected by the right to manage. The DOE produced a draft of model constitution for TMO's wishing to exercise the right to manage in November 1993.⁷⁶

⁷¹ IOH *"The right to manage : the IOH response to the DOE draft regulations"* 30.9.93

⁷² Ibid

⁷³ Ibid

⁷⁴ *Inside Housing* "Councils issue race warning over new management rights" 15.10.93

⁷⁵ *Inside Housing* "Tenants' right to manage plans may cost councils dear" 20.8.93

⁷⁶ DOH *"Recognising tenants' organisations for the right to manage model constitution consultation draft"* 29.11.93

F. European legislation and CCT

1. The Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE)

The Transfer of Undertakings Regulations derive from the 1977 European Council Acquired Rights Directive the effect of which is to protect staff pay and conditions in the event of a relevant transfer of an undertaking. The question of whether TUPE applies in the context of CCT has given rise to much debate and disagreement in political, local government, legal and private sector circles. The two main issues which have been raised in relation to TUPE are whether it applies to the transfer of an undertaking which is not in the nature of a "commercial venture" and whether the contracting out of a service constitutes a "transfer of an undertaking."

TUPE, unlike the Acquired Rights Directive, originally distinguished between the transfer of commercial and non-commercial ventures, leading to the suggestion that the regulations did not apply to local authority services as they are not commercial in nature. The European Court of Justice (ECJ), when interpreting the Acquired Rights Directive in the case of *Dr Sophie Redmond-Stichting v Bartol* (1992) I.R.L.R. 366, held that an undertaking did not have to be of a "commercial nature" for the Directive to apply. This ruling has now been confirmed so far as TUPE is concerned by amendments made in the *Trade Union Reform and Employment Rights Act 1993* which came into force on 30 August 1993.

The position on whether the contracting out of local authority services constitutes a "transfer of an undertaking" is less clear. One view is that on implementing CCT a local authority merely changes its method of operation and that nothing moves from the authority. The ECJ has, however, given a series of very broad judgements on the Acquired Rights Directive⁷⁷ which indicate that it may apply to the contracting out of a service if enough of the elements of the original operation are transferred. The examples which the ECJ gave of factual circumstances which form relevant considerations in deciding whether the Directive applies include the nature of the undertaking, whether assets are transferred, whether staff are taken on and the degree of similarity of activities pursued before and after the transfer.

⁷⁷ *Rask and Christensen v ISS Kantineservice A/S*, November 12 1992, ECJ

Research Paper 94/40

The DOE's initial stance on TUPE was that it would not normally apply to contracts let under the CCT legislation.⁷⁸

Transfer of Undertakings and Acquired Rights

Mr. Tipping: To ask the Secretary of State for the Environment if he will list the advice he has issued to local authorities over the transfer of undertakings and acquired rights directive.

Mr. Robin Squire: The Directive was implemented in the United Kingdom by the Transfer of Undertakings (Protection of Employment) Regulations 1981. We are at present consulting interested parties on a draft of guidance to be issued under section 9 of the Local Government Act 1992, which states our view that it would be most unusual for the Regulations to apply to a normal contract let under the compulsory competitive tendering legislation. However the interpretation of the law in individual cases is a matter for the courts.

This position has now changed. On 11 March 1993 Michael Howard, then Secretary of State for the Environment, made a statement on the application of TUPE to CCT:⁷⁹

Mr. Bates: To ask the Secretary of State for the Environment if he will make a statement on the application of the Transfer of Undertakings (Protection of Employment) Regulations 1981 to compulsory competitive tendering.

Mr. Howard: My right hon. Friend the Chancellor of the Duchy of Lancaster has today issued and placed in the Library guidance on the implications of the Transfer of Undertakings (Protection of Employment) ("TUPE") Regulations 1981 for the market testing of public services.

The principal provision of the TUPE Regulations is that where a "relevant transfer of an undertaking" has taken place, the new employer takes over responsibility for the employment contracts of the employees, who would transfer on their previous terms and conditions of service.

My right hon. and learned Friend the Attorney General, in a statement to the Standing Committee on the Trade Union Reform and Employment Rights Bill on 21 January, set out the principles regarding the "transfer of an undertaking" as follows:

"It is clear from the case law that under both the [EC Acquired Rights) Directive and the [TUPE] Regulations, [transfer of an undertaking) means the transfer of an

economic entity which is capable of operating as a going concern and which retains its identity. The contracting out of service is not a transfer of an undertaking unless it involves enough of the elements of the "original operation such as premises, staff, goodwill or customer base to constitute the transfer of a going concern." "But no single one of these [elements] is essential for there is to be a transfer. The case law makes clear that it is the overall sum of what is transferred which determines whether there has been a transfer of an undertaking."

I am aware from many complaints which I have received from hon. Members, local businesses and industry, that a number of local authorities have been including conditions in their CCT tender material which require the contractor to take on the employment of existing staff on the same terms and conditions.

This is a matter of concern, for the following reasons. The objective of CCT is to ensure that local authority services are provided in the best and most cost-effective way, for the benefit of local residents and council taxpayers. CCT gives both in-house teams and prospective private contractors the opportunity to develop and offer innovative and improved

⁷⁸ HC Deb 28.10.92 c670W

⁷⁹ HC Deb 11.3.93 cc662-664W

ways of providing services. enabling local authorities to choose the best option from all the possible approaches.

It is an essential part of the process of competition that local authorities are prepared to consider all possible options, without setting prior restrictions on the arrangements which prospective contractors or in-house teams must adopt, other than on matters relevant to the performance of the service.

The CCT legislation therefore requires that in seeking tenders for services, authorities must not act "in a matter having the effect or intended or likely to have effect of restricting, distorting or preventing competition." [Local Government Act 1988 section 77].

Where, therefore an authority seeks in a tender invitation to ensure that tenderers will be required to take over responsibility for all existing staff and observe existing terms and conditions of service, either by:

specifying expressly that he should make offers of employment, without economic or operational justification; or

specifying that TUPE must apply to the contract where it is not clear at the point of inviting tenders that this would necessarily be the case; or seeking to achieve the same purpose by specifying requirements relating to matters other than employment of staff, without economic or operational justification;

the effect of this action is to restrict the flexibility of prospective contractors and prevent them from offering alternative arrangements for providing the service.

In the Government's view, any such requirement may deter some prospective contractors from tendering and is likely to constitute a "restriction of competition" in the terms of the legislation, and the Secretary of State will, subject to the facts of each case, take action through the notice and direction powers provided in the legislation to require the authority to remove such restrictions.

In this way, we will ensure that all local authorities conduct compulsory competitive tendering in the manner which this House provided for in the legislation, and will ensure that all authorities, residents and taxpayers continue to secure the benefits of new, more flexible, and more economical ways of providing services.

At the time of writing this guidance is still valid on the substantive issue of whether or not TUPE applies to a particular contract. On 2 March 1994 the European Commission issued a first draft of proposed amendments to the Acquired Rights Directive. The proposed revision of article 1, which defines what the Directive applies to, states:

"The sub contracting of only an activity of an undertaking, whether or not it was previously carried out directly, does not in itself constitute a transfer of an undertaking within the meaning of the Directive. However, the transfer of an undertaking shall be considered to have taken place in cases, where together with the sub contracting of an activity, a business which retains its identity is also transferred."

Research Paper 94/40

Early reactions to this amendment suggest that it falls short of clarifying whether CCT will always come within the Acquired Rights Directive.⁸⁰ The draft is likely to go through a number of revisions before it is seen by MEPs. Any amendments will have to be approved by all the member states.

Following consultation with representatives of the local authority associations and contractors organisations the DOE published an issues paper in January 1994 on the handling of TUPE-related issues which arise during the CCT process.⁸¹ This paper covers, *inter alia*, the approach which authorities should adopt in relation to requests for indemnities; the provision of information to contractors about workforce matters; delay to the CCT timetable; the treatment of tenders where there is a disagreement on the applicability of TUPE, and the evaluation of tenders.

The paper also advises that paragraph 43 of DOE Circular 10/93⁸² will be amended. This paragraph currently states that if local authorities refer to TUPE when inviting tenderers, they should not express a view of the likelihood of TUPE applying or otherwise. The paragraph will be replaced with the following:

"The Secretary of State accepts that authorities may wish to refer prospective contractors to the TUPE Regulations when inviting tenders. Whether the Regulations apply in any particular case will depend on the nature of the work involved and the contractor's detailed proposals for carrying it out. Authorities should therefore not prejudge whether or not the Regulations apply. They may however wish to indicate their preliminary view of the likelihood of the Regulations applying. In doing so, they must make clear that the applicability of the Regulations depends ultimately on a consideration of any proposals submitted by a contractor, and that contractors may put forward proposals with different TUPE implications. Otherwise, authorities' expressions of view may have the effect of distorting, restricting or preventing competition. Any preliminary view must be adopted in good faith and based on careful consideration of the activity in question."

If and where TUPE does apply to CCT there will be a number of consequences:⁸³

⁸⁰ *Local Government Chronicle*, 'European court may trip up TUPE rules', 4.3.94

⁸¹ DOE *"Issues paper : handling of TUPE matters in relation to CCT"* 21.1.94

⁸² *"Local Government Act 1992, Section 9: Competition in the Provision of Local Authority Services"* 14.6.93

⁸³ See *Inside Housing* "Tendering and the rights of workers" 6.8.93 and *Housing Magazine* "CCT - The impact of the European Community" March 1993

- the employment contracts of the employees concerned will be transferred automatically to any company or association awarded the management contract;
- any dismissal of an employee by the transferor or transferee will be automatically unfair if the reason for the dismissal is the transfer or is connected with the transfer unless it can be shown that the dismissal is for an "economical, technical or organisational reason;"
- the employees will be transferred to the new company or association with their existing terms and conditions unaffected, although there is doubt over the effect of a transfer on employees' pension entitlements. Guidance on the assessment of pensions arrangements offered by external bidders during the CCT process is contained in paragraph 5.18 of "The Government's Guide to Market Testing" (August 1993).⁸⁴
- collective agreements will transfer to the new body which is awarded the contract;
- it is questionable whether an authority awarding a contract to other than the in-house team could make redundancy payments or take such payments into account in evaluating the tenders received, given the statutory and fiduciary restrictions placed on local authorities.

The fact that TUPE may oblige external organisations to continue the terms and conditions of employment of existing staff may deter these bodies from submitting bids. Efficiency and cost savings derived from varying the conditions of employment could certainly be jeopardised and, given that housing management is a labour intensive industry, this could put a question mark over the achievement of any CCT cost reductions. Alternatively, certain aspects of TUPE may be of assistance to contractors when preparing tenders, such as the right to acquire information on the existing in-house work force.

2. The EC Service Directive [Council Directive 92/50/EEC 18 June 1992]

This Directive came into effect on 1 July 1993. It deals with the co-ordination of procedures for the award of public service contracts. It applies to service contracts between a contracting authority and a service provider with a value greater than 200,000 ECUs (approximately £140,000 in October 1993). The Directive divides services into two annexes and each has

⁸⁴ HC Deb 18.2.94 c 1010W

Research Paper 94/40

a different regime. Housing management functions fall within Annexe 1A which means that the contracting authority is obliged to follow the full regime. The requirements and restrictions which the Directive lays down are described below:

- the Directive makes it clear that European Community standards and technical specifications should be employed, where available, when specifying work which is to be subject to CCT. Contract terms which might discriminate against tenderers from other EC countries are to be avoided;
- the Directive provides for three methods of contracting out services, the "open" method under which anyone expressing an interest is automatically invited to tender and the "restricted" method which has been likened to a form of selective tendering. The third "negotiated" method allows for a chosen number of service providers to be negotiated with after an advertisement is placed in the *Official Journal of the European Community* (OJEC). The "negotiated" method will be rarely available. All three procedures prescribe minimum and maximum time limits for certain stages of the process. Of the three, the Treasury advises that the restricted procedure should be used;
- notices must be published within fixed time limits in the OJEC at certain stages of the process;
- the Directive specifies that objective criteria be used for the qualitative selection of service providers. It provides for the evaluation of tenders on one of two bases, lowest price or the most economically advantageous tender received. The Treasury favours the latter option which provides for the possibility of quality judgements in tender selection. The Directive also lays down grounds on which tenderers may be disqualified and on which their financial and economic standing, as well as their technical capacity, may be assessed;
- where services with an estimated value of ECU 750,000 (around £530,366) or more are being put out to tender authorities will be required to send an "indicative notice" for publication in the OJEC as soon as possible after the commencement of each financial year. The award of the housing management contract will need to be followed within 48 days by the despatch of a contract award notice to the journal for publication. Authorities will be obliged to inform unsuccessful tenderers with reasons why they were rejected at any stage of the procedure.

UK Regulations will be introduced to implement this Directive.

The interaction of the European system with CCT in Britain is discussed in the following extract from *Compulsory Competitive Tendering : Law and Practice*.⁸⁵

The European system is fundamentally different in concept to that of compulsory competitive tendering. It is not enforced competition between an in-house provider of services and the private sector. Instead it is an obligatory tendering regime which must be followed if a public authority chooses or is required to award contracts for works or services covered by the rules. The public procurement regime applies only where procurement activity will be entered into by contract. Thus, it is perfectly proper to avoid the regime by performing services in-house. Indeed the in-house provision of services is recognised within the Services Directive (*see* Art 43).

21.4 The unfortunate result for those in local government is therefore that compulsory competitive tendering effectively renders the EC regime mandatory across a wide range of services, by forcing them to undertake a tendering exercise if they wish to retain the option of performing the services with their own in-house labour force.

The compulsory competitive tendering regime itself may be avoided by those local authorities who wish to privatise their services and have no wish to consider the use of in-house labour. However, even in these circumstances a tendering exercise would be the normal course of action by virtue of the common law fiduciary duty, owed by local authorities to their local electorate. Clearly the EC procedures may be needed in any event and if a tendering exercise is held it is likely to trigger the EC rules, but in this latter case there will not be the problem of the interplay of two different regimes.

The basic principle which needs to be borne in mind is that both procedures have certain obligatory elements and certain discretionary elements. The obligatory elements of both regimes need to be followed. In certain cases, particularly tender evaluation, this will mean that compulsory competitive tendering procedures will be more closely regulated and more complicated in operation than they were before the overlap.

⁸⁵ Volume 1, Stephen Cirell and John Bennett

G. CCT in Wales and Scotland

It is proposed that housing management CCT will be introduced in Wales and Scotland along similar lines to that in England.

In Wales, CCT is to be phased in over three years from April 1997; this is to take account of local government reorganisation within the principality. Details of the proposed phasing arrangements and requirements on the housing stock are set out in the *Extension of Competitive Tendering for Housing Management in Wales*.⁸⁶

The Government issued *Competing for Quality in Housing in Scotland* alongside its English and Welsh counterpart in June 1992. An announcement in January 1993 advised that CCT would be extended to housing management in Scotland with the first contracts due to take effect on 1 April 1998, two years after local government reorganisation. The Scottish Office's current proposals for housing management CCT were issued on 7 February 1994.⁸⁷ Consultation on these proposals ends on 31 March 1994. Scottish Homes has been invited to carry out a pilot CCT exercise by the Scottish Office; it plans to start putting contracts out to tender on some of its 59,000 homes in April 1995.⁸⁸

⁸⁶ Welsh Office, July 1993

⁸⁷ Scottish Office *Extension of Compulsory Tendering to Housing Management*, 7.2.94

⁸⁸ Scottish Homes, *Strategic Plan 1993/94 : Towards a Housing Future*, March 1993

Appendix 1

Proposed Defined Activity for Housing Management CCT

Rent and Service Charge Collection

- * notifying rent and service charges to tenants and leaseholders,
- * monitoring rent and service charges paid by current and former tenants, and leaseholders,
- * collecting rents, service charges and contributions to tenant insurance schemes,
- * ensuring payment of rents and service charges (excluding service charge loans) including the arrears of current and former tenants, and leaseholders,
- * negotiating, monitoring and ensuring compliance with payment agreements for rent and service charge arrears,
- * recovering rent and service charge arrears.

Letting of Property

- * contacting nominated applicants for dwellings, offering allocated properties and arranging tenancy agreements,
- * processing applications for transfers and exchanges, including management transfers, interviewing tenants and make recommendations in connection with such applications,
- * accompanying applicants on viewing visits and undertaking home visits to tenants,
- * terminating tenancies, inspecting properties and resolving outstanding tenancy issues,
- * processing applications and letting garages, parking spaces and stores relating to qualifying properties.

Tenancies

- * issuing tenancy agreements and leases,
- * ensuring compliance with agreements and leases, taking action to stop or prevent breaches of agreements and issuing warnings,

Research Paper 94/40

- * responding to disturbances, harassment and domestic disputes involving tenants, including attendance at scene where required, liaising with tenants, residents and specialist agencies to deal with conflicts or make recommendations,

Vacant Properties

- * arranging the vacating of properties and taking possession,
- * inspecting vacant properties and arranging clearance, repairs, cleaning, decoration, security and maintenance,
- * preventing vandalism and illegal occupation,
- * obtaining possession of properties occupied by illegal occupants.

Repairs and Maintenance

- * receiving requests for responsive repairs, assessing and transmitting requests to contractors,
- * monitoring and ensuring progress with responsive repairs,
- * monitoring performance of contractors, carrying out post repair inspections and reporting compliance by contractors,
- * reporting contractor performance,
- * carrying out stock inspections and condition surveys
- * receiving and assessing claims under right to repair and right to compensation for improvement schemes and recommending action, including arranging the payment of compensation

Caretaking and Cleaning

- * operating concierge services,
- * monitoring condition of common areas and grounds of multi-occupant dwelling blocks
- * ordering repairs, maintenance, cleaning, rubbish removal and disinfection services of common areas in multi-occupancy buildings,
- * reporting contractor performance.

**Department of the Environment
November 1993**

Appendix 2

THE FIVE BANDS AND THE HOUSING AUTHORITIES PLACED IN THEM

BAND I

Amber Valley	Forest of Dean
Ashfield	Gedling
Ashford	Gosport
Babergh	Gloucester
Basildon	Harborough
Bassetlaw	Harlow
Blackburn	Hastings
Blackpool	Hereford
Boston	Horsham
Breckland	Hove
Brentwood	Hyndburn
Bridgnorth	Ipswich
Brighton	Isles of Scilly
Bromsgrove	Kennet
Broxbourne	Kensington and Chelsea
Broxtowe	Kerrier
Burnley	Kingswood
Calderdale	Lancaster
Canterbury	Langbaurgh-on-Tees
Carlisle	Lewes
Cheltenham	Lichfield
Chester	Luton
Chesterfield	Macclesfield
Chichester	Maidstone
Chiltern	Malvern Hills
Christchurch	Melton
Cleethorpes	Merton
Congleton	Mid Bedfordshire
Copeland	Mid Devon
Cotswold	Mid Suffolk
Crawley	Newark and Sherwood
Darlington	Newbury
Dartford	New Forest
Daventry	Northavon
Dover	North Bedfordshire
Eastbourne	North Devon
East Hampshire	North Hertfordshire
Eastleigh	North Norfolk
East Lindsey	North West Leics
East Northamptonshire	North Wiltshire
East Yorkshire	Oadby and Wigston
Eden	Oswestry.
Ellesmere Port & Neston	Oxford
Epsom and Ewell	Pendle
Erewash	Penwith
Exeter	Peterborough
Fareham	Poole

BAND I (contd)

Fenland	Purbeck
Forest Heath	Redditch
Richmond upon Thames	Swale
Rochford	Tamworth
Rossendale	Teesdale
Rother	Teignbridge
Rushmoor	Test Valley
Rutland	Thanet
St Edmundsbury	Three Rivers
Salisbury	Torbay
Scarborough	Torridge
Scunthorpe	Tunbridge Wells
Sedgefield	Vale Royal
Sedgemoor	Wansbeck
Shepway	Wansdyke
Slough	Warrington
Solihull	Waveney
South Derbyshire	Waverley
South Hams	Wealden
South Herefordshire	Wear Valley
South Kesteven	Welwyn Hatfield
South Lakeland	West Devon
South Northants	West Lancashire
South Ribble	West Somerset
South Shropshire	West Wiltshire
South Somerset	Weymouth and Portland
Spelthorne	Winchester
Stafford	Windsor and Maidenhead
Stevenage	Wokingham
Stockport	Worthing
Stratford-on-Avon	Wyre
Stroud	Wychavon
Sutton	Wyre Forest

BAND II

Adur	Harrogate
Allerdale	Harrow
Alnwick	Hartlepool
Arun	Hart
Aylesbury Vale	Havant
Barrow-in-Furness	Hertsmere
Basingstoke & Deane	High Peak
Bath	Hinckley & Bosworth
Berwick-upon-Tweed	Holderness
Beverley	Huntingdonshire
Bexley	Kettering
Blaby	King's Lynn & W Norfolk
Blyth Valley	Kingston-on-Thames
Bolsover	Leominster
Boothferry	Lincoln
Bournemouth	London, City of
Braintree	Maldon
Bracknell Forest	Mansfield
Bury	Medina
Cambridge	Mendip
Cannock Chase	Mid Sussex
Caradon	Mole Valley
Carrick	Newcastle-under-Lyme
Castle Morpeth	North Cornwall
Castle Point	North Dorset
Charnwood	North East Derbys
Chelmsford	North Kesteven
Cherwell	North Shropshire
Chester-le-Street	North Warwickshire
Chorley	Nuneaton & Bedworth
Colchester	Preston
Corby	Reading
Craven	Redbridge
Crewe & Nantwich	Reigate & Banstead
Dacorum	Restormel
Derbyshire Dales	Ribble Valley
Derwentside	Richmondshire
Durham	Rugby
East Bedfordshire	Runnymede
East Cambs	Rushcliffe
East Devon	St Albans
East Dorset	Sevenoaks
East Staffs	Shrewsbury and Atcham
Elmbridge	South Beds
Epping Forest	South Bucks
Fylde	South Cambs
Gillingham	Southend-on-Sea
Glanford	South Holland
Gravesham	South Norfolk
Great Grimsby	South Oxfordshire
Great Yarmouth	South Staffs

BAND II (Contd)

Guildford
Halton
Hambleton
Tandridge
Taunton Deane
Tendring
Tewkesbury
Thamesdown
Thurrock
Tonbridge & Malling
Trafford
Tynedale
Uttlesford
Vale of White Horse

South Wight
Staffs Moorlands
Suffolk Coastal
Warwick
Watford
Wellingborough
West Lindsey
West Oxfordshire
Woking
Woodspring
Worcester
Wycombe
York

BAND III

Barking and Dagenham
Barnet
Barnsley
Bolton
Brent
Coventry
Derby
Haringey
Havering
Hillingdon
Knowsley
Milton Keynes

North Tyneside
Norwich
Portsmouth
Plymouth
Rochdale
St Helens
Southampton
South Tyneside
The Wrekin
Westminster
Wirral

BAND IV

Croydon
Doncaster
Ealing
Easington
Enfield
Hammersmith and Fulham
Hounslow
Middlesbrough

Northampton
Oldham
Sefton
Stockton-on-Tees
Stoke-on-Trent
Tameside
Waltham Forest
Wigan

BAND V

Birmingham
Bradford
Bristol
Camden
Dudley
Gateshead
Greenwich
Hackney
Islington
Kingston upon Hull
Kirklees
Lambeth
Leeds
Leicester
Lewisham
Liverpool

Manchester
Newcastle upon Tyne
Newham
Nottingham
Rotherham
Salford
Sandwell
Sheffield
Southwark
Sunderland
Tower Hamlets
Wakefield
Walsall
Wandsworth
Wolverhampton

TIMETABLE FOR IMPLEMENTATION:

	Band I	Band II	Band III		Band IV	
	All stock	All stock	first 60%	final 40%	first 60%	final 40%
Year -2 1994/95	Begin preparations/ consultations	Begin preparations/ consultations	Begin preparations and consultations		Begin preparations and consultations	
Year -1 1995/96	Complete preparations/ consultations Go to tender	Continue preparations/ consultations	First 60% Complete preparations/ consultations Go to tender	Final 40% Continue preparations/ consultations	Continue preparations and consultations	Continue preparations and consultations
Year 1 1996/97	Contracts operating	Complete preparations/ consultations Go to tender	First contracts operating	Complete preparations/ consultations Go to tender	First 60% Complete preparations/ consultations Go to tender	Final 40% Continue preparations/ consultations
Year 2 1997/98	Reports to Department	Contracts operating	Reports to Department	Remaining contracts operating	First contracts operating	Complete preparations/ consultations Go to tender
Year 3 1998/99	Reports to Department	Reports to Department	Reports to Department	Reports to Department	Reports to Department	Remaining contracts operating

	Band V		
	first 40%	next 30%	final 30%
Year -2 1994/95	Begin preparations and consultations		
Year -1 1995/96	First 40% Complete preparations/ consultations Go to tender	Remaining 60% Continue preparations and consultations	
Year 1 1996/97	First contracts operating	Next 30% Complete preparations/ consultations Go to tender	Final 30% Continue preparations/ consultations
Year 2 1997/98	Reports to Department	Contracts operating	Complete preparations/ consultations
Year 3 1998/99	Reports to Department	Reports to Department	Remaining contracts operating