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

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1. Introduction

1. This paper summarises past decisions and recent developments regarding competition enforcement by the European Commission in the waste management sector, in particular packaging waste. It focuses on the application of Articles 102 and 106 of the Treaty on the Functioning of the European Union (TFEU).

2. First, the paper briefly summarizes relevant Commission decisions and presents issues related to the pending investigation in Austria for an alleged abuse of dominant position (Article 102 TFEU) by the Austrian incumbent in packaging waste management, Altstoff Recycling Austria (ARA).

3. Second, the paper discusses the potential application of Article 106 in combination with Article 102 TFEU to the waste management sector, i.e. the abuse of a dominant position related to exclusive or special rights granted to an undertaking.

2. Previous Commission Decisions and the Ara investigation in the Waste Management sector

4. The Commission issued two decisions regarding systems organising the collection and recovery of packaging waste in 2001, Eco-emballages¹ and DSD² and one decision in 2003, ARA.³ These national collection and recovery systems (in France, Germany and Austria respectively) had notified their contracts with collectors, producers and recyclers to the Commission under the former notification procedure pursuant to Regulation 17/62. The Commission had cleared the contracts on the condition that they comply with certain principles (such as an adequate contract duration in case of exclusive contracts between the collection and recovery system and a single regional collector, as well as public tendering). The Commission also found that collection and recovery systems must not impose exclusivity conditions on their regional collectors, and that when such systems are offering a 'Green Dot' licence to producers, a fee can only be claimed for this licencing when a service is provided (‘no service, no fee’). In addition, in the 2003 ARA decision, the Commission imposed an obligation on ARA not to prevent packaging waste collectors from contracting with competitors of the ARA system on (i) the sharing of containers and (ii) other arrangements for the collection and sorting of household packaging waste, in order to ensure access to the collection infrastructure by competing systems. ARA appealed this decision and the Court upheld the decision⁴.

³ Commission decision of 16 October 2003 in cases COMP/35.470 and COMP/35.473.
⁴ Judgment of the General Court of 22 March 2011 in case T-419/03, Altstoff Recycling Austria AG v European Commission.
5. The latest investigation of the Commission regarding packaging waste also concerns ARA. On 15 July 2011, the Commission opened proceedings against ARA regarding possible foreclosure under Article 102 TFEU of Austrian markets for the management of packaging waste. Under EU law, producers are required to collect and recycle a set percentage of the packaging waste resulting from the use of their products. ARA, created in 1993, is the leading collection and recovery system in Austria, offering producers to discharge them of their obligation against a licensing fee. ARA is collecting and recycling various packaging materials such as wood, plastic, metal, glass or paper. In practice, ARA has set up a network of regional collectors and of recyclers to provide the waste management service. ARA is also generating revenues from the sale of collected packaging waste to recyclers.

6. In 2012, ARA had 15,500 licensing partners (producers, packagers or retailers subject to the producer responsibility and paying a fee to ARA), generating around 144 million Euro in licensing fees. It collected and recovered around 829,000 and 778,000 tons respectively.\(^5\)

7. Today, ARA is *de facto* the only system authorised by Austrian legislation for all types of household packaging waste.\(^6\) In the commercial packaging waste management sector, some other systems have been authorised and are competing with ARA, the leading player on this market. New systems can more easily enter the commercial waste market as such entry only requires setting up a limited number of regional collection centres.

8. In July 2013, the Commission sent a Statement of Objections to ARA. The Commission's concerns are that ARA may have infringed competition rules in two respects.\(^7\)

9. First, the Commission has concerns that ARA may have prevented competitors from accessing the household collection infrastructure. This infrastructure is defined as all containers and bags under ARA’s control, together with the collection services contracted between ARA and its regional collectors. Competing systems would need to gain access to such infrastructure as Austrian law requires that collection and recovery systems must have a nationwide coverage of collecting services, and since duplicating this infrastructure would be impossible in practice.

10. Second, ARA may have foreclosed competitors from the market for commercial packaging waste. The Commission has concerns that ARA may have offered certain companies to collect waste directly from their premises using ARA containers, as ARA does for households. As ARA containers may only be used for ARA-licensed products and as companies do not want to have several containers for the same type of waste on their premises, these companies may have made sure that their suppliers choose ARA as waste management system, thus possibly foreclosing competing systems.

11. The Commission's investigation is on-going. The sending of a Statement of Objections does not prejudge the final outcome of the investigation.

12. Recently the Austrian authorities adopted a new law for waste packaging management. The law aims to increase competition, *inter alia* by allowing competing systems to create their own infrastructure.

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\(^5\) Source: ARA website.

\(^6\) Another system, Oko-Box, is authorised for the household waste but it is only active in the segment of drink packaging.

\(^7\) We distinguish below between packaging waste occurring at households ("household waste") and packaging waste occurring at commercial sites ("commercial waste").
(physical infrastructure and network of contracts) for household waste in parts of Austria and by facilitating the access of competing systems to ARA's existing infrastructure in the rest of the country.

3. Potential application to the waste management sector of Article 106 in combination with Article 102 TFEU

13. According to Article 106(1) TFEU, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular 102 TFEU in the area of antitrust.

14. An issue that frequently arises in this sector is that private waste management companies complain that public authorities (often municipalities) reserve to public companies the most profitable segments of household waste management, namely the packaging waste management. In several Member States, the waste laws have been amended in recent years so that municipalities – traditionally active in the segment of mixed municipal waste – can also become active in the segment of packaging waste.

15. The fact that special or exclusive rights are granted to a specific company (be it public or private) is not in itself a violation of Article 102 TFEU in conjunction with Article 106 TFEU, even where e.g. the collection and recycling services used to be performed by several competing players in the past. However, for there to be a breach of Article 106 TFEU in conjunction with Article 102 TFEU it is sufficient that the measure creates an inequality of opportunity which distorts competition.

16. Since the waste management sector is generally highly regulated, it is important for a competition authority to distinguish between independent company behaviour and behaviour that is imposed on the company by legislation.

4. Conclusion

17. Competition enforcement plays an important role in the waste management sector. Competitive and efficient waste management markets will result in lower prices paid by consumers. DG Competition and the national competition authorities are active in enforcing competition rules in order to help achieving a level playing field. Competition problems in this sector traditionally stem from the dominant position of the incumbent system and the measures taken to exclude competitors from the market. The fact that the waste management sector is a highly regulated sector adds a further complexity to competition enforcement. A careful distinction has to be made between competition problems arising from company behaviour and problems arising from legislation. It is therefore also important that Member States design their waste management legislation in a way that allows for effective competition.

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9 Commission Decision COMP 38700 Greek Lignite, para. 238. The decision was annulled by the General Court in Case T-169/08, DEI v Commission. This judgment is under appeal in Case C-553/12 P, Commission v DEI.