

**Competition issues in waste management systems**

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1. Introduction

On 22 September 2005, DG Competition published the 'DG Competition Paper concerning issues of competition in waste management systems' (the Paper) on its internet website. (1) The Paper sets forth key competition issues, in particular as regards the collection and treatment of three types of waste under the corresponding EC Directives, namely: (i) packaging waste (Packaging Directive (2)), (ii) end-of-life vehicles (ELVs) or 'car wrecks' (ELV Directive (3)) and (iii) waste electrical and electronic equipment (WEEE) (WEEE Directive (4)). The Paper was prepared by DG Competition in co-operation with the national competition authorities (NCAs). The objective was to exchange information and to prepare transparent and coherent policy guidance in the waste management sector in order to enhance consistency of approaches within the European network of competition authorities.

2. Background

The markets for recycled materials will become key resource markets of the future and the waste management sector is rapidly increasing in economic importance. For example, Germany has seen a significant amount of takeover activity in the field of waste management recently as undertakings are aiming to position themselves in the lucrative waste management markets. (5) In Germany alone, the waste management sector handles almost 400 million tonnes of waste every year, employs over 240,000 employees and generates an annual turnover of approximately € 50 billion. (6) The application of competition policy is therefore of considerable importance in this field. In applying competition policy to the waste management sector, the overall objective is to achieve competition and environment policies that are implemented in a mutually reinforcing way in order to best contribute to ensuring open and competitive markets as part of the partnership for growth and jobs under the Lisbon strategy.

3. Procedure

The process applied in the preparation of the Paper was a rather novel one. In 2003, the Commission decided to enter into a comprehensive dialogue process with the NCAs in the field of waste management. As a first step, a questionnaire was sent to the NCAs requesting information, e.g., about waste-specific competition law provisions under national legislation and NCAs’ case law and experience in the field of waste management. A discussion paper was subsequently drafted on the basis of existing Commission decisions (7) and on the basis of the replies received from the NCAs. In 2005, a meeting took place with the Commission and the NCAs to discuss the draft paper, which was finalised and published in September 2005. Stakeholders were not consulted during the process. The Paper is not legally binding and does not constitute 'Commission Guidelines'.

The co-operation with the NCAs allowed the Commission to obtain an overview of the waste management sector and to identify potential competition concerns with a limited use of resources, in particular without the considerable manpower required for sector inquiries under Article 17 of

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(1) The Paper is available at http://europa.eu.int/comm/competition/antitrust/others/
(5) See, for example, the takeover of Duales System Deutschland (DSD), a collective system active in the packaging waste sector, by the private equity investor KKR in the beginning of 2005 and the attempted takeover of Cleanaway by SULO at the end of 2005.
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EC Regulation 1/2003. (5) This approach may be applied in an identical or similar form in other industry sectors in the future.

4. The relevant markets

The waste markets are relatively new markets. The packaging waste markets have developed gradually since the mid-1990s. As regards ELVs and WEEE, the markets in most countries are either in the process of being created or will be created in the future. As a result, it is difficult to precisely delineate the relevant product and geographic markets in the ELV and WEEE sector.

a. The relevant product markets

In the Paper, the Commission has identified three principal product markets for each of the three types of waste concerned. Similar market definitions may also apply to other types of waste (e.g., waste batteries). Each of the three markets may be further subdivided into several sub-markets.

The first market is that for the organisation of systems or solutions to fulfil the obligations under the respective waste Directives. Collective systems and individual solutions organise the collection and recovery of waste. Collective systems offer their services to the companies obliged to recycle their waste under the national laws implementing the respective Directive, usually producers and importers (obliged companies). Instead of taking part in a collective system, obliged companies may also opt for an individual solution and organise the collection and recovery of waste for their own products.

The second market is that for the collection and sorting (including dismantling and shredding in the case of ELVs and certain WEEE) of waste. In this market, the systems/solutions obtain the collection and sorting services from private and public companies. The collection and sorting markets may also constitute separate markets.

The third market is that for recovery services and secondary material. Recovery companies offer their services to the systems/solutions, which in turn organise the delivery of the collected and sorted waste to the recovery companies. Recovery companies sell the secondary material for re-use, e.g., to producers.

b. The relevant geographic markets

As regards the organisation of systems or solutions, the supply and demand conditions including the legal framework continue to differ considerably from country to country. Thus, the geographic market is likely to be national.

The geographic market for collection and sorting services is likely to be local or regional as collection and sorting companies normally operate at local or regional level but may also be national (e.g., the collection of car wrecks in a small or medium sized Member State may be carried out nation-wide).

The geographic market for recovery services and secondary material may be national but may also be EU-wide since this market is becoming increasingly internationalised. The geographic scope will, inter alia, depend on the material in question as transport costs (and thus cross-border traffic) may vary for each secondary material such as, e.g., plastics, glass or paper.

5. The competition concerns

A. General

The Paper identifies three principal competition policy objectives in the field of waste management systems:

➢ first, the prevention of anti-competitive practices such as, e.g., market sharing, price fixing and the exchange of sensitive information;

➢ second, the assurance of a framework which allows choices between several waste management systems for the companies obliged under national legislation to recycle their waste;

➢ third, the avoidance of exclusive arrangements of all kinds without solid and convincing economic justification.

The Paper discusses possible competition concerns for each of the three types of waste separately. It is noteworthy that the Commission, as well as most of the NCAs, have considerably more experience in the field of packaging waste as compared to the relatively new areas of car wrecks and electronic waste. The Paper analyses the relationships between the relevant economic actors in the waste management sector, i.e., the systems/solutions, the obliged companies and the collection/sorting/recovery companies. This article limits itself to presenting a general overview of the possible competition concerns without distinguishing between the three types of waste.

B. Relationship between obliged companies

In nearly all Member States, obliged companies co-operate in order to establish waste management systems. This co-operation may give rise to certain competition concerns. According to the Commission’s Horizontal Guidelines (para. 182), (*) collection/recycling agreements may relate to and have effects on two markets, i.e., (i) the market on which the parties are active as producers or distributors (spill-over effects) and (ii) the markets of collection (or sorting) services potentially covering the good in question (in particular effects of bundling of demand).

Spill-over effects. If obliged companies are competing producers or importers, their co-operation at the waste management level may potentially lead to (i) the development of a common design of the product, (ii) commonality of costs as regards the products through uniform recycling costs and (iii) the exchange of sensitive information. The risk of developing common designs will largely depend on the level of homogeneity of the product in question. The risk of commonality of costs will depend in particular on the importance of the recycling costs in relation to the total costs. For example, the recycling costs of certain types of light bulbs may account for a very significant percentage of the total costs of light bulbs, and co-operation between producers in the field of waste management could therefore lead to considerable price alignment. The risk as regards the exchange of sensitive information will mainly depend on whether the obliged producers participating in a collective system are direct competitors or not (the risk would appear limited if, e.g., producers of shampoo and cereals co-operate in the packaging waste area whereas co-operation among all shampoo producers would give rise to more serious concerns).

Effects of bundling of demand. The co-operation of obliged companies may bundle the demand for collection, sorting and recovery services for waste. The importance of these ‘effects of bundling’ depends on the market share (market power) of the system. Generally, the market power of a collective system increases the more obliged companies with important market shares participate in it. However, it is important to note that the market share of a system on the purchasing markets for collection, sorting and recovery services does not necessarily correspond to the aggregated market shares of the members of the system as producers or distributors. For example, televisions and computer monitors may constitute different product markets, whereas their collection may be part of the same collection services market.

The adverse effects of bundling need to be balanced with possible network effects and economies of scale. For example, due to the high infrastructure costs required for the collection of household packaging waste at individual homes, systems may only be economically viable if they are able to cover a sufficient amount of waste. For this reason, a certain degree of bundling of demand would seem to be the inevitable consequence to allow for the creation of viable systems in the area of household packaging waste. For other types of waste such as, e.g., industrial packaging waste or car wrecks these considerations would seem to be much less relevant. In order to mitigate the adverse effects of bundling, it is essential to ensure that the bundling of demand does not lead to unjustified restrictions of competition on the downstream markets (competition between collection, sorting and recovery companies) and upstream markets (competition between systems). Possible measures to limit anti-competitive effects may include restrictions of the scope of the system (e.g., a system with a high market share in the area of household packaging waste may be prevented from expanding into industrial packaging waste), limitations on the duration of agreements with the collection, sorting and recovery companies and an obligation to carry out tender procedures.

Possible indicative 30% market share threshold. The Paper emphasizes the difficulty to determine indicative market share thresholds below which a co-operation among obliged companies may be generally accepted. To the extent that the principal effects of a co-operation relate to the vertical relationship between systems and collection/sorting/recovery companies, it could be argued that guidance may be drawn from the Commission’s policy regarding vertical restraints (see Article 3 of the Block Exemption Regulation for vertical agreements (BEVR)). (10) On the basis of Article 3 BEVR, a co-operation of producers/importers representing a market share of less than 30% in the market for the manufacture and distribution of the product would be presumed not to raise anti-competitive concerns. However, the 30% threshold would appear most appropriate for car wreck systems as the share of the co-operating car producers/importers as regards car sales is likely to reflect their share of demand in the purchasing market.


for the collection and sorting services. This congruency of market shares applies to a much lesser extent to packaging waste and electronic waste systems. In any case, even for car wrecks the 30% threshold is by no means to be regarded as absolute and is merely put forward as an approximate benchmark. The exceeding of the 30% threshold would not lead to an automatic prohibition of a system but would merely indicate that closer scrutiny may be warranted.

C. Relationship between systems/solutions and obliged companies

Membership criteria. Dominant collective systems must apply objective, transparent and non-discriminatory conditions as regards membership criteria and with regard to fees levied by the system.

Fees of the systems. The fees of a collective system should reflect the costs of the collection and recovery in order to provide an incentive to improve efficiency. Also, contractual arrangements of a dominant system which do not respect the principle ‘no service, no fee’ are abusive. For example, the German system DSD obliged its customers to use the trademark ‘Green Dot’ held by DSD on their packaging and required them to pay the fee for all packaging placed on the market bearing the ‘Green Dot’. The fee applied irrespective of whether the collection and recovery service was provided by DSD or not. As a result, where an obliged company wanted to use DSD’s services only for some of its packaging (because it wanted to use a competitor for the rest), it either had to pay the full fee amount to DSD or it had to introduce two different packaging lines (with and without the ‘Green Dot’). As this excluded competitors from the market, the Commission adopted a prohibition decision based on Article 82 EC in 2001. (12) Furthermore, the fee structure of a dominant system may be found to be abusive if it includes rebates designed to attract the entire or a very substantial waste amount of the obliged companies.

All or nothing rules. Systems may require that the participants transfer all of their obligations to the system, i.e., participating members may either contract for all of their waste or for nothing. The effect of such an ‘all or nothing rule’ is to deny alternative systems the possibility to compete for these ‘tied-in’ waste amounts. The rule infringes Article 81(1) EC to the extent that it appreciably restricts competition and appreciably affects trade between Member States. The effects are appreciable in the case of systems with high market shares or in the case of systems with relatively small market shares if there are cumulative effects of parallel networks of similar agreements. The all or nothing rule may also infringe Article 82 EC where a system is dominant. The Commission accepted the all or nothing rule under Article 81(3) EC in the past under exceptional circumstances, namely to encourage vital investment in a country’s collection and recycling infrastructure. (13) However, the rule cannot be exempted where further substantial investment in waste collection infrastructure is no longer necessary to fulfil the obligations under the relevant waste legislation and/or where the rule may no longer be regarded as an effective means of securing new investment.

D. Relationship between systems/solutions and collection/sorting/recovery companies

Exclusivity in favour of collection/sorting/recovery companies. Many collective systems contract exclusively with one collection/sorting company for a given collection district. Exclusive agreements may also be entered into with recovery companies. According to Article 3(1) BEVR, (14) exclusive agreements are exempted if the market share of the supplier (i.e., the collection/sorting/recovery company) does not exceed 30%. However, companies in a local or regional collection district may often exceed the 30% threshold of Article 3(1) BEVR. If the BEVR does not provide an exemption, a case-specific analysis is necessary taking into account the market conditions, the market position of the collective system and the collection/sorting/recovery company and the duration of the collection agreement. For example, the market for the collection and sorting of household packaging waste is characterised by very specific supply-side conditions (strong network economies, disposal traditions of consumers, container instalment constraints). For this reason, efficiency gains, but also considerations of reliability and continuity may favour contracting with only one collector.

Exclusivity in favour of systems. It follows from the DSD and ARA decisions that collection,

(12) A number of UK packaging waste systems in 1998 and 2000 received comfort letters on the grounds that the operation of the all or nothing rule was necessary to encourage vital investment in the UK’s collection and recycling infrastructure for packaging waste.


sorting and recovery companies should not be obliged to contract exclusively with one system. Both DSD and ARA undertook not to impose exclusivity clauses on their collection and sorting companies.

**Shared use of infrastructure.** For certain types of waste, the duplication of existing collection infrastructures may not be economically viable. For example, the collection of household packaging waste requires thousands, if not millions, of collection facilities at individual households. Therefore, unrestricted access to — and the unlimited sharing of — such collection facilities of a dominant system may be essential for competition on the down-stream market of organising systems/solutions. The collection companies operating these facilities must not be prevented from offering the same facilities to competitors of the dominant system.

6. **Conclusion**

The Paper does not provide an exhaustive list of competition concerns that may arise in the waste management sector. Nor is the Paper legally binding on the Commission or the NCAs, as mentioned earlier. The aim of the Paper is to provide some informal guidance to the economic actors concerned and to the various authorities and courts applying EC competition law. As a result of the modernisation of antitrust rules empowering NCAs (and national courts) to apply Articles 81 and 82 EC in their entirety and due to the largely national scope of waste management systems, antitrust cases in the waste management sector are more likely to be dealt with by NCAs than by the Commission in the future. However, the Commission will, together with the NCAs, continue to closely monitor the developments in this important sector and intervene where appropriate.