Summary of Discussion Points
Presented by the Business and Industry Advisory Committee (BIAC) to the OECD
Competition Committee Working Party 2 (WP2)
on Competition and Regulation

Roundtable on Waste Management Services

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I Introduction

1. The Business and Advisory Committee (BIAC) to the OECD welcomes this opportunity to submit comments to the OECD Competition Committee Working Party 2 on Competition and Regulation for its Roundtable on Waste Management Services. In the context of increasing awareness of environmental issues in the various OECD countries, effective waste management is an important policy instrument for reaching national and international targets of pollution reduction. Moreover, effective waste management and notably recycling plays an important role in developing a resource-efficient economy by providing secondary raw materials.

2. The application of competition law to the waste management services may (i) help to eliminate restrictions of competition and, as consequence, contribute to a more level playing field for companies and more competition in waste management sectors, but also (ii) complicate efficient co-operation between companies in these fields.

3. The opening of waste collection services to competition is desirable but entails specific challenges, as these services are often supplied by publicly-owned providers or under the supervision or in co-operation with local or national governments. In many cases, the award of contracts for waste management services, particularly in the market for the regular collection of household waste, takes place against a background of local monopoly, which potentially raises a number of issues, in particular potential discrimination against (new) market actors by public entities or national or local waste management service providers sponsored by (local) government. BIAC therefore strongly supports initiatives aimed at ensuring free competition in the allocation of such markets, especially through transparent and non-discriminatory bidding processes. Public procurement law and competition law can and should play an important role in these cases since competition on the market and competitive tenders lead to better public services and efficient public spending as it involves private capital and know-how and guarantees transparency as well as protection against discrimination and corruption.
4. BIAC also notes that OECD countries are increasingly adopting legislation to reduce the impact of their economic activities on the environment. In turn, this has led to important efforts to reduce the amount of waste generated and to achieve higher recycling rates.

5. In light of the scarcity of certain raw materials, a situation which is expected to worsen in the next decades, BIAC underlines the necessity to develop strategies to reduce the dependency on the importation of such materials. Increasing recycling opportunities may be an important way to reduce this dependency. As such, BIAC welcomes efforts to develop recycling technologies and services and to enable business to collaborate in recycling schemes and other initiatives to meet this objective.

6. One of the core strategies adopted by several countries to handle waste is embodied in the extended producer responsibility (“EPR”) principles. This concept provides that all actors along the production and distribution chain of goods are responsible for the fate of each product until the end of its life cycle and EPR obligations include take back and recycling/recovery obligations. In Europe, EPR obligations are in particular embodied in the Waste Framework Directive, the Packaging Waste Directive, the ELV Directive regarding end-of-life vehicles and electronic waste.5

7. As such, the concept of EPR appears to be a useful guiding principle to achieve the above mentioned goals, since producers may be best placed to develop products in a way that allows a reduction of waste amounts and greater repair, re-use, disassembly and recycling opportunities. However, its application in practice entails a number of issues. In particular, EPR transfers to and imposes on producers the responsibility to ensure the provision of services which are radically different from their core business. This situation results in specific challenges under competition law.

8. Although BIAC recognises that in the vast majority of cases environmental considerations and competition law have concordant goals, it notes that producers subjected to EPR obligations may be confronted with situations where there is insufficient guidance to assist producers to achieve compliance with both sets of regulations.

9. Indeed, the development and operation of collective waste management systems that businesses set up to meet their EPR obligations may require a degree of co-operation amongst market players. Because recycling and other waste management systems are generally specific to recyclable materials (glass, paper, metals and the like) and the products themselves (including electronic equipment, lamps, packaging waste, vehicles, batteries and lubricants), these collective systems often involve competitors. The systems may be complex and involve a network of agreements between participating producers and with third party service providers. As a consequence, companies taking part in such systems are sometimes faced with significant dilemmas.

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in evaluating the impact of their arrangements not only on the markets for waste management services but on the underlying product markets, for example in relation to the exchange of information. BIAC therefore calls for greater clarity, guidance and advocacy to support the efficient development of such systems, thereby contributing to the achievement of environmental objectives and reducing the risk for business of inadvertently violating competition law.

10. BIAC also regrets the difficulty for market players to rely on environmental efficiencies to justify potential competition restraints, especially in the light of the necessity to quantify such efficiencies and the legal and practical problems of doing so where environmental benefits are concerned.

11. Finally, BIAC is concerned that the heterogeneity of waste management schemes implemented in the different countries and even amongst different local regions may be a significant hurdle for the development of efficient, large-scale international businesses to enhance competition in the different markets related to waste management.

II Opening waste collection markets to competition.

12. BIAC welcomes the opening of markets for waste collection services to competition through competitive tenders and would encourage further steps to introduce competition in this way. The complexity of these markets and their dependence on access to other facilities and services create challenges for the design and implementation of fair and effective tender processes. The importance of economies of density will mean that often awarding an exclusive contract to a single waste collector will be the most efficient approach, so that the tender process will need to optimise competition for the market. This should, as an initial consideration, involve awarding a contract for an appropriate duration, taking account of the investments and sunk costs involved. It may also require the contracting authority to take specific measures to open the tender process to new entrants, including ensuring that the winning bidder will be able to access the necessary resources such as sorting, transit and disposal facilities where these cannot be replicated cost-effectively. Careful consideration to every aspect of the tender specifications and regulations will be required to ensure that a level playing field between private and public suppliers exists in practice as well as in law. Transparency throughout the process will also assist in encouraging entry and ensuring fair treatment as between new entrants and entrenched local players.

III Collective waste management systems: limited guidance for antitrust compliance

13. Collective waste management systems aimed to meet obligations deriving from EPR entail a number of specific antitrust issues for the companies involved. Such issues arise because of two features regularly present in the context of such systems: market concentration and co-operation between companies.

14. Many companies that are under an obligation to ensure the appropriate collection and recycling of their waste products find it efficient to enter into horizontal or vertical

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6 On the importance of the level playing field, see BIAC’s Summary of Discussion Points presented to the OECD Global Forum on Competition - SOEs and Competitive Neutrality - February 2009 and prior work referred to there.
agreements, which can extend to entire industries, aiming at ensuring the provision of such services.

15. As a result, these types of co-operation often occur in concentrated markets and/or involve a large percentage of the firms active in the specific sector at hand. Competition authorities have been confronted with cases where the combination of these factors led to potential antitrust issues, mostly in the form of spill-over effects and bundling of waste management or recycling services.\(^7\)

16. Spill-over effects arise from the contacts and coordination between market players in the context of their co-operation in waste management systems. Such co-operation can lead to concerns, especially when participants to the schemes are competitors. While coordination in relation to aspects which are distant from the final market, such as in the design of product packaging may be less susceptible to raise issues under competition rules, the spread of such coordination to the actual product or costs/price structures of products sold to consumers may trigger greater concerns from competition authorities.\(^8\) The other main concern, the bundling of waste management services, relates to the ability of market players with dominant positions on waste management markets to enter into bundling practices, for example by leveraging their dominant position for a certain type of waste into services relating to another type of waste.\(^9\)

17. The general position of competition authorities towards such conduct is relatively clear: companies are entitled to enter into collective systems to ensure the proper implementation of collection and recycling obligations, but such systems should not be the pretext for anticompetitive coordination or abuse.\(^10\) Despite the apparent clarity of these principles, BIAC is concerned about the concrete difficulties companies may be confronted with when dealing with collective systems.\(^11\)

18. It must first be noted that, due to the structural tendency of such markets to be highly concentrated, companies will only rarely benefit from safe harbour clauses provided in competition legislation and standard guidance. Companies are confronted with the difficulty of assessing the thresholds determining the legality of information exchange. While the organisation of collective waste management systems requires a certain level of exchange of information, companies benefit from only limited guidance as to the concrete limits imposed on these practices by competition law. Another example of

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\(^7\) One of the prominent cases is the “Grüne Punkt” case before the European Commission (Case COMP D3/34493 - DSD) and the European Court of Justice (Cases T-151/01 & 289/01 and C-385/07); see also e.g., Investigations by various United States authorities’ into Stericycle Inc., and Browning-Ferris Industries, Inc. for territory allocation (State of Utah vs. Stericycle, Inc. and BFI Waste Systems (Dist. Utah, 2:03-cv-0049)).

\(^8\) As underlined by the European Commission DG COMP Paper Concerning Issues of Competition in Waste Management Systems.

\(^9\) This is also illustrated by the recent statement of objection sent by the European Commission to the Austrian company Alstoft Recycling Austria AG (“ARA”), which reaches the preliminary conclusion that ARA has used its monopoly for household packaging waste services to extend its reach into the market for commercial packaging waste services. See http://europa.eu/rapid/press-release_IP-13-711_en.htm.

\(^10\) See also the Report from the Nordic competition authorities n° 1/2010, Competition Policy and Green Growth, Interactions and challenges.

\(^11\) See also BIAC’s contribution to the OECD Competition Committee roundtable on Horizontal Agreements in the Environmental Context (October 2010).
practical difficulties follows from the different approaches that national agencies have chosen with regard to the merits of collective systems versus individual systems, as well as the desirability of competition between different collective systems.

19. As a result, BIAC believes that companies may experience difficulties in navigating the obligations to organise efficient waste management systems and to comply with competition law rules. While BIAC does not advocate the disapplication of competition rules, it considers that the reliance by public authorities on companies to handle structural services for the benefit of social welfare, such as the proper collection and treatment of waste for disposal from private households, should at the very least be coupled with clear and concrete guidelines allowing companies to implement their obligations without risking any subsequent antitrust proceedings. 12

20. BIAC also notes that companies targeted by EPR can generally not rely on the regulated conduct defence since typically the collective solution is encouraged but not required by the legislation.

III The difficulty of justifying competition restraints by environmental efficiencies

21. Competition law need not be an obstacle to the achievement of increasingly ambitious environmental objectives of governments and societies generally. Players in competitive markets may indeed be driven towards greater environmental protection, because environmental considerations may increasingly influence consumers' choice. As such, BIAC does not advocate any exclusion from competition law for environmental protection schemes.

22. However, the increasing reliance of public organisations on companies for the achievement of environmental goals may require a clearer articulation of the specific features of collective waste management systems in the implementation of competition rules. In some circumstances, it appears that competition and environmental objectives require a balancing exercise. In these circumstances, the question arises whether the current framework of analysis of competition restraints should be applied or whether a more specific approach would be more appropriate.

23. Collective waste management systems set up by companies targeted by EPR obligations constitute an area where this question is most pressing. It is important to consider the fact that when waste management obligations are imposed on producers, companies are obliged to organise services which are not part of their core business. In some cases it may even be doubtful whether it is possible to offer these types of services in a competitive environment, at least initially. This is illustrated by the fact that several collective waste management systems are non-profit entities.

24. BIAC is concerned that a rigid application of the standard competition assessment tools to waste management services may hinder the justification of competitive restrictions by environmental considerations. In considering efficiencies, competition authorities tend at best to require a detailed quantification of environmental benefits so as to determine whether these benefits outweigh competition restrictions. Although

12 Some efforts have been made in several countries such as in France with the publication in 2012 of guidelines on relations between collective systems and waste management operators. In The Netherlands efforts are being made to provide additional guidance under competition law for companies wishing to engage in joint projects that may have a positive impact on the environment. However, most operators remain confronted to a high level of uncertainty or even contradictions as to the limits imposed on their conduct.
quantification is sometimes not impossible, it remains much more difficult to provide, with a sufficient degree of certainty, a reliable quantification of environmental efficiencies than for other types of efficiencies such as cost-related ones.

25. The specific nature of certain waste management services can be taken into consideration in the EU under the regime of services of general economic interests (SGEI). It has indeed been established that waste management may constitute a SGEIs and that restrictions to competition, notably in the form of exclusive rights, may be justified on the ground of Art. 106§2 TFEU.13 BIAC notes that EU Member States retain a wide discretion in the definition of SGEIs. However, BIAC points out that Art. 106 § 2 TFEU provides for a limited exemption from the competition rules and therefore has to be construed in a narrow sense and to be applied restrictively; moreover, the Member States have to respect the framework for SGI and SGEI set by the European Commission which has a special competence concerning SGI and SGEI pursuant Art. 106 § 3 TFEU.

26. Moreover, BIAC notes the risk that the conventional framework of analysis of competition authorities may constitute a hurdle for companies willing to take a step further in favour of environmental protection and, as such, may contradict environmental objectives targeted by governments in relation to waste management. Competition authorities generally consider competition restrictions as justified by environmental efficiencies if such restrictions are necessary for the attainment of these efficiencies. While this approach may be suited in some cases, efficiencies may be less likely to be acceptable when companies intend to adopt decisions favourable to the environment on their own initiative.

27. In the EU, while the previous possibility to notify such agreements allowed determining with certainty whether environmental considerations could indeed justify restrictions on competition,14 the abolition of the notification system and the resulting necessity of self-assessment make it risky for companies to engage in any form of coordination aimed to adopt common efficiencies in favour of the environment. BIAC encourages competition agencies to make liberal use of their possibilities to provide business with meaningful guidance in this area.

IV The necessary streamlining of waste management rules

28. More generally, BIAC underlines the important variety of national or even local schemes in the organisation of waste management in the different OECD countries.15 This situation is also reinforced by the fact that waste management policies are often implemented at a local level. As a consequence, it is difficult for companies involved in

13 See for example case C-209/98, FFAD [2000], §75.
14 This allowed for example the authorization by the European Commission of an agreement among household appliances manufacturers intended bring down CO2 emissions by discontinuing the sale of each participants’ least energy-efficient products (Case COMP/37894, CECED [2001]).
15 See for example, the report of the French agency ADEME on European collective waste management systems, Panorama européen des eco-organismes ou structures assumant la responsabilité des producteurs pour la gestion des produits en fin de vie, May 2003.
waste management to rely on competition law precedents in an attempt to attain a sufficient degree of predictability.

29. This variety of waste management schemes also reflects and ensures that the size of geographic markets may differ widely. The U.S. Department of Justice, for example, typically defines the geographic markets depending on the type of waste and the means of disposal. The defined geographic markets are based on the location of demand rather than the location of disposal facilities. For instance, for direct-haul municipal solid waste disposal, the Department of Justice views the market on a local or regional level, but for small container commercial waste collection, the agency views the market on a local basis only. Even more, for infectious waste collection, the agency views the market based on transportation costs for transferring waste from customer sites to treatment facilities.

30. Because of the varying market sizes, waste management companies may have varying degrees of market power, depending on the market conditions at hand, which may contribute to a limited level of transparency and predictability. In addition, these heterogeneous market conditions further restrict the potential for market entry and cross-national competition amongst companies.

31. As a result, BIAC is in favour of efforts aimed at streamlining the differences between the various national and local legislations and the development of cross-national waste collection and recycling schemes that provide non-discriminatory access on reasonable, cost-oriented terms. This would provide market players with a higher level of transparency and would allow the achievement of efficiencies in the organisation of such services, which would benefit both market participants and the environment.

V Conclusion

32. In conclusion, key issues for business in relation to competition in waste management services include the need to facilitate entry of private players into markets for the collection and treatment of waste, including by designing tendering processes to ensure a level playing field between public and private entities and between new entrants and entrenched local players, the need for additional guidance on the application of competition rules to collective recycling systems, the importance of clarifying how environmental benefits and efficiencies can be balanced against competition restraints and the value of efforts to streamline the rules in these complex areas.

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16 See Department of Justice Challenge of Allied Waste, Inc.’s acquisition of Republic Services, Inc. (2008). In that challenge, the agency concluded that, absent intervention, the merger would likely reduce competition substantially in 13 separate municipal solid waste disposal markets across the country, and in nine separate small container commercial waste collection markets.

17 See Department of Justice challenge of Stericycle, Inc.’s acquisition of MedServe, Inc. (2009). In that challenge, the agency required the parties to divest all assets in certain state where the closest competitor for infectious waste collection was 300 miles away.