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European competition policy for the recycling markets

Contribution of
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I. Introduction

Mr. Chairman, Ladies and Gentlemen,

I would like first to thank the organisers for their invitation and for the organisation of this Conference in Madrid on the "Impact of the recycling policies on competition in the framework of the Single Market". The markets linked to recovery activities have been developing for almost a decade or so in some countries, and the Commission has recently taken position on how they should be organised in order to be compatible with the Community competition rules. Your conference therefore gives me the opportunity to outline the Commission's present thinking. As the same markets are only recent or about to be created in some Member States, the Commission's policy message should be helpful for the legislators and operators in these countries.

Let me start by exploring the relationship between competition policy and environmental protection. In overall terms, the Commission seeks to act in the consumer interest. It believes high standards of environmental protection can be met while putting in place systems that deliver the services at the best value possible, within a competitive framework.

II. Competition policy and environment

1. Growing importance of environmental protection

The importance of environmental protection has grown consistently in recent years. It has led to a wide range of environmental initiatives and to the creation of new economic activities and markets, such as those for the recycling of packaging materials.

Community law provides that environmental considerations must be integrated into all other Community policies. This includes European competition policy.

In their turn, both the national legislator and the industry have to respect competition law in putting in place environmental initiatives. Neither should they establish forms of collaboration, rules or practices that would constitute unjustified obstacles to competition.

2. Commission Decision on Domestic Appliance Manufacturers' agreement

A recent decision on domestic appliances illustrates the role that competition policy can play in achieving environmental objectives. The Commission approved an agreement to stop production with a view to improving the environmental performance of these products. The participants in the agreement, nearly all the European producers and importers of domestic washing machines, stop producing or importing into the EU the least energy-efficient machines in order to reduce the energy consumption of such appliances and thereby reduce

pollutant emissions from power generation. Although participants restrict their freedom to manufacture and market certain types of washing machine, the agreement can be accepted as it brings about advantages and considerable savings for consumers, in particular by reducing pollution. The Commission decision takes account of this positive contribution to environmental objectives, for the benefit of present and future generations.

3. Guidelines on the applicability of Article 81 to environmental agreements

I should also like to provide you here with an example how the Commission takes into account the growing importance of environmental issues when modernising its policy instruments.

Since 1 January 2001 there are new rules for the assessment of horizontal co-operation agreements. These guidelines for the first time also cover explicitly environmental agreements by which the parties undertake to achieve pollution abatement or other environmental objectives. There is a shift towards a more economic approach. The basic idea is to allow competitor collaboration where it contributes to economic welfare without creating a risk for competition. These guidelines help companies to assess whether or not an agreement is restrictive of competition.

After these general remarks as to the relationship between the competition rules and environmental objectives, let me now come to the recovery and recycling markets.

III. Guiding principles for the application of competition law in the recycling sector

1. Context

The Commission's aim is to ensure that the markets are open and that competition takes place within a framework which maintains high levels of environmental protection. In its recent decisions with respect to Eco-Emballages in France and DSD in Germany, the Commission has defined key principles of competition to be complied with by comprehensive collective packaging waste recovery systems.

In comprehensive systems, there are contractual relations between the system operator and producers/distributors of packaged goods, the collectors and the recycling companies. This multitude of contractual relations indeed makes the systems comprehensive and complex as a whole.

For an individual producer or distributor of packaged consumer goods, such as a soft drink producer for example, it may be the simplest way to fulfil his obligations under national law to join such a system. However there are always also those who don't want to choose the simplest option but seek instead better adapted, perhaps more cost-effective, solutions. This creates competition.

As I just mentioned, the producer and distributor must comply with the national legislation applying at the place of activity, and so must the system operator. The relevant markets where the systems are active seem so far to be limited to the territory of one Member State, probably largely due to the differences in national legislations and practical difficulties for “foreign” operators to satisfy the regulatory requirements set for such systems. This could change in the future.

2. Choices for obligated companies

The Commission believes that obligated companies should have the choice between several systems or other compliance solutions. The aim is to secure their freedom not to contract with the dominant system or to do so only with a partial amount of packaging. Taking into account the very strong market position of the already existing systems, it is of the utmost importance for the emergence of competition that there is unrestricted market access for alternative service providers.

This policy principle has been clearly demonstrated by the Commission in its decision taken on the 20th of April 2001 in the DSD case. The Commission did not accept that customers had to pay fees corresponding to the volume of packaging bearing the Green Dot trademark. Fees can be charged only where requested exemption service is actually provided. The underlying principle followed by the Commission is “no service, no fee”.

The example of L’Oreal, a haircare product manufacturer, illustrates this issue. It could not use the same multilingual packaging, with the Green Dot, throughout Europe if it wished, in Germany, to take the packaging back itself or use a competitor of DSD. L’Oreal would have been required to run a separate packaging distribution line (without the Green Dot) for Germany or would have faced the risk to pay twice (once to DSD and the second time to the company taking care of its packaging). The Commission could not accept such a situation, which would have led ultimately to higher costs for consumers.

The policy line was also applied in the Eco-Emballages decision of the 15th of June 2001. Eco-Emballages amended some of the clauses of its contracts to make room for competitors. In France, there is a parallel – albeit small – comprehensive system operated by Adelphe. It was important for the Commission that the Eco-Emballages contracts are not too wide in their scope and not too long in their duration, so that Adelphe can offer competing services.

All obligated companies in France may now conclude a contract for all or only some of their packaging and terminate their contract on an annual basis in order to join the competing system. Eco-Emballages also accepted to offer the possibility of using the Green Dot logo to anybody who legitimately needs to use this symbol to carry out business. First, Adelphe has indeed got from Eco-Emballages a sub-license to use the Green Dot in its system, and other potential competing systems would also be entitled to a sub-license. Second, Eco-Emballages agreed to grant such sub-licenses even to undertakings which wish to make individual arrangements for some or all of their packaging while calling on the services of a collective system for the rest, and this either in France or in another country. This permits such a sub-licensee to use the same packaging bearing the Green Dot whilst paying for it only to the extent that the services of the exemption system are also used. The recovery results of the other system or the self-management arrangement must nevertheless be comparable to those imposed on collective systems.

3. Possibilities of competition in collection market

When we assess restrictions in competition in this area we notably consider the scope and the duration of the contracts. The Commission is critical in general towards all kinds of exclusive arrangements without economic justification.

In the Eco-Emballages case local authorities, responsible for collection in their respective territories, may immediately terminate their contract with the system to join another one, while Eco-Emballages must honour the contract length of six years unless there is default from the municipality side. According to Eco-Emballages they already could have relied upon an established case-law allowing public bodies terminate their private-law contracts, and thus Eco-Emballages accepted to include this clause of unilateral right of termination in the contracts. Therefore it was not necessary to carry out economic analysis to establish what contract length was objectively necessary in this case.

In the DSD case it was not as simple. Thanks to successful liberalisation measures, DSD has the possibility to contract with private collectors as well as with contractors controlled by the municipalities. Each selected collector has the exclusive task of collecting and sorting sales packaging in a designated district. The originally notified agreement between DSD and the collectors had given rise to complaints because of the exclusivity. The assessment showed, taking into account the market position of DSD and the duration time of the agreement, that access to the market by domestic and foreign collectors was significantly obstructed. The Commission carried out a sophisticated economic analysis. The results suggested that if the agreements with collectors were to run until the end of 2003, collectors would have sufficient time to achieve an economically satisfactory recovery of their investment, and that exclusivity was justified until this date but not beyond. As a consequence, the duration of the collection agreements was reduced to 2003. For the future, these service agreements have to be put out for public tendering according to the German legislation. The Commission tends to consider that a lifetime of no more than three years will be reasonable and economically justified.

4. Unlimited access to the collection infrastructure

One of the specificities of the market for the collection and sorting of packaging waste at households is that duplication of the existing collection infrastructure is in practice difficult. It would be inconvenient for households to use different bins for different collection systems for the same material and presumptively this would not be an economically viable solution. Therefore the Commission considers the sharing of the collection facilities of the collectors to be a precondition for the occurrence of competition in practice.

5. Free marketing of secondary material

The marketing of secondary material by the collectors should also be as free as possible while making sure that materials will find an appropriate reprocessing channel. Collected and sorted packaging material can indeed be re-used as a secondary raw material for various new products.

6. Pro Europe

I take this opportunity to say also a few words about how the Commission sees Pro Europe and its role in these markets.

The Commission services have scrutinised the shareholder agreement and the licensing agreements. It is important that the Pro Europe agreements neither foreclose the market to competing packaging recovery systems or solutions nor serve as a market partitioning vehicle for its shareholders. It needs to be safeguarded that there are no significant anti-competitive network effects.

Pro Europe has introduced some clarifications and modifications so as to make sure that competing systems or self-management solutions can obtain sub-licenses from the principal licensees and are not unduly put in a disadvantageous position. It is therefore likely that the Commission will be able to close this file since we consider that there is currently no reason to object to these agreements. Particular attention needs to be given to the sub-licensing practices by the members of Pro Europe. In addition, if and when different – so far national – systems become active in other territories as well, and thus become competitors, it is very important that no collusive, anti-competitive exchange of information takes place in the framework of Pro Europe.

IV. Recycling and state aid

1. State aid guidelines on environment

It is also worth mentioning that in December 2000, the Commission adopted new Guidelines on State aid for environmental protection. These guidelines take into account the Community renewable energies policy and also the new forms of aid granted by the Member States, notably market based instruments and tax reductions.

Here the “polluter pays” principle implies that firms internalise the costs for environmental protection. The Commission’s position is therefore that aid should no longer be used to make up for the absence of cost internalisation. If environmental requirements are to be taken into account in the long term, prices must accurately reflect costs.

2. Examples of cases

Over the past months, the Commission has investigated three waste disposal systems in the Netherlands, for PVC façade elements, paper/cardboard and car wrecks respectively. All three systems are based on a voluntary agreement between the companies involved to pay a levy into a fund. These monies are 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 Dutch Minister of Environment has declared these agreements generally binding to all companies in the sector, also those that did not subscribe the agreement, in

order to ensure that all "polluters" pay the levy. This makes the system comparable to parafiscal charges.

In the first two cases the Commission concluded that there was no State aid. There was no aid in favour of the companies that take care of the recycling, transport and sorting because they supply their services, against remuneration, in the first place to the producers and importers of the products (the "polluters"), not to State. There was no aid either in favour of the producers and importers of the products. In the car wrecks case, however, the Commission originally was informed of wide cost variation among car dismantling companies. Therefore it doubted whether the calculated, fixed contributions to these companies could be regarded as a market price. The final decision in the car wrecks case is expected soon and I cannot say more on it at this stage.

The Commission's experience shows that determining whether or not a waste disposal system, based on an obligatory charge, constitutes State aid or not, is not always a straightforward issue. In case of doubt, Member States that intend to put in place such systems are advised to consult the Commission.

V. Conclusion

The Commission acts in a consistent manner, and so you can expect that the principles outlined above will be applied also to currently pending and future cases. The Commission will naturally continue to observe the relevant markets to make sure the policy principles are respected and will not hesitate to launch new investigations if deemed necessary, either on its own initiative or acting on complaints.

Let me underline again that the consumers benefit directly from all these decisions, since competition in all markets and also in packaging waste recovery markets is expected to reduce the price that the consumer ultimately pays for the products disposed of in the recovery systems.

Finally, I would like to convey to you my personal feeling that the legislation and the systems put in place in the 90s to tackle recycling issues have generally been successful, but sometimes at the price of too much rigidity, implemented with a rather monolithic and national vision and not enough regard to the potential of a European dynamic. The challenge for the coming years is then to pursue a successful environment policy but with more flexibility, more economic efficiency and more Europe.