Waste treatment, recycling and state aid

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1. Introduction

Treatment and recycling of waste is a growing economic activity. National authorities, on their own initiatives or in accordance with European Directives, are implementing all kinds of systems to ensure treatment and recycling of all kinds of materials. There is substantial regulation in this area, both at the national and EU level. Such regulation concerns not only environmental aspects, but also the rules on free circulation of goods and services and the rules on competition, both anti-trust (1) and State aid. The number of parties involved can be high, which usually adds to the complexity.

As interesting as the rules in other areas are, this article only deals with the State aid aspects. It builds on recent experience, in particular the decisions on waste disposal systems in the Netherlands, for PVC façade elements (N484/00), paper and cardboard (NN87/00) and car wrecks (C11/01), the waste oil collection system in Germany (N387/01) and a Dutch scheme for treatment of sludge (N812/01) (2). At the moment of writing the Commission has not yet decided on this last case.

2. In which circumstances may State aid arise?

The definition of State aid in Article 87(1) contains four elements: there must be a selective advantage financed by State resources that affects trade between Member States and (threatens to) distort competition. In general, the Commission considers that recycling systems affect trade between Member States and that they are capable of distorting competition. Despite various restrictions, trade in waste generally exists and the companies involved may have international activities. The other elements in the definition appear to be more complex.

Selective advantage, but to whom?

The leading principle for the Commission’s assessment is the ‘polluter pays principle’. In the Dutch cases mentioned above, the polluters are the companies that sell or import the products that, at a later stage, turn into waste (‘producer responsibility’). The consumer may be held responsible for delivery of the waste at certain collection points (‘consumer responsibility’), but the cost of waste treatment and/or recycling is to be considered as a normal company cost for the producers, in particular when they are legally obliged (under national or European law) to bear such costs. Consequently, when producers (and importers) do not bear the costs, a selective advantage may exist.

Waste treatment and recycling systems may also provide a selective advantage to the waste treatment and recycling companies. National authorities may award financial contributions that have the effect of lowering the cost of these companies, enabling them to offer their services at lower prices. Whether or not the advantage of such a lower price is ‘passed on’ to the polluters, depends on the actual arrangements. This may not be the case, in particular, when no polluter can be held responsible.

Waste treatment and recycling companies may receive a selective advantage also when a system leads to contributions to these companies that surpass the market price (‘overcompensation’). Even if the service of treatment and recycling itself is considered as an advantage to the polluters, the overcompensation may still constitute an advantage to the treatment and recycling companies.

State resources

Only if a selective advantage is financed by State resources, may it constitute State aid. State resources are clearly present when a government directly grants money to the polluters or to the treatment or recycling companies. The situation is also clear if such a grant is given to a fund or organisation that takes care of the system. More complicated is the case of a fund or organisation that is being financed by contributions from the...
producers and importers. When the national authorities make such a levy obligatory, it has the characteristics of a para-fiscal tax, of which the proceeds are normally to be considered as State resources. The use of such proceeds is normally assessed separately from the payments.

However, in the specific situation of the Dutch recycling systems, the Commission came to the conclusion that the effect of the obligatory levy and the other arrangements is only to oblige the producers and importers to internalise all of the true environmental costs associated with their activities. The levies they pay correspond to the costs of treatment and recycling for which they are responsible. Taking these and other circumstances into account, the Commission concluded that there is no State aid in favour of the producers and importers.

3. Compatibility

In many cases aid for treatment or recycling will take the form of operating aid. Section E.3.1 of the guidelines on environmental aid (1) contains the rules applicable to such aid. The main requirements are that such measures should be degressive and temporary. However, as long as polluters cannot be identified or held legally responsible, treatment or recycling systems are likely not to respect these requirements.

In the case of sludge treatment, the Dutch authorities invoked Article 86(2), claiming that the contributions to the sludge treatment companies constitute a (partial) compensation for a service of general economic interest. They referred to a Court decision in Case 209/98 that confirmed that the management of a waste might be considered as a service of general economic interest (2). However, the Commission may consider that the service of sludge treatment does not have a general character as it is closely tied to the dredging. The contributions may have to be considered to benefit the dredging parties in the first place, and in that case, as explained below, there will be no need to invoke Article 86(2). Whatever the decision will be, the Commission may accept the application of Article 86(2) in other cases when the service of waste treatment and recycling has a genuine general character. (3) A necessary, but not sufficient, condition is the absence of polluters that can be held responsible for the waste concerned.

4. Recent experience

In the Netherlands various systems are based on a voluntary agreement between the companies involved, to pay a levy into a fund that is used for financing the cost of recycling, transport, sorting and dismantling, etc. in as far as these costs cannot be recovered under normal market conditions. The Minister of Environment declares these agreements generally binding on all companies in the sector, including those that did not subscribe the agreement, in order to ensure that all ‘polluters’ pay the levy. As explained above, the Commission came to the conclusion that none of the notified systems constituted State aid.

The German waste oil scheme is financed by direct grants from the government, therefore State aid was involved. The aid was considered to favour the waste oil regeneration companies. It was found compatible under the exemption of Article 87(3)(c), as explained below.

The Dutch scheme for treatment of sludge (supporting treatment of contaminated sludge beyond what is required by legal standards) is also financed by direct grants from the government. However, the contributions may be considered to favour the public and private authorities that are responsible for the dredging, because the treatment is closely tied to the procurement of the dredging and treatment. Most of the dredging is done by public bodies under their public responsibilities, but such public bodies carry out economic activities, the subsidies may still be considered as State aid. The advantages to private parties remain below the de minimis threshold. As indicated, the Commission has not yet come to a conclusion at the time of writing.

The following considerations are worth mentioning:

- The contribution for recycling PVC façade elements was established after an open tender procedure. The contributions for paper and cardboard treatment and car dismantling were based on studies on the actual costs of these companies. Despite the absence of tender procedures, the Commission could view these contributions as ‘market prices’. In the car wrecks case the Commission initially had doubts on this particular issue, as the cost of dismantling varied substantially among car dismantling companies.

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(1) OJ C37 of 3.2.2001, p. 3.
(2) Court judgement of 23.5.2000, Sydhavnen's Sten & Grus, C-209/98, ECR p. I-3743.
(3) Court judgement of 22.11.2001, Ferring vs ACOSS, C-53/00 casts doubts on the issue whether or not a compensation for the cost of providing a service of general economic interest constitutes State aid in the meaning of Article 87(1). If there is no overcompensation, there would be no advantage, and hence no State aid.
The Dutch authorities submitted detailed information before these doubts were allayed.

- Various Directives were concerned and these contained varying clauses on responsibility and costs. Article 5(4) of the End-of-life vehicles directive (1) is most clear: producers and professional importers have to bear all or a significant part of the costs of the dismantling and recycling in as far as it cannot be passed on to the last owner or holder of the car. The directive on packaging and packaging waste (2) is much less clear. It refers in a general way to the polluter pays principle, but rather stresses close cooperation of all partners and shared responsibility. The directive on waste oils (3) mentions the polluter pays principle, but Article 14 stipulates that Member States may grant indemnities to collection and disposal undertakings for the service rendered. For the German scheme for regeneration of waste oils it meant that the Commission could approve direct grants to compensate for the losses, despite the fact that they do not fully comply with the criteria in the environmental aid guidelines (4). A similar reasoning would certainly not hold for similar grants in the car wrecks case.

- The Commission also took into account the potential competition between the recycled and ‘virgin’ material. In the Dutch cases it was concluded that the remuneration to recycling and treatment companies did not allow for such a distortion of competition. In any event, any general effect on producers of the virgin materials that might materialise would be no more than a typical result of regulations requiring all environmental costs to be internalised by the industry as a whole.

- The Commission normally requires that importers are exempted from para-fiscal charges and that exports are taxed equally as domestic sales. However, imports do add to the domestic waste problem, whereas exports do not. As the Dutch systems focussed on the domestic waste, the Commission accepted that importers are obliged to pay the same charge as domestic producers, whereas exports are exempted.

- The Commission can find aid compatible with the common market provided that it does not infringe other provisions in the Treaty (5). Of particular relevance may be national restrictions on trade in waste. If aid is dependent on such restrictions, the Commission may have to establish whether these restrictions are compatible with the provisions on the free circulation of goods and services, before it can find aid compatible with the common market.

5. Conclusions

National authorities and the private parties involved should be well aware of State aid aspects when setting up systems for treatment and recycling of waste. Of course, in case of doubt as to the existence of State aid, the golden rule is to notify the system to the Commission.

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(4) In the past the Commission considered similar schemes for waste oil not to constitute State aid, this based on a very specific Court ruling. This approach was changed in the German case due to other Court rulings on public services. However, also the recent Ferring ruling (see footnote above) may be relevant for this case.