



Tackling the interlink between competition in the waste-management sector and the circular economy

📅 12/11/2021

📖 EU AND COMPETITION, SUSTAINABILITY

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Adopted in March 2020, [the new Circular Economy Action Plan](#) is Europe's new agenda for sustainable growth, in line with the goals put in place with [the European Green Deal](#). The European Commission (EC) defines "Circular Economy" as the system where the value of products, materials and resources are maintained in the economy for as long as possible, while waste generation is minimised. In such a setting, everyone is encouraged to contribute to the objectives of the circular economy (e.g public authorities, businesses, civil

society, citizens).¹ Keeping the ambitious objectives for a sustainable future in mind, competition rules must be enforced attentively to ensure the greatest and fairest participation of market players.

European competition enforcement is undergoing a lively transformation which puts sustainability at the heart of competition law assessments. As sustainability concerns grow more important in recent EU case law, the Commission may soften its enforcement approach in some

¹ <https://ec.europa.eu/eurostat/web/circular-economy>

areas of competition.² Within the broader context of sustainability, environmental protection is our generations' priority. This priority may however call for an even more rigorous application of competition rules in some sectors of critical importance. Compared with other sectors, *waste management*, if operated properly, might have the purposes and highest potential to serve environmental protection and public health. But in some jurisdictions, the market structure could present specific characteristics making the sector more vulnerable to anti-competitive practices. This vulnerability could stem from technical, financial, and/or administrative constraints that lead to a *de facto* position of dominance. In such settings, the National Competition Authorities and the Commission should be mindful of risks of abuse of dominance, even collective dominance, in particular cases.

Thus, the Commission case law concerning the waste sector should promote the application of antitrust rules in line with environmental policies so that one strengthens the other. In that perspective, lately, antitrust cases in the waste management sector have increasingly been dealt with by the National Competition Authorities (NCAs), rather than the Commission itself. This is a consequence of the modernization of antitrust rules that now

empower the NCAs to directly apply EU competition law. A recent example came from the **Italian Authority for Competition and the Market (AGCM)**, which examined two important cases of abuse of dominance, involving two incumbent operators dominating particular segments of the market in the waste management sector.

1. The first investigation

concerns the management of electric and electronic waste which is a market dominated by the operator "Erion" whose market share is 70%. The AGCM accused Erion of abusing its dominance by including a "best-price clause" in the contracts it places with collective systems. That clause obliges waste-management facilities to give the best price to Erion provided they receive the biggest volumes of electronic waste from Erion. Erion also included an "exclusivity clause" in its Statute which deters electronics producers from collaborating with other waste management systems. Finally, Erion also introduced "environmental contributions" at very low levels that are not proportionate to the waste-management costs the electronics producers need to cover according to the "polluter-pays" principle. These three practices by Erion were found by the AGCM to be an abuse of its dominance aiming to

² Further information on the topic can be found in our recent article, "Greener European Competition Policy takes a more definite shape", available at <https://www.lexology.com/library/detail.aspx?g=023834c0-4371-4698-b08e-9fb8838e4cea>

exclude competitors from the market.

2. In the second investigation, the AGCM accused “Polieco”, a consortium comprising producers/importers/distributors of goods made in polyethylene, of abusing its dominant position through a set of anti-competitive actions. Polieco has been the only consortium in that market for a long time due to restrictions. The Italian legislator has recently enabled other consortia to operate in the same market, which led a newly established consortium called “Ecopolietilene” to start operating as a direct competitor of Polieco. The AGCM found that Polieco had adjusted its Statute, granting companies that join Polieco some benefits for the payment of outstanding contributions and that the introduction of a fee structure including rebates designed to attract more companies, if performed by the dominant firm, could be abusive. In the present case, Polieco not only requested full contribution payments from the companies that were not registered with Polieco, but also deceived companies into believing that this difference in treatment was the result of Italian environmental law, whilst it was in fact caused by the provisions of Polieco’s Statute.

Contractual arrangements
imposed by dominant market

players (e.g through price-fixing, market share or exclusivity clauses) can be translated into and abuse of dominant position. The second case mentioned above in particular brings to mind the landmark case by the Commission dating back to 2001 regarding the application of fees in a way that excludes competitors from the market.³ That case emphasized the importance of the fees of a collective system reflecting the costs of the collection and recovery, so as to provide an incentive to improve efficiency. The case concerned the German system for the collection and recycling of packaging waste called Duales System Deutschland (DSD). It 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 was applied irrespective of whether the collection and recovery services were 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 for practical purposes excluded competitors from the market, the Commission **adopted a prohibition decision based on Article 82 EC (i.e**

³ Commission decision of 20 April 2001, DSD, OJ L 166, 2001, can be found at, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001D0463>

currently Art. 102 TFEU) in 2001.

In March 2021, the AGCM formulated a set of proposals in a report entitled ***"Proposals for competition reform, for the purposes of the Annual Law for the Market and Competition for the year 2021"*** and submitted the report to the President of the Council of Ministers. The fifth chapter of the proposals tackles the interlink between competition and environmental sustainability. One of the subsections takes a closer look at the **role of competition in promoting a circular economy in the waste sector**. In line with the goals of the European Green Deal and the New Circular Economy Action plan, the AGCM seeks to suggest solutions to encourage the waste-recycling systems to use scarce resources more efficiently. According to the AGCM, recycling activities should promote fierce competition as only through the dynamic participation of different market players can the sector benefit from innovation allowing waste to be reintroduced in the manufacturing industry in the most efficient way. The waste-management sector in Italy is made up of thousands of small private and public operators, and a few large ones. Looking at the market infrastructure, the AGCM seems to shoulder the responsibility of promoting stronger competition in the waste management chain. In pursuit of the objectives of the circular

economy and the European Green Deal, the Competition Authority;

- points out that the **Italian Consolidated Law on the Environment**⁴ envisages a tariff reduction for unsorted waste management only in agreements exceeding the duration of five years. As this rule is improperly extending a right of public management, it was proposed that the relevant article should be amended to eliminate the minimum five-year duration rule and restore free competition between the various operators;
- emphasizes that the collection phase is often carried out under a local concession regime that mandates integrated management activities of urban waste entrusted on an exclusive basis. However, integrated management is often used improperly, over-expanding the number of activities along the supply chain that are included in the concession. This waters down competition throughout the waste management chain. Indeed, integrated management activities should not include recovery and disposal activities available under the free market regime. The operator holding the concession must use competitive procedures, which do not favour its subsidiaries when selecting its service providers.

⁴ Legislative Decree no. 152 of 3 April 2006

The afore-mentioned investigations by the Italian AGCM and recent developments should give an important signal to the market players in the waste management and recycling sectors. Developments seem to support the idea that competition principles must be enforced in a way that allows for greater environmental protection and enhanced public health. The

waste management sector, in that vein, requires the utmost attention, because despite its potential to facilitate the achievement of environmental goals, a lax scrutiny could give rise to anti-competitive practices. The National Competition Authorities and the Commission are already highly attentive to these risks and will remain vigilant.

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