

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

**Energy and Environmental Law commission
and
Antitrust Commission**

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General Report

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1. 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).

2. Country/jurisdiction's institutional framework

2.1 Brazil

The competence of environmental protection is organized at Federal, State and Municipality levels, that means that for each state, and for the federal district, there is an environmental Agency or in some cases more than one agency with different competences (forestry protection, water protection and others).

The most relevant Federal environmental agencies are IBAMA (Brazilian Institute of Environment and Natural Renewable Resources) and ICMBIO (Chico Mendes Institute of Environment Conservation). The foremost Antitrust authority is the Administrative Council of Economic Defense (CADE). There are no relevant cooperation agreements between the antitrust and environmental agencies. While an agency might request information or even technical information from another

agency in order to better deal with a specific case, these opinions are not mandatory and the Agency retains the authority and independence to render its decision.

2.2 Finland

Environmental law on waste aims at contributing to sustainable production and consumption by preventing waste generation and promoting the re-use, recycling and other forms of waste recovery, to reduce waste disposal, contribute to the efficient use of recourse and retrieve valuable secondary raw materials.

The Finnish antitrust agency is the Finnish Competition and Consumer Authority (“FCCA”). Its goal is to increase the societal significance of competition and consumer issues and improve administration efficiency. The agency’s responsibilities relate to implementing competition and consumer policy, ensuring good market performance, implementing competition legislation and EU competition rules, and securing the financial and legal position of the consumer. All in all, the FCCA protects effective economic competition by intervening, when necessary, in restrictive practices.

On the other hand, there is not a single environmental agency. Instead, environmental affairs are distributed among different authorities, depending on the issue. These include:

- the Regional State Administrative Agencies (“AVI”);
- the Centre for Economic Development, Transport, and the Environment (“ELY-keskus”);
- the Finnish Safety and Chemicals Agency (“Tukes”);
- the Energy Authority (“Energiavirasto”).

There have been several cooperation agreements between the FCCA and the above-mentioned authorities. However, these are mostly project-based and temporary. Moreover, the FCCA may be involved in the legislative procedure whenever the subject requires its position.

2.3 Sweden

In Sweden, there is the agency in charge of antitrust issues, is the Swedish Competition Authority (Sw.Konkurrensverket). There is also an environmental agency, known as the Swedish Environmental Protection Agency (Sw. Naturvardsverket). Although the cooperation between both of these agencies is limited,

both agencies presented a common report due to competition issues that had been identified in the market. Furthermore, within this area, the Competition Authority shall report to and consult with the environmental Protection Agency.

3. Objectives of antitrust and environmentalism

3.1 Brazil

Environmental protection is one of the main objectives within Brazilian public policy. Government activities shall provide ecological balance, considering the environment as a public asset to be necessarily secured and protected. Therefore, public policies shall be oriented by environmental protection objectives.

Antitrust Law shall provide for the 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 from abuses of economic power. While environmental protection cannot be directly listed as one of antitrust policy's objectives, given the importance that environmental protection has it would be expected to impose environmental protection as one of antitrust policy's objectives. However, it is unlikely that environmental issues will be taken into consideration so as to reduce Antitrust decisions.

3.2 Finland

The Finnish Constitution establishes a responsibility for the environment, imposing an obligation on public authorities to guarantee the right to a healthy environment, and stating that environmental issues are a responsibility for everyone.

On the other hand, the Finnish Competition Act ("FCA") does not include environmental protection as one of the antitrust policy's objectives, nor does the competition authority consider environmental objectives when assessing potentially unlawful behavior. However, given that there have been cases where there has been a collision between environmental legislation and objectives of

antitrust law, the FCCA is currently drafting a study to assess problematic areas between competition neutrality and the Waste Act.

3.3 Sweden

The main objective of antitrust policy in Sweden is to eliminate and counteract obstacles to effective competition in the production of, and trade in, goods, services and other commodities. However, environmental protection is not listed as one of antitrust policy's objectives.

Even so, the Swedish competition Authority can take environmental protection objectives into consideration when asserting the efficiencies of potentially unlawful behavior, but this is rarely seen in practice. The Swedish Competition Authority is the one who has the primary responsibility to apply Swedish antitrust legislation on the public interest, and this includes environmental protection

For the time being, no case has involved a collision between the objectives of antitrust and environmental policy.

4. Merger controls and environmental protection

4.1 Brazil

While environmental protection could be considered in merger control analysis, it is not the main subject to be considered.

4.2 Finland

Following the reasoning provided in the section above, environmental protection is not considered in merger control analysis.

4.3 Sweden

Environmental protection is not considered in merger control analysis.

5. Antitrust enforcement and environmental protection

5.1 Brazil

While environmental protection may be considered in a conduct case of antitrust enforcement, it is not the main subject to be considered. There were no cases in which mergers were cleared or blocked because of the need to protect the environment.

5.2 Finland

Competition rules in Finland apply equally to all sectors, but to this date no merger cases have been cleared stating environmental reasons.

5.3 Sweden

Environmental protection is not considered in any antitrust enforcement conduct case.

6. Questions concerning antitrust in the waste management sector

6.1 Brazil

Brazil's National Policy of Solid Waste imposes a number of obligations on companies. Collective systems (previously known as "SIGs – Special Interest Groups" and now "Extended Producer Responsibility Collective Systems") are joint actions between different levels of public administration or between public administrations and the business sector. These joint acts shall take place between the companies in a specific sector, such as pesticides, batteries, tires, lubricating oil, fluorescent lamps, sodium vapor, mercury, electronic products and components; and also some products sold in plastic containers, metal or glass.

As for the exact legal nature of "collective systems", they are agreements intended to collect and recover solid waste to the business sector, in order to reuse it in its production cycle or other production cycles private. They must abide by Brazilian regulations and their operations are monitored by the Environmental Agency in all matters concerning the National Policy of Solid Waste. Still, they have internal operating rules.

No administrative authority has been charged with monitoring and enforcing producers' compliance with their respective objectives and the proper functioning

of their collective systems in Brazil, thus preventing any coordination with antitrust agencies or national competition authorities. Not only does the National Policy on Solid Waste focus on allocating market shares of waste to be collected and recycle by obliged companies but companies are subject to environmental liability, and might be held liable under administrative, civil and penal regulations – independently and jointly-, if they fail to collect, treat, recover or dispose of the market share assigned.

Financial compensation could be claimed by companies assuming higher market shares than the initially assigned.

6.2 Finland

Legal obligations for waste holders in general are established in the Finnish Waste Act. It establishes that the producer will be responsible for waste management and associated costs of its products. Other legal obligations for producers of waste include: arranging reception points for discarded products, providing information on reception of discarded products and waste, promoting re-use, and keeping a record. Similarly, product distributors shall accept certain discarded products free of charge from the possessor, and shall duly provide information about the possibility of bringing discarded products to the distributor's reception point.

The foresaid legal obligations may be met in several manners. For instance, obliged companies ("producers") may join a producer corporation, submit an application for registration in the producer database to the Pirkanmaa ELY Centre -Centre for Economic Development, Transport and the Environment- (the "national authority"), or establish a producer corporation together with other producers.

Moreover, the Waste Act imposes obligations on these producer corporations, including:

- to fairly divide obligations between the producers;
- to maintain a publicly available, up-to-date list of the producers that have transferred their producer responsibility to it;
- to have sufficient financial resources to facilitate the appropriate organization of its operations;

- to take equal account of other economic actors and their prospects for operating in the market in question, in such a way as to avoid any barriers to business and distortion of competition.

When one of the companies fails to comply with an obligation, a supervisory authority may take measures against it. The Supervisory Authority may prohibit the breaching party from continuing or repeating the procedure, order the breaching party to restore the environment to its prior state or eliminate the harm, or order temporary measures. In addition to this, if a producer or producer corporation has not organized the reuse, recycling, other recovery or other waste management based on producer responsibility, the national authority may oblige the concerned party to prove that the changes have been made, or prohibit the concerned party from placing the product onto the market until it has been entered in a producer register. In this regard, however, the competition authority of Finland has not defined directly the relevant product markets in the waste management industry.

6.3 Sweden

The responsibility for waste management in Sweden is divided between different actors depending on the source and nature of the waste. Companies have specific legal obligations relating to the waste management of their products.

In general Holders of waste are obliged, by the Swedish environmental Code, to ensure that the waste is managed in an acceptable manner with regards to health and environment.

Furthermore, the municipalities in Sweden are responsible for household waste, which is not included in the producer's responsibility.

In general, producers in Sweden opt to be part of a collective system or individual solution to organize the collection and recovery of waste for their products, for example by founding so called "material companies", which cover different types of waste and take care of the responsibility of each individual member company's producer responsibility.

There is no precedent in connection with the consequences of not collecting, treating, recovering or disposing of the market share assigned to a certain obliged company.

Material companies are created by the producers to recycle their waste. The producers' responsibilities are not transferred to the material companies, they function as administrative bodies. Thus the producers are responsible for the waste management and the administration of the material companies. The material companies have founded organizations that coordinate the establishment and operation of waste management. They can enter agreements with municipalities.

The Swedish Competition Authority has investigated whether the cooperation between material companies is allowed under the antitrust legislation, or not, in some cases.

These material companies and service organizations are all subject to the antitrust and environmental legislation.

7. Relevant product and geographic markets

7.1 Brazil

The relevant geographical market and appropriate product market for waste management industries are yet to be defined, as the National Policy on Solid Waste was only passed five years ago. Still, it is usually divided by the type of waste, considering for this the waste origin, destination, chemistry composition and dangerousness.

In terms of funding the collection, treatment and recovery of their products, the producers of electrical and electronic equipment (the so-called WEEEs) shall comply with the inverse logistic, which is a set of actions, procedures and means that enable the collection and recovery of solid waste by the business sector, to reuse in its production cycle or other production cycles, or other environmentally adequate final disposal methods.

7.2 Finland

The Finnish competition authority has not directly defined the relevant product markets in the waste management industry. The market is segmented as follows:

- Cars, vans and other vehicles;
- Tires from motor vehicles and other equipment

- Electronic and electrical appliances;
- Batteries and accumulators
- Printing paper and other paper products;
- Packaging, where the responsibility pertains to the packers and importers of packaged products.

Finally, producers of electrical and electronic equipment (“WEEEs”), shall provide a financial guarantee assigned to the national authority to cover the costs incurred by reception, transport, other waste management and the related distribution of information, and for promoting the reuse of household electrical and electronic equipment placed on the market by the producer.

7.3 Sweden

The waste market in Sweden is segmented and classified in accordance with the nature and source of the waste, and also in accordance with the geographic scope of the municipalities.

Also, as highlighted above, municipalities in Sweden are responsible for household waste, which is not included in the producer’s responsibility.

With regards to household waste, market shares are allocated based on the geography of the municipalities.

8. Possible competition concerns (abuse of dominance)

8.1 Brazil

“All or nothing” rules may not apply for collective systems in Brazil, as environmental responsibility is shared. Companies have a commitment with all other producers for its waste – for example in this case inverse logistic is applied. Before potential anticompetitive practices relating to other abusive conduct, such as rebates designed to attract a substantial amount of the obliged companies, investigations are conducted by the possibility of an infraction. There is an administrative procedure to analyze the conducts.

8.2 Finland

The Competition Authority has examined few suspect breaches, but they did not result in measures.

8.3 Sweden

The Swedish competition Authorities have not found any collective system to be dominant. However, it 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.

The Swedish Competition Authority has received complaints with regards to the acts of public undertakings. In the Konkurrensverket, beslut av 2011-12-10, Dnr 76/2011 case, where a municipal waste management company has a department for market services whose costs were covered by the household waste fees on the monopolized market, the company both operated in the monopolized and the competitive market. However the Swedish Competition Authority did not proceed with the matter since the company had taken certain measures in order to avoid an abuse of its position.

9. Possible competition concerns (cooperation between obliged companies)

9.1 Brazil

The competition authorities in Brazil conducted investigations relating to cooperation between obliged companies, especially in bidding proceedings for public collection of urban waste and hospital waste, as the competition authority (CADE) understood the existence of a cartel between the bidding companies. The companies had previously agreed on the bidding, in terms of how they would act and which one would be the bid winner. Those companies had combined the prices between the ones that would participate in 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 was imposed to those companies.

9.2 Finland

Obliged companies are not allowed to form collective systems to agree contracting prices and conditions with waste managers dealing with certain waste

processing, recycling or disposal operations. Neither can they incur collective systems in those practices or in reaching other agreements between them.

The FCCA has investigated three cases concerning producer corporations, two of them concerned an abuse of dominant position and the other concerned a restriction of competition, but they didn't lead to a judgment.

9.3 Sweden

Obligated companies can form collective systems as long as such agreements are not considered illegal under antitrust legislation. The Swedish Competition Authority has recently investigated whether cooperation between companies is allowed under the antitrust legislation or not in some cases.

