

**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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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, the Swedish Competition Authority (Sw. *Konkurrensverket*).

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

Yes, the Swedish Environmental Protection Agency (Sw. *Naturvårdsverket*).

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

In general, the cooperation between the agencies is limited. In 2004, the agencies presented a report regarding the situation on the waste management market in Sweden¹, due to an initiative from the Swedish government. The initiative was taken *inter alia* because of competitive issues that had been identified on the market, especially with regards to public undertakings vis-à-vis private undertakings.

Further, the Swedish Competition Authority is the supervisory body of public procurement and responsible for the overall procurement assistance under the government, including the Swedish Environmental Management Council's work with procurement support. Within this area, the Competition Authority shall report to and consult with the Environmental Protection Agency.

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

It may be possible but I have not seen such opinions.

- 1.5. **If so, please provide details.**

See above.

- 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.**

¹ See "Marknaden för avfallsantering", Rapport 5408, september 2004, Naturvårdsverket.

In theory, there is room under the legal framework for interface between antitrust and environmental policy to take place in antitrust cases, though it has not been very common so far. As stated above, the Swedish Competition Authority has recently become responsible for the Swedish Environmental Management Council's work with procurement support. With regards to this, such interface may increase in the future.

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. The main Swedish legislation that defines environmental protection as one of the objectives of the public policies are:

- the Swedish Environmental Code (SFS 1998:808), which contains the legal framework for Swedish environmental law, and
- the Planning and Building Act (SFS 2010:900), which contains rules on the planning of land and water and construction.

2.2. Does the antitrust policy clearly state its objective?

Yes. The main objective of the antitrust policy in Sweden, i.e. the Swedish Competition Act (SFS 2008:579), is to eliminate and counteract obstacles to effective competition in the production of, and trade in, goods, services and other commodities.

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

No.

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

In theory, yes, the Swedish Competition Authority can take environmental protection objectives into consideration. However, it is rarely seen in practice.

As an example, Ch. 3 § 27 in the Swedish Competition Act grants an exception from prohibition against public bodies' engagement in sales activities that distorts (or is intended to distort) the conditions for efficient competition on the market, or inhibits (or is intended to inhibit) the occurrence or development of such competition, when proceedings are defensible *from a public perspective*. In theory, the *public perspective* could also include environmental protection.

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

The Swedish Competition Authority has the primary responsibility for applying the Swedish antitrust legislation. However, sanctions and prohibitions may, in some situations, only be issued by Swedish courts.

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.

Not to my knowledge. However, there have been cases within the public procurement area where environmental policy have effected the court's assessment.²

3. Merger controls and environmental protection

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

Not to my knowledge.

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 to my knowledge.

² See for example *Kammarrätten i Stockholm 8647-96 Gama Dental AB vs. Stockholms läns landsting*, and *Kammarrätten i Stockholm 3627-06 IF Luftfilter AB vs. Västerås kommun*.

- 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 to my knowledge.

4. Antitrust enforcement and environmental protection

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

Not to my knowledge (besides what has been described above with regards to public procurement).

- 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 to my knowledge.

- 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 to my knowledge.

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”)?**

The responsibility for waste management in Sweden is divided between different actors depending on the source and nature of the waste.

In general, holders of waste are, in accordance with the the Swedish Environmental Code, Ch. 15 § 5a, obliged to ensure that the waste is managed in an acceptable manner with regards to health and environment.

Companies that professionally manufactures, imports or sells a product or packaging, or in their professional activities generate waste that requires special measurer of sanitation or environmental reasons, i.e. “producers” (according to the definition in the Swedish Environmental Code Ch. 15 § 4), are responsible for waste from products that fall within the producer responsibility such as paper, packaging, electronic products, cars, batteries etc., in accordance with the Swedish Environmental Code Ch. 15 § 6.

The municipalities in Sweden are responsible for household waste, in accordance with the Swedish Environmental Code Ch. 15 § 8, which is not included in the producers’ responsibility described above. Thus, household waste is subject to a monopolized market. In addition to this, every municipality is required to have its own sanitation policy consisting of a waste plan and regulations for waste management.

The Swedish Waste Ordinance (SFS 2011:927) provides general rules regarding responsibilities between different actors in the waste management sector.

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

Yes.

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?

In general, producers in Sweden opt to be part of a collective system, for example, by founding so called “material companies”. The material companies cover different types of waste and take care of the responsibility of each individual member company’s producer responsibility.

The municipalities must choose themselves how to organize their waste management, since local government autonomy is a fundamental part of the Swedish Constitution. Different structures are available for the organization of

waste management, such as e.g. municipal enterprise (owned independently or jointly with other municipalities) or self-administration.

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?**

Material companies are, as stated above, founded by the producers. The producers' responsibilities are not transferred to the material companies though. Instead, the material companies function as administrative bodies. The producers themselves are responsible for the waste management and, thus, for the administration of the material companies.

Material companies organize the collection of the waste. For this purpose, local entrepreneurs are contracted, such as companies controlled by the municipalities. The material companies have founded service organizations that coordinate the establishment and operation of the waste management. Such organizations may enter into agreements with the municipalities with regards to, for example, waste management. In general, the material companies are owned by producers and/or trade organizations.

5.5. **What are these collective systems entitled to?**

The material companies and service organizations are governed as non-profit organizations/companies. Their financing varies depending on the waste sector. For example, the collection of packaging waste is funded by packaging charges while the collection of recycled paper is jointly funded by paper producers.

The costs for the waste management by the municipalities are financed by a waste collection fee.

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

The operations of the material companies and service organizations and the municipalities and their companies and associations (jointly referred to as the “collective systems”) are all subject to the antitrust and the environmental

legislation. The governing bodies depend on what type of association the company/organization/public institution is.

5.7. Which specific legal obligations are imposed on them?

The collective systems may be subject to legal obligations under the environmental legislation with regards to, for example, the responsibility for operating recycling stations³. With regards to the antitrust legislation, the behavior of the collective systems on the market may be reviewed in the same manner as any other companies or organizations.

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?

As stated above, the responsibility of waste disposal in Sweden is divided depending on the nature and source of the waste. With regards to household waste, “market shares” are, in this regard, allocated based on the geography of the municipalities.

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?

Not applicable to my knowledge.

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?

Not applicable to my knowledge.

5.11. Are the administrative authorities that monitor and enforce producers' compliance with their respective objectives and the proper functioning of

³ See for example *MÖD 2005:64, Mark- och miljööverdomstolen, 2005-11-03*

their collective systems coordinated in any way with antitrust agencies or national competition authorities?

Not to my knowledge.

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?

Not to my knowledge.

5.13. How is the waste market segmented?

As described above, the waste market in Sweden is segmented in accordance with the nature and source of the waste, and (for household waste) in accordance with the geographic scope of the municipalities.

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

See above.

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?

Not to my knowledge.

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.

Not to my knowledge. However, the Swedish Competition Authority has received complaints, mainly with regards to the pricing of public undertakings on the waste management market, but also regarding public undertakings carrying out activities both in monopolized and competition sectors of the waste management market.⁴

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

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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)?**

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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.**

As described above, the Swedish Competition Authority has received complaints *inter alia* with regards to the acts of public undertakings.

As an example, in the case concerning Nordvästra Skånes Renhållnings Aktiebolag (*Konkurrensverket, beslut av 2011-12-10, Dnr 76/2011*), a municipal waste management company, Nordvästra Skånes Renhållnings Aktiebolag, had a department for market services whose costs were covered by the household waste fees on the monopolized market, rather than the prices in the commercial market where the costs incurred. Thus, the municipal company both operated in the monopolized and the competitive market. Nordvästra Skånes

⁴ See for example *Nordvästra Skånes Renhållnings Aktiebolag, Beslut Konkurrensverket, 2011-12-10, Dnr 76/2011*, and *Östra Göinge Renhållnings AB, 2013-02-25, Dnr 226/2011*.

Renhållnings Aktiebolag's acts allegedly consisted of an abuse of its dominant position on the market. The Swedish Competition Authority did not choose to proceed with the matter though, since Nordvästra Skånes Renhållnings Aktiebolag had taken certain measurement in order to avoid an abuse of its position.

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?**

As long as such agreements are not considered illegal under the antitrust legislation, obliged companies can form such collective systems.

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

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- 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. For example, the Swedish Competition Authority has investigated whether the cooperation between material companies is allowed under the antitrust legislation or not in some cases. One case concerned an extensive cooperation regarding the purchase of recycled paper within the framework of a joint venture. The case was reviewed at the Swedish Market Court by appeal, which found that the cooperation lacked significant anti-competitive effects, partly due to the statutory producers' responsibility.⁵

⁵ See MD 1999:11, *Marknadsdomstolen 22 april 1999, IL Returpapper*