



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

**Recycling waste and competition law (or the need for a clean market for
a dirty business)**

Commission(s) in charge of the Session/Workshop:

Energy and Environmental Law Commission

and

Antitrust Commission

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National Report of Brazil

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Introduction

Environmental law on waste is a very complex area of law. Waste represents a hazard for the environment and households, but it often also has value as a resource. The waste sector is heavily regulated to achieve specific environmental objectives. Environmental law aims to contribute to sustainable production and consumption by preventing waste generation and by promoting the re-use, recycling and other forms of waste recovery, to reduce waste disposal, contribute to the efficient use of resources and retrieve valuable secondary raw materials.

Environmental law on waste is novel and evolves rapidly. Technologies for re-using and recycling waste also change rapidly. This means there are many different markets within the waste sector and these markets and the economics within these markets evolve quickly. The useless part of some waste today may become a priceless raw material for certain industries in the future. What represents an expense today may be a valuable asset tomorrow. This also means that shaping the boundaries of the markets to apply competition policy might not be an easy task. It is difficult to specifically define the product and geographic markets in the waste sector.

Some countries have established the “extended producer responsibility,” which should work as a mechanism to make producers support the design and production of goods, taking into account and facilitating the efficient use of resources during their whole life-cycle. It often obliges producers and importers of products to finance, in proportion to their products on the market, the collection and treatment of waste in line with the predefined waste hierarchy established in that country (i.e., prevention, preparing for re-use, recycling, other recovery methods and disposal). Producers and importers may fulfill obligations embraced by the “extended producer responsibility” individually or collectively with other producers through an entity often called a “producers responsibility scheme.”

Applying competition law to waste to allow for effective competition is very important, but it is also very complex. Competition law should help to achieve the waste hierarchy, specifically by helping producers meet their extended producer responsibility at a lower cost for households.

Producers' responsibility schemes involve cooperation between product market competitors and exclusive agreements with service providers, and these may restrict competition. How do these competitors interact in those schemes, what sort of information do they exchange, what sort of agreements do they reach, how do they hire waste managers, how do they define prices and focus on one market or another, and how do they compete with other schemes? How do they prevent anti-competitive practices (i.e., market sharing, price fixing and exchange of sensitive information) and avoid exclusive clauses?

Several international organizations deal with the relationship between competition law and waste production and management. The OECD and the EU have issued studies and analyses during the last 10 years. More recently, some competition authorities have carried out or initiated investigations into companies in the waste sector in different countries (such as Austria, France, Romania and Spain).

As this is a questionnaire and not a national report, we do not want to take too much of your time. **You are welcome to respond with brief answers, such as bullet points**, to avoid having to write lengthy texts. If you are uncomfortable answering any question, please skip it, but please answer as many questions as possible to allow us to draw representative conclusions. Please feel free to provide us with any marketing materials, or examples that you feel are appropriate or interesting.

1. About your country/jurisdiction's institutional framework

1.1. Is there an antitrust agency in your country/jurisdiction? If so, what is its name?

Yes. There is an Administrative Council of Economic Defense (CADE).

1.2. Is there an environmental agency in your country/jurisdiction? If so, what is its name?

Yes. There are several environmental agencies in Brazil. It is because in Brazil the competence of environmental protection is divided between Federal, State and Municipality competence.

Just to clarify it better, Brazil it is a Federal Union of 26 States and one federal district. That means that for each state, and for the federal district, there is an environmental Agency or in some cases more than one with different competence (forestry protection, water protection and others), and also some cities have their own environmental Agencies.

As to the Federal agencies, the most relevant are IBAMA (Brazilian Institute of Environment and Natural Renewable Resources) and ICMBIO (Chico Mendes Institute of Environment Conservation).

- 1.3. Have there been any cooperation agreements between the antitrust and the environmental agencies?

No.

- 1.4. Is it possible for either agency to provide opinions, etc, on activities/subjects of the other authority?

Yes. However it is not mandatory for the authority to follow such opinion.

- 1.5. If so, please provide details.

An agency might request information or even technical information for another agency in order to better deal with a specific case. However, in mostly of the cases, those opinions are not mandatory and the Agency has the authority and independence to render its decision.

- 1.6. Is there room for the interface between antitrust and environmental policy to take place in antitrust cases? If so, please explain briefly why you believe this is the case.

It should be a room for such interface. However, In Brazil antitrust policy and environmental policy do not communicate directly. You might find some

environmental principles that shall rule antitrust issues, but it is not the main concern in these cases.

It is fundamental for a fair competition between the companies that environmental principles and rules shall be followed, as environmental resources are inputs of the production.

On the other hand, it is important for environmental protection that antitrust takes environment as a serious matter to concern, in order to not benefit a company without environmental compliance.

2. Objectives of antitrust and environmentalism

- 2.1. Does any legislation define environmental protection as one of the objectives of the public policies? If so, name the rule(s) briefly.

Yes: Law 6,938/81 and Federal Constitution.

The environmental national policy (Law 6,938/81) foresees that Government activities shall provide the ecological balance, considering the environment as a public asset to be necessarily secured and protected, given the collective use (article 2nd.,I, Law 6,938/81). Also, the Federal Constitution imposes to the Government and to the population the responsibility to protect the environment. Therefore, public policies shall be oriented by environmental protection objectives.

- 2.2. Does the antitrust policy clearly state its objective?

Yes, in the 1st. Article of Law 12,529/11 it foresees that antitrust Law shall provide for prevention and repression of violations of the economic order, guided by the constitutional principles of free enterprise, free competition, social function of property, consumer protection and restraint of abuses of economic power.

- 2.3. Is environmental protection listed as one of the antitrust policy's objectives?

Not directly. However, when it mentions that Antitrust Law shall be guided by constitutional principles of free enterprise and social function of property it,

consequently, imposes the environmental protection as one of antitrust policy's objectives. It is because Federal Constitution foresees that environmental protection shall be complied in cases of free enterprise, as per article 170, VI, Federal Constitution, and also in cases of social function of property, as per article 186, II, Federal Constitution.

- 2.4. Can the competition authority consider environmental protection objectives when assessing the efficiencies of a potentially unlawful behavior?

The constitutional orders to protect environment in cases of free enterprise and to comply with the social function of property allow the authority to consider environmental protection when assessing the efficiencies of a potentially unlawful behavior.

- 2.5. Can any other authority or the government approve restrictive behavior based on the public interest (including environmental protection)?

The antitrust Law shall be guided by constitutional principles, including environmental protection. However, it will be unlikely the main reason for the approval.

- 2.6. Have there been cases in which there was a collision between the objectives of antitrust and environmental policy? If so, name them, explaining whether it was a merger control or a conduct case.

The objectives of antitrust policy should be guided also by the environmental protection. However, it is unlikely to take environmental issues into consideration in order to render a decision.

3. Merger controls and environmental protection

- 3.1. Is environmental protection considered in the merger control analysis? If so, please provide details.

When the Law 12,529/11 foresees that some constitutional principles shall guide the prevention and repression of violations of the economic order, environmental protection may be considered in the merger control analysis. However, it is not the main subjected to be considered.

- 3.2. Have there been cases in which the merger was cleared because of the need to protect the environment? If so, please explain briefly.

Not applied.

- 3.3. Have there been cases in which the merger was blocked because of the need to protect the environment? If so, please explain briefly.

Not applied.

4. Antitrust enforcement and environmental protection

- 4.1. Is environmental protection considered in a conduct case? If so, please provide details.

When the Law 12,529/11 foresees that some constitutional principles shall guide the prevention and repression of violations of the economic order, environmental protection may be considered in a conduct case of antitrust enforcement. However, it is not the main subjected to be considered.

- 4.2. Have there been cases in which the merger was cleared because of the need to protect the environment? If so, please explain briefly.

Not applied.

- 4.3. Have there been cases in which the merger was blocked because of the need to protect the environment? If so, please explain briefly.

Not applied.

5. Questions concerning antitrust in the waste management sector

A. General questions

- 5.1. Which specific legal obligations are imposed on companies relating to waste management of their products under the national law of your jurisdiction (the “obliged companies”)?

There are several obligations imposed by the National Policy of Solid Waste (Law 12,305/10). We may highlight the following:

- (i) Environmental protection;
- (ii) Sustainability development;
- (iii) Disposal and destination environmentally adequate;
- (iv) Respect to local and regional peculiarities;
- (v) Eco-efficiency, by compatibility between supplement, under competitive prices, of qualified goods and services that satisfy human needs and bring quality of life and reducing the environmental impact and consumption of natural resources to a level at least equivalent to estimated carrying capacity of the planet.

- 5.2. If so, can obliged companies meet their obligations by associating with other obliged companies?

Yes. It is one of the objectives of National Policy of Solid Waste a joint action between the different levels of public administration, and these with the business sector, with a view to technical and financial cooperation for the integrated management of solid waste, as per article 7, VIII, Law 12,305/10.

- 5.3. Do companies obliged to recycle their waste opt to be part of a collective system or opt for an individual solution and organize the collection and recovery of waste for their own products?

A collective system is more common. A joint act shall take place between the companies in a specific sector. There some products that are obliged to provide the inverse logistics (set of actions, procedures and means to enable the collection and recovery of solid waste to the business sector, to reuse in its production cycle or other production cycles, or other environmentally adequate final disposal), such as pesticides - its wastes materials and packaging; batteries;

tires; lubricating oil - its waste materials and packaging; fluorescent lamps; sodium vapor and mercury and mixed lighting; electronic products and components; and also some products sold in plastic containers, metal or glass.

- 5.4. What is the exact legal nature of “collective systems” (previously known as "SIGs – Special Interest Groups" and now "Extended Producer Responsibility Collective Systems")? Which form of incorporation can these collective systems take? What are their internal operating rules or bylaws?

Those collective systems are Sector Acts or Terms of Agreement between Public Sectors or Business Sector. They are private agreements that must follow Brazilian regulations concerning environmental protection, antitrust rules, consumer’s protection rules and also local specific regulations. As they are agreements, they are internal operating rules.

- 5.5. What are these collective systems entitled to?

To organized and provide rules for the collection of certain goods. Dividing liabilities and structuring how the collection will work.

- 5.6. What are their governing bodies and how are their operations monitored?

Concerning the National Policy of Solid Waste, their operations are monitored by the Environmental Agency.

- 5.7. Which specific legal obligations are imposed on them?

The collection and recovery of solid waste to the business sector, to reuse in its production cycle or other production cycles, or environmentally adequate final dispose.

- 5.8. Are any administrative authorities responsible for allocating market shares of waste to be collected? How is this share calculated? How are exact amounts to be collected, treated, evaluated or eliminated assigned?

The National Policy on Solid Waste foresaw the shared responsibility, in order to minimize the volume of solid waste and waste produced and to reduce the

impacts to human health and environmental quality resulting from the life cycle of products.

The urban cleaning entitled shall provide systems of selective collect of waste, provide measures to assure the returning of productive circles to reuse or recycle the waste, provide the activities determined by a sector agreement.

- 5.9. What is the consequence of failure, i.e., not collecting, treating, recovering or disposing of the market share assigned to a certain obliged company?

The company is subjected to environmental liability, and might be held liable under administrative, civil and penal regulations – independently and jointly.

- 5.10. In line with the previous question, if one of the collective systems credits collecting a higher market share in terms of volume or weight, can it claim financial compensation from any collective systems not complying with theirs?

Such provision must be specified in Sector Agreements and Terms of Agreement. Before Public Entities the liability is shared.

- 5.11. Are the administrative authorities that monitor and enforce producers' compliance with their respective objectives and the proper functioning of their collective systems coordinated in any way with antitrust agencies or national competition authorities?

No. Unfortunately in Brazil there is no such coordinated act.

B. Relevant product and geographic markets

- 5.12. How have the competition authorities in your jurisdiction defined the relevant product markets in the waste management industry?

The National Policy on Solid Waste does not have five years, so it is still a market under development.

- 5.13. How is the waste market segmented?

Usually it is divided by the type to the waste, considering for this the waste origin, destination, chemistry composition and dangerousness.

- 5.14. Which geographic scope has been considered for each of those product markets?

Not applied.

- 5.15. Are the producers of electrical and electronic equipment, the so-called WEEEs, obliged to finance the collection, treatment, recovery and disposal of waste from their products in any specific way?

Yes, they shall comply with the inverse logistic, which is the set of actions, procedures and means to enable the collection and recovery of solid waste to the business sector, to reuse in its production cycle or other production cycles, or other environmentally adequate final disposal.

C. Possible competition concerns (abuse of dominance)

- 5.16. Have the competition authorities in your jurisdiction found any collective systems dominant? If the answer is yes, please specify the reasons.

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- 5.17. Are the fees the collective systems charge the obliged companies based on the “no service, no fee” principle?

As to the obliged companies fees it depends on the terms of the agreement.

- 5.18. Do collective systems apply an “all or nothing rule” (i.e., requiring participants to transfer all of their obligations to the system; they may either contract for all of their packaging or for none)?

Please note that in Brazil the responsibility is shared, so the company has a commitment to all other producers for its waste – for an example in the case inverse logistic is applied.

- 5.19. Have the competition authorities in your jurisdiction conducted investigations into anticompetitive practices relating to abusive fees imposed by dominant collective systems? Or have they conducted investigations into anticompetitive practices relating to other abusive conduct, such as rebates designed to attract a substantial amount of the obliged companies, the application of the “all or nothing rule,” and denying competitors access to the dominance system? If so, please explain briefly the main theory of harm and the final decision adopted.

The investigations are conducted by the possibility of an infraction. There is an administrative procedure to analyze the conducts.

D. Possible competition concerns (cooperation between obliged companies)

- 5.20. Can obliged companies form collective systems to agree contracting prices and conditions with waste managers dealing with certain waste processing, recycling or disposal operations?

Not applied.

- 5.21. Can collective systems incur in the aforementioned practices? Can they reach other agreements between them? If so, what kind of agreements?

Not applied.

- 5.22. Have the competition authorities in your jurisdiction conducted investigations relating to cooperation between obliged companies? If so, please refer to the case/s and explain briefly the grounds (such as spill-over effects, and the effects of bundling of demand) and the final decision adopted.

Yes. In bidding proceeding for public collection of urban waste and hospital waste the competition authority (CADE) understood the existence of a cartel between the bidding companies. The companies used to combine previously the bidding how they would act and which one would be the bid winner. Those companies had combined the prices between the ones that would participate of the bid in order to prevent having prices under a fixed base price. The authority understood that such conduct caused losses to municipality finances and provided damages to the consumers. A fine, as an administrative penalty, was imposed to those companies.