DG Competition Paper

Concerning Issues of Competition in Waste Management Systems

The views expressed in the present document are purely those of the Directorate General for Competition at the time of writing and may not in any circumstances be regarded as stating an official position of the European Commission.

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I. Introduction

A. The aim

1. The starting point for identifying issues of competition in the waste management sector is that competition and environment policies should be implemented in a mutually reinforcing way in order to best contribute to the Lisbon strategy goal of making the European Union the world's most dynamic, competitive and sustainable economy by 2010.

2. The Commission has adopted four formal decisions[1] in the area of antitrust related to packaging waste management systems and has resolved a number of other cases informally. In addition, Commission decisions concerning waste management systems have been adopted in the area of State aid.[2] Similarly, the decisions adopted by NCAs to date may contain valuable guidance as to how to safeguard competition in this area while ensuring the objectives of the waste directives. The Commission's Horizontal Guidelines[3] contain useful guidance on environmental agreements (paras. 179 *et seq*.) that will in many cases be applicable to agreements in the waste management sector.

3. Since 2003, the Commission and the NCAs have carried out an exchange of information and experience in the waste management sector, in particular as regards three types of waste and the corresponding EC Directives, namely: (i) packaging waste (Packaging Directive[4]), (ii) end-of-life vehicles (ELVs) also

[1] Commission decision of 16 October 2003, *ARA, ARGEV, ARO*, OJ 2004 L 75/59 (Article 81 EC) – appeal pending; Commission decision of 17 September 2001, *DSD*, OJ 2001 L 319/1 (Article 81 EC) – appeal pending; Commission decision of 15 June, 2001, *Eco Emballages*, OJ 2001 L 233/37 (Article 81 EC); and Commission decision of 20 April 2001, *DSD*, OJ 2001 L 166/1 (Article 82 EC) – appeal pending.

[2] E.g., Commission decision of 30 October 2001, *ARN*, OJ 2002 L 68/18 (with respect to a waste management system for ELVs); Commission decision of 16 December 2003, OJ 2004 C 69/23 (approval of a Finnish state aid scheme for the disposal of ELVs). Also see the Community guidelines on State aid for environmental protection, OJ 2001 C 37/3.

[3] Commission Notice – Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ 2001 C 3/2. For an example of an environmental agreement see Commission decision of 11 February 2000, *CECED*, concerning an agreement of producers to stop the production of the least energy-efficient washing machines, OJ 2000 L 187/47.

[4] Directive 94/62/EC of the European Parliament and Council of 20 December 1994 on packaging and packaging waste, OJ 1994 L 365/10. This Directive was amended by the Directive 2004/12/EC of the

known as "car wrecks" (ELV Directive[5]) and (iii) waste electrical and electronic equipment (WEEE) (WEEE Directive[6]). This Paper incorporates the results of the information exchange.

B. The Relevant Markets

4. The markets in question are relatively new. The packaging waste markets have developed gradually since the mid-1990s. As regards ELVs and WEEE, the markets in most countries are either in the process of being created or will be created in the future. In addition, developments occur at a different pace in different countries. At this stage, it may therefore not be possible to fully assess and identify the product markets and geographic markets in all of the sectors concerned. The markets will have to be defined on a case-by-case basis. However, it is clear that the markets for recycled materials will become a major if not the key resource market of the future.

5. The Commission has distinguished in previous merger decisions between ordinary waste and hazardous waste.[7] Within each of the two categories of waste, previous decisions have also distinguished between collection and disposal/treatment. Within the market for the collection of ordinary waste, the Commission has considered in previous decisions the possibility of two distinct product markets, the collection of ordinary household waste and the collection of ordinary industrial and commercial waste.[8] However, the question was left open.[9]

6. In the waste management sector, various agreements are concluded between undertakings operating either at the same or at different economic levels, i.e., horizontal and vertical agreements, respectively. These undertakings include: (i) producers/importers (with or without having defined waste-related obligations resulting from legislation or regulation), (ii) undertakings carrying out collection and/or sorting and/or other treatment of products and waste materials and (iii) undertakings carrying out the actual recovery[10], recycling[11] or disposal[12] of collected waste.

European Parliament and Council of 11 February 2004, OJ 2004 L 47/26 (hereinafter the Revised Packaging Directive).

[5] Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of-life vehicles, OJ 2000 L 269/34.

[6] Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE), OJ 2003 L 37/24.

[7] See Case M.1059, *Suez Lyonnaise/BFI*, at para. 11; Case M.2897, *Sita SverigeAB/Sydkraft Ecoplus*, at para. 10.

[8] Case M.916, *Lyonnaise des Eaux/Suez*, at para. 25.

[9] See Case M.2897, *Sita SverigeAB/Sydkraft Ecoplus*, at para. 10.

[10] The operations that fall under the term **recovery** are listed in Annex IIB to Directive 75/442/EEC on waste (OJ 1975 L 194/39).

[11] **Recycling** means the reprocessing in a production process of the waste materials for the original purpose or for other purposes but excluding energy recovery.

7. Accordingly, at least **three different levels of economic activities** may be identified which are relevant for this Paper, namely (i) the organization of systems/solutions to fulfill the obligations under the respective Directive, (ii) the collection, sorting and treatment of waste, and (iii) recovery services and secondary material.

8. It is also worth bearing in mind that different market conditions are likely to result not only from undertakings' actions or from requirements possibly laid down by NCAs, but also from different legislative/regulatory frameworks in the Member States that have implemented the relevant Community Directives. As regards the legislative framework, it is to be noted that both the WEEE Directive, which should have been transposed into the national laws of the Member States by August 2004, and the ELV Directive, which should have been transposed in 2002, still have to be (fully) implemented in a few countries. In both cases, the development of the respective markets is difficult to predict. At the same time, this uncertainty offers an opportunity to provide some guidance at an early stage in view of potential competition problems that may arise.

C. Structure and scope of this Paper

9. The following sections of this Paper will deal with three European Directives that specifically relate to the collection and recovery of (i) packaging waste (ii) ELVs and (iii) WEEE.

10. As regards packaging waste, the competition principles will be discussed in light of the decisions adopted by the Commission and the NCAs' experience in this sector to date. With respect to ELVs and WEEE, this Paper confines itself to shortly summarising the legal framework and to raising certain potential competition issues for further discussion.

11. The main focus of this Paper will be the application of Articles 81 and 82 EC to undertakings. Liability of Member States (e.g., in the context of implementing legislation) will only be briefly discussed. Public procurement issues remain outside the scope of this Paper.

12. While the scope of this Paper is limited to the three above-mentioned Directives, practical and legal experience relating to waste management systems not covered by these Directives (e.g., non-packaging waste paper such as newspapers,

[12] The operations that fall under the term **disposal** are listed in Annex IIA to Directive 75/442/EEC on waste.

traditional non-packaging household waste, tyres, or batteries[13]) may also be helpful in analysing potential competition issues.

D. General competition and environmental policy aspects

13. This Paper sets forth a number of competition issues in the waste management sector. The main competition policy objectives that are put forward in this Paper may be summarized as follows:

- *Preventing anti-competitive practices* such as, e.g., market sharing, price fixing and the exchange of other sensitive information.
- *Ensuring choices* between several waste management systems for the companies obligated under national legislation to recycle their waste.
- *Avoiding exclusive arrangements* of all kinds without solid and convincing economic justification thus allowing for increased competition and lower prices.[14]

14. These objectives must be achieved bearing in mind that in the waste management area competition policy is closely intertwined with environmental goals. On the one hand, efficient waste management policy relies on functioning markets and, therefore, competition policy can contribute to better environmental policy. On the other hand, adopting efficient, market-based instruments to achieve environmental objectives also ensures that competition problems, once a waste management scheme is in place, are reduced to a minimum. It is therefore fundamental to clearly identify the environmental goals behind the Directives and determine the most efficient market instruments capable of achieving these goals. For example, while the "free take-back" and "producer responsibility" principles under the ELV and WEEE Directives aim at supporting the achievement of the environmental goals provided for in the Directives, they may also result in distortions of competition. To the extent that the Directives leave discretion as to their implementation it should be ensured that the most effective solution from an environmental and competition perspective is chosen. To take up the above example, "free take-back" or "producer responsibility" may be conducive to but may not be strictly necessary for the achievement of recycling targets and may be doubtful from a competition point of view. In particular, non-manufacturers of cars should not be foreclosed as collection and dismantling companies on the market for ELVs. These objectives are more easily met if legislation proposals are thoroughly screened as to their impact on competition before being implemented.

[13] For example, the Commission has dealt informally with an Italian collection and recycling system for batteries (Competition Policy Newsletter, 2001 No.1, p. 39). A number of NCAs have dealt with cases concerning, e.g., batteries or waste tyres.

[14] A recent example of cost savings as a result of competition policy enforcement is the DSD decision (see footnote 1) in which the Commission required DSD to reduce the exclusive duration of its service agreements with collecting companies which led to a cost reduction of around € 200 million as set forth in more detail at para. 81 below.

II. Packaging Waste

A. The Packaging Directive

15. The objective of the Packaging Directive is to harmonise national measures concerning the management of packaging and packaging waste in order to prevent any impact thereof on the environment and to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the Community (Article 1). The Packaging Directive sets targets for recycling and recovery and incineration at waste incineration plants with energy recovery for packaging waste to be achieved by the Member States. The Member States had to reach a first set of targets by June 2001 (Article 6).[15] The Revised Packaging Directive provides for more ambitious recovery and recycling targets, which the Member States will have to reach by 2008.[16]

16. The Member States shall take the necessary measures to ensure that systems are set up to provide for (i) the return and/or collection of used packaging and/or packaging waste from the consumer, other final user, or from the waste stream in order to channel it to the most appropriate waste management alternatives and (ii) the reuse[17] or recovery including recycling of the packaging and/or packaging waste collected, in order to meet the objectives laid down in the Packaging Directive (Article 7 par. 1).

17. The return, collection and recovery systems shall be open to the participation of the economic operators of the sectors concerned and to the participation of the competent public authorities. The systems shall also apply to imported products under non-discriminatory conditions, including the detailed arrangements and any tariffs imposed for access to the systems, and shall be designed so as to avoid barriers to trade or distortions of competition in conformity with the EC Treaty (Article 7 par. 1).

18. The Packaging Directive does not explicitly mention the principle of producer responsibility. It does not specify who should bear the costs for the collection and recovery of packaging waste.

[15] Greece, Ireland and Portugal may attain lower targets and postpone the deadline. Transitional provisions concerning the targets for the new Member States are contained in the respective Annexes to the Act of Accession.

[16] See Article 6 of the Revised Packaging Directive. Greece, Ireland and Portugal may postpone the deadline until 2011. Pursuant to Directive 2005/20 EC (OJ L 70/17), Cyprus, the Czech Republic, Estonia, Hungary, Lithuania, the Slovak Republic and Slovenia may postpone the deadline until 2012, Malta until 2013, Poland until 2014 and Latvia until 2015.

[17] **Reuse** means in essence any operation by which components of products are used for the same purpose for which they were conceived (see, e.g., Article 2 No. 6 of the ELV Directive).

B. Implementation in the Member States

1. Legislation

19. All Member States have implemented the Packaging Directive into national law, often by enacting Packaging Ordinances.

20. Most Member States introduced the **principle of producer responsibility**, i.e., manufacturers, distributors and importers of packaging are responsible for the collection and recovery of their packaging waste. They may fulfil their obligations either by taking back used packaging from the customers at the points of sale (**individual solution**), or by taking part in a system, which guarantees a regular collection of packaging waste from the final consumer throughout the distributors' sales territory (**collective system**). Nearly all Member States allow for individual solutions (or individual compliers) as well as for collective systems.

21. Most Member States did not grant exclusive or special rights to companies operating collective or comprehensive[18] systems. Their laws do not prohibit the creation of alternative systems and do not prevent the obliged companies from opting for individual solutions.

22. Some Member States require that packaging taking part in a collective system be marked in some form or that its participation be otherwise indicated to the consumers (e.g., Germany, France), whereas the laws of other Member States contain such a requirement for packaging which is taken back on an individual basis (e.g., Austria). Some Member States specifically require the use of the trademark the "Green Dot" on packaging taking part in a system (e.g., Portugal). In other Member States the marking of packaging is not a requirement at all (e.g., Netherlands, Finland and UK).

23. Some Member States require that collection systems for household packaging waste have a certain geographical coverage, e.g. the entire territory of the Member State. This may render difficult the market entry of new waste management systems. At the same time, such an obligation may avoid the "cherry-picking" of the most profitable regions (in particular cities) by waste management systems.

24. A few Member States limit the scope of collective systems to household packaging (e.g., Germany). In other Member States, collective systems may be set up both for household and commercial packaging (e.g., Austria). In the latter case, legislation sometimes requires a separation of the cost structures of the household and the commercial sector (e.g., Austria).

[18] The term "comprehensive system" hereinafter describes a system in which all producers concerned participate. It is clear that comprehensive systems would have to be examined very critically.

25. In the UK, obliged businesses are required to produce „Packaging waste Recovery Notes“ (PRN) to prove that their recycling and recovery targets have been met. They may do so either by contracting with an accredited reprocessor, by joining a collective system or by buying PRN at the „Environment Exchange“. The PRN are therefore tradable. However, only obliged businesses, reprocessors and systems have the right to acquire them.

2. Factual situation

26. Most of the systems are limited to organisational and financial management tasks. The collection and recovery services are subcontracted by the system and carried out by specialized companies. These contracts are normally awarded on the basis of a tender procedure.

27. In most Member States, collective systems have been established. The systems do, however, vary appreciably. There are highly cooperative approaches on the basis of agreements of a self-binding character for the entire industry concerned (e.g., Netherlands) as well as systems set up by some obliged companies (e.g., Austria, Germany, France). Some systems operate on a cross-sectoral and cross-material basis (e.g., ARA, DSD, Eco Emballages, Valpak), whereas others focus on specific packaging waste sectors or specific packaging materials (e.g., Difpak). Some of the specific systems, while enjoying significant commercial independence, operate under the umbrella of a coordinating cross-sector “holding” organisation. Some systems have established different entities in charge of certain activities and materials (e.g., within the ARA system, ARGEV is responsible for metal packaging, ARO for packaging made of paper, etc.) whereas other systems are active on a cross-sectoral basis (e.g., DSD).

28. Whereas some systems are limited to household packaging (e.g., DSD, Eco Emballages) or commercial packaging (e.g., Val-i-Pac), others cover both household and commercial packaging (e.g., ARA).

29. In most Member States one cross-material system predominates (e.g., ARA in Austria, DSD in Germany, Eco Emballages in France, Valpak in the UK) or one material-specific system predominates per material (e.g., Svensk GlasAtervinning for glass in Sweden). Competitors usually only operate at the market fringes, either by offering individual solutions for specific sectors (e.g., Belland, Vfw, Interseroh in Germany) or by offering systems for specific sectors or materials (e.g., Ökobox and EVA in Austria, Difpak in the UK). In some Member States alternative cross-sectoral and cross-material systems exist (e.g., Biffpack, Wastepack in the UK, Adelphe in France, Landbell in the German Federal State Hessen) but their market shares are appreciably lower than those of the respective ”leading” systems.

30. Some systems require that the packaging taking part in the system bear the Green Dot trademark (e.g., DSD), whereas other systems allow the non-obligatory use of the Green Dot (e.g., ARA). Some systems do not use the Green Dot trademark or any other trademark for the packaging at all (e.g., Valpak in the UK, the Dutch system, the Swedish system).

31. There are important differences as to the recycling rates reached in the Member States (see Report of the Commission to the Council and the European Parliament of 19 May 2003, COM(2003) 250 final, pages 145 ff.). The types of costs covered and the prices for recycling charged by the various systems in the Member States also differ to a considerable extent. A detailed analysis of the cost sharing between public authorities and recycling systems in four countries can be found at the Commission's website.[19]

C. Competition principles

32. In the area of packaging waste management systems, the Commission has to date adopted four decisions[20] and issued several comfort letters.

1. Market definitions[21]

33. In general, three principal levels of activities may be distinguished as regards packaging waste management systems, namely (i) the organisation of systems/alternative solutions to fulfil the environmental obligations, (ii) the collection/sorting of packaging waste and (iii) the recovery/marketing of secondary material. Each level has been found by the Commission to constitute a different market.

1.1. The market for the organisation of systems to fulfil the obligations under the Packaging Directive

34. At the first level (or market), collective systems and alternative solutions organise the collection and recovery of packaging waste. They offer their services to the companies obliged by the national laws implementing the Packaging Directive. Obliged companies may either take part in a collective system or opt for an individual solution. Both possibilities appear to be equally well suited to meet the targets of the Packaging Directive. The two options are thus, in principle, to be considered **basically interchangeable**.

[19] Cost-efficiency of packaging recovery systems: the case of France, Germany, the Netherlands and the United Kingdom: http://europa.eu.int/comm/enterprise/library/lib-environment/libr-environment.html
[20] See footnote 1.
[21] For guidance as regards the definition of relevant product and geographic markets, see the Commission Notice on the definition of relevant market for the purposes of Community competition law for guidance concerning the determination of relevant product and geographic markets, OJ 1997 C 372/5.

a. Sub-markets for household packaging waste and commercial packaging waste

35. In general, the practical organisation, the functional substitutability of the products and services from a demand side perspective as well as the legal requirements differ appreciably between the collection of packaging waste from private consumers (**household packaging waste**) on the one hand and from the industry and large commercial enterprises (**commercial packaging waste**) on the other hand. For this reason, the market for the organisation of systems/solutions for household packaging waste may normally be distinguished from the market for the organisation of systems/solutions for commercial packaging waste.

b. Sub-markets according to specific sectors or specific materials

36. Depending on the specific rules in each Member State, it may also be necessary to identify sub-markets for systems/solutions for specific sectors or for specific materials.

1.2 The market for the collection and sorting of packaging waste

37. The second level (or market) is that for the collection and sorting of packaging waste.[22] In this market, the systems/solutions obtain the collection and sorting services from private and public companies for packaging waste. However, the collection and sorting markets may also constitute separate markets.[23]

a. Sub-markets for the collection and sorting of household packaging waste and commercial packaging waste

38. Within the market for the collection and sorting of packaging waste a sub-market for the collection and sorting of **household packaging waste** may, depending on the specific circumstances in the Member States, be distinguished from a sub-market for the collection of **commercial packaging waste**[24] for two principal reasons.

[22] The market for the collection and sorting of packaging waste needs to be distinguished from the market for the collection and sorting of traditional household and residual waste because of its **substantially broader service profile**. Unlike traditional household and residual waste, packaging waste is collected and sorted separately according to different materials and with special collection and sorting facilities. In addition, unlike traditional household and residual waste (which is usually disposed in landfills), packaging waste is used for recycling.

[23] Collection and sorting may constitute separate markets, for example, if waste management systems carry out separate tendering procedures for collection and sorting services (e.g., DSD in Germany) or different companies are carrying out the two activities.

[24] Commercial packaging waste often accumulates with other types of industrial waste. Although the disposal logistics are to some extent comparable (source location, collection frequency, waste characteristics), differing legal requirements have an effect at the collection and sorting level. In particular, collectors and sorters must normally comply with **specific reporting rules as regards packaging waste**.

39. First, **logistical requirements of collection differ considerably**, e.g., with regard to the number of collection points that have to be serviced, the average waste volume to be collected from each collection point, the number of containers required, and the intensity of the collection schedule. As regards commercial packaging waste, the number of collection points is relatively limited. In addition, the packaging waste volume to be collected is fairly substantial and the collection points may therefore be serviced separately by different collectors. Conversely, household packaging waste has to be collected in relatively small amounts from a large number of households or regional collection points in the respective local authority's area. The collection of household packaging waste from final consumers is therefore characterized by the existence of strong network economies.

40. Second, there are **considerable differences in terms of the materials collected**. Tinplate, aluminium and plastic from private households are often collected together and have to be sorted subsequently. Sorting takes place in relatively capital-intensive sorting plants which are not needed for the sorting of commercial packaging waste.

b. Sub-markets according to specific sectors or specific materials

41. Depending on the specific circumstances in each Member State, it may also be necessary to identify sub-markets for certain packaging waste sectors or for specific materials (e.g., glass, paper, metal) due to differing sorting and recycling facilities.

1.3. The market for recovery services and secondary material

42. The third relevant level (or market) is that for recovery services and secondary material. Recovery companies offer their services to the collective systems or individual solutions, which in turn organise the delivery of the collected and sorted packaging waste material to the recovery companies.

43. In general, each material to be recovered constitutes a separate market (e.g., glass, paper, metal). However, it is important to note that these markets may not only include packaging waste but also other types of waste of the same material.

As a result of the reporting requirements, the collection of packaging and non-packaging waste of similar types of material in the same container may be difficult. Consequently, depending on the national laws, collection and sorting of commercial packaging waste may form a separate market from the collection and sorting of **other types of industrial waste**.

1.4. Geographic markets

44. As regards **household packaging waste**, it would appear that the supply and demand conditions including the legal framework at the first and second level continue to vary in the various Member States. Thus, the relevant geographic market for the organisation of the systems/solutions as well as for the collection and sorting of household packaging waste would be regional or national as a result of existing infrastructures and transport costs.

45. The corresponding geographic markets for **commercial packaging waste**, in particular for collection and treatment services, are, at this stage, also more likely to be regional or national but may also be wider.

46. The geographic market for **recovery services and secondary material** may be national but may also be EU-wide since this market is becoming increasingly internationalised. Some smaller Member States do not have recycling facilities and have to export their waste to other Member States. The geographic scope may also depend on the material in question (e.g., there appears to be more cross-border traffic of paper than glass). Transport costs play an important role in this respect.

47. As a general matter, the geographic market definition may also be influenced by national legislation which may impede or render difficult the export of waste. The Packaging Directive does not contain an obligation to recover waste in the Member State where it was collected and does not impede cross-border transports.

2. Possible competition concerns

2.1. General considerations for the setting up of waste management systems for packaging waste

48. The Packaging Directive stipulates that Member States shall ensure that systems are set up to fulfil the environmental obligations. Thus, in most Member States the obliged companies cooperate in systems of some form in order to discharge their obligations concerning packaging waste. Such cooperation may give rise to competitive concerns. It is important to note in this respect that the fact that the Packaging Directive envisages the possibility of systems, including collective systems, does not in itself prejudge their legality under EC competition rules.

a. Liability of undertakings

49. Comprehensive and collective systems established by economic operators will have to be closely scrutinized under Articles 81 and 82 EC. As regards Article 81(3) EC, any effects of economies of scale and the passing on of beneficial

effects to consumers as well as the "indispensability" of the comprehensive or collective system will have to be clearly established. Implementing legislation (or other State measures) may also play an important role in the context of liability of undertakings as they may give rise to exceptions from undertakings' liability under Articles 81 and 82 EC on account of (i) the so-called state action defence or (ii) Article 86(2) EC (see para. 54 below).

50. *State action defence.* According to this defence, undertakings are not liable under Articles 81 and 82 EC where the State by measures of public authority (legislation or administrative acts) **requires** them to engage in anti-competitive conduct.[25] This means that undertakings remain liable if the State merely encourages, favours or facilitates such conduct. Moreover, it is important to recall the recent *CIF* judgment[26] which clarified the scope of the state action defence. It confirmed the duty of NCAs to adopt a decision to disapply national law which contravenes EC competition law thereby removing the undertaking's state action defence as soon as the decision by the NCA has become definitive.[27]

b. Liability of Member States

51. It must be borne in mind that not only the actions of the undertakings involved but also actions by Member States, especially implementing legislation, must be considered for any competition law analysis in the packaging waste management area. Implementing legislation (or other types of State measures) by a Member State may give rise to liability of the Member State for a violation of EC competition law in particular under (i) Articles 3(1)(g) and 10(2) EC in conjunction with Articles 81 and 82 EC and (ii) Article 86(1) EC in conjunction with Articles 81 and 82 EC.

52. *Articles 3(1)(g), 10(2), 81 and 82 EC.* It is established case law that Article 81 EC (and Article 82 EC[28]) read in conjunction with Articles 3(1)(g) and 10(2) EC, requires the Member States not to introduce or maintain in force measures, including of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.[29] This Paper will not set out in detail

[25] The same applies where the State creates a legal framework which itself eliminates any possibility of competitive activity by the undertakings; see, e.g., Joined Cases C-359/95 P and C-379/95 P, *Commission and France v Ladbroke Racing*, judgment of the ECJ of 11 November 1997, ECR [1997] I-6265, at para. 33.

[26] Case C-198/01, *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato*, judgment of the ECJ of 9 September 2003, ECR [2003] I-8055.

[27] As long as the state action defence is valid (but no longer) the undertakings enjoy immunity from fines and also immunity from damage claims.

[28] Liability under Articles 3(1)(g) and 10(2) EC has in the past usually arisen with respect to Article 81 EC but may also be relevant in the context of Article 82 EC.

[29] E.g., Case C-35/99, *Arduino*, judgment of the ECJ of February 19, 2002, ECR [2002] I-1529, at para. 34.

the situations in which Member State liability has been found in previous cases.[30] An example in the packaging waste sector could be a State measure that, in addition to providing for the establishment of collection and recovery systems, recommends or requires that producers of packaged products cooperate in their respective sectors in order to devise identical packaging for their competing products (leading to communality of costs and price alignment).[31]

53. *Article 86(1) EC.* Article 86(1) EC imposes an obligation on Member States, as regards public undertakings or undertakings to which Member States grant special or exclusive rights, not to enact nor to maintain in force measures contrary to rules of the EC Treaty, in particular those rules provided for in Article 12 and Articles 81 to 89 EC. In the field of competition, Member State liability usually arises under Article 86(1) EC in conjunction with Article 82 EC. Under Article 86(1) EC a Member State may, under certain circumstances, be liable for the actual or potential abuses carried out by the undertakings. This Paper will not set out in detail the different situations in which Article 86(1) EC has been found to be infringed in connection with Article 82 EC.[32] It is, however, worth recalling the preliminary ruling in the *Dusseldorp* case[33] where the ECJ found that an exclusive right to waste treatment combined with a prohibition for those obliged to have their waste treated to export their recoverable waste amounted to an inevitable abuse, namely a limitation of markets contrary to Article 86(1) EC in conjunction with Article 82 EC. An example in the packaging waste sector could be a State measure that would lead, e.g., to the application of discriminatory membership criteria vis à vis foreign participants by the dominant collective waste packaging system (as an undertaking within the meaning of Article 86(1) EC).

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[30] The Court has stated repeatedly that if a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere, it can be held liable under Articles 3(1)(g), 10(2) and 81 EC (see, e.g., *Arduino*, *supra*, para. 35).

[31] Possible consequences of measures adopted or maintained by a State that are contrary to Articles 3(1)(g), 10(2) and 81, 82 EC include: (i) the Commission and other Member States may start infringement proceedings under Articles 226 and 227 EC; (ii) by virtue of the primacy of Community law, national courts and national administrative bodies including NCAs have a duty to interpret State regulations in the light of those Community provisions and, if necessary, a duty to disapply State regulations which are in conflict with the EC Treaty; and (iii) persons negatively affected by the State measures in issue can introduce an action for damages against the Member State for breach of Community law in national courts.

[32] Article 86(1) EC in conjunction with Article 82 EC has been found to apply in particular in cases where (i) the Member State creates a situation in which the undertaking is manifestly unable to meet demand (e.g., Case C-41/90, *Höfner & Elser v Macrotron*, judgment of the ECJ of 23 April 1991, ECR [1991] I-1979), (ii) the Member State creates a situation where there is a concrete likelihood that the undertaking infringes Article 82 EC, for example, because of a conflict of interest (e.g., Case C-260/89, *ERT v Dimotiki*, judgment of the ECJ of 18 June 1991, ECR [1991] I-2925) and (iii) where the Member State extends the undertaking's dominant market power into neighbouring markets without objective justification (e.g., Case C-18/88, *RTT v GB-Inno-BM*, judgment of the ECJ of 13 December 1991, ECR [1991] I-5941).

[33] Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV and others*, judgment of the ECJ of June 25 1998, ECR [1998] I-4075.

54. *Article 86(2) EC.* According to Article 86(2) EC, the EC Treaty rules do not apply to undertakings that are entrusted by a Member State with the operation of services of general economic interest if the application of EC Treaty rules would obstruct the particular tasks assigned to them. Article 86(2) EC may be an exception available to undertakings with regard to their duties under Articles 81 and 82 EC as well as an exception available to Member States with regard to their duties under, e.g., Articles 3(1)(g), 10(2), 81 and 82 EC as well as Article 86(1) EC in conjunction with Article 82 EC. As an exception to the competition rules, Article 86(2) EC is to be interpreted narrowly. In this context, e.g., exclusivity for operators of packaging waste management systems may be justified in situations that require State intervention to address a particular environmental problem. In the *Sydhavnens Sten & Grus* case[34] the ECJ recognised that **waste management may constitute a service of general economic interest** within the meaning of Article 86(2) EC. The case concerned a municipality which was faced with a serious environmental problem because of insufficient capacities to recycle building waste. The ECJ concluded that a State-granted exclusive right to receive building waste in order to ensure a sufficient flow of waste for the new building waste facility could be justified under Article 86(2) EC where such exclusivity was required (and the least restrictive measure) for the accomplishment of the mission of general economic interest.

2.2. Cooperation between obliged companies

55. In nearly all Member States, the obliged companies cooperate in order to establish a system for the management of packaging waste. Most of these systems are non-profit legal entities. Shareholders are often the obliged companies.[35] This kind of cooperation may give rise to certain competition concerns.

56. According to the Commission's Horizontal Guidelines (para. 182), collection/recycling agreements may relate to and have effects on two markets, i.e., (i) the market on which the parties are active as producers or distributors (**spillover effects**) and (ii) the markets of collection services potentially covering the good in question (in particular **effects of bundling of demand**).

a. Spillover effects in the markets for the packaged products

57. Obliged companies may be competitors in the market for the packaged products. Their cooperation to fulfil the obligations under the Packaging Directive may therefore have spillover effects in the market for the packaged products. In particular, cooperation at the packaging waste level may potentially lead to (i) the

[34] Case C-209/98, *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune*, judgment of the ECJ of 23 May 2000, ECR [2000] I-3743.

[35] In Germany, DSD used to be owned by the product and packaging manufacturers and retailers. DSD was recently acquired by an independent American investor company. The sale of DSD had been requested by the German Bundeskartellamt.

development of a common design of the packaged product (or the packaging) and (ii) **communality of costs** as regards the packaged products through uniform costs of collection and recovery.

58. As regards the development of a common design, competitive concerns would appear to be limited. In particular, the cooperation under the Packaging Directive only relates to the packaging waste but not to the packaged products. For this reason, there seems to be little risk that the parties limit their ability to devise the characteristics of their products or the way in which they produce them (for that aspect see Horizontal Guidelines, para. 189).

59. With respect to uniform costs of collection and recovery, two potentially adverse consequences have to be taken into account for any competition law analysis. First, the costs related to the collection and recovery would be harmonized (leading to communality of costs) and cease to be the subject of competition between the cooperating companies thus depriving the consumer from benefiting from the effects of such competition, i.e. a lower price of the packaged product. For example, the Commission found in *VOTOB* that a waste management agreement by six tank storage operators that was financed by a fixed fee constituted a restriction of competition since the fixed fee harmonized the costs and thus excluded competition on an important price component.[36] Second, there would be a reduced incentive for innovative design or improved recyclability of new products thus undermining the environmental objectives.

60. In the case of packaging, the costs of the collection and recovery normally represent only a small part of the total costs of the products. However, it will have to be carefully examined on a case-by-case basis whether price competition in the markets of the packaged products is appreciably restricted or whether the development of better and more environment-friendly products is hampered as a result of such cooperation on waste management.

61. As a general principle, it is clear that, to the extent that the cooperation on waste management would be "abused" by the participants to exchange sensitive information or to fix or align prices of the packaged products, Article 81 EC would be violated.

62. With respect to the last consideration, it is to be noted that concerns would appear limited in cross-sectoral systems. In particular, as the relevant legal obligations concern all types of different packaged products including, e.g., food products, clothing, electrical equipment and cement, any cooperation is industry-wide and not sector-specific. Therefore, while certain obliged companies participating in a cross-sectoral system may be competitors in the markets for the packaged

[36] *VOTOB*, 22nd Commission Report on Competition Policy [1992], at paras. 177 *et seq*.

products, the cooperation would not seem sufficiently focused to create an appreciable risk of a collusion in the markets of the packaged products.

b. Effects of bundling of demand for collection and sorting services

63. The cooperation of obliged companies may lead to a bundling of the demand for collection and sorting services for packaging waste. The market power of the system increases the more obliged companies with important market shares participate in a system. The bundling of demand limits the choice of collection/sorting and recycling companies and, in the case of a *de facto* or *de iure* monopoly of the system, leaves these companies only a single system that they may enter into agreements with.

aa. Household packaging waste

64. A collective system for household packaging waste will create a strong demand side on the relevant market for the collection and sorting of household packaging waste. Competition concerns may conceivably (but not necessarily[37]) arise, for example, if a collective system covers not only packaging waste but also other types of waste because this may increase the effects of bundling of demand. Under specific circumstances, it may also be appropriate to prevent a system with a *de facto* monopoly for household packaging waste from entering the market for commercial packaging waste, or *vice versa*.

65. However, it should also be taken into account that the collection of household packaging waste entails **important network economies**. It may only be viable to collect household packaging waste with a collection infrastructure separate of that for other household waste if a sufficient amount of household packaging waste can be collected. For this reason, a certain bundling of demand would seem to be the inevitable consequence of the creation of viable systems for the collection of household packaging waste. However, it is essential to ensure that this bundling of demand does not lead to unjustified restrictions of competition on the downstream markets (competition between collectors) and upstream markets (competition between systems). Thus, as will be described in more detail below at paras. 80 *et seq*., the Commission found in previous decisions that the contracts between a system and the collectors should be of limited duration, there should be a transparent, objective and non-discriminatory tender procedure, and the system must not prevent access of competitors to the collection infrastructure. If alternative solutions to the collection of household packaging waste are a realistic option in a Member State, it might be particularly difficult to justify the bundling of demand resulting from a comprehensive system.

[37] Potential synergy effects will, for example, have to be considered in this respect.

bb. Commercial packaging waste

66. Systems for commercial packaging waste may also create a strong demand side on the market for the collection of this type of packaging waste. However, as there are less network economies, it is easier to set up alternative waste collection structures with respect to commercial packaging waste. The justification for the setting up of collective and in particular comprehensive systems would therefore be more difficult.

2.3. Relationship between systems and obliged companies

67. As a general matter, collective systems should apply objective, transparent and non-discriminatory conditions as regards membership criteria and with regard to fees levied by the system.

a. Fees of the system

68. In general, the collective systems are financed by fees paid by the obliged companies taking part in the system. In most collective systems, the fee depends on the amount of packaging which is exempted as a result of the company's participation in the system, the packaging waste volume and the type of material. The fee should also **reflect the costs of the collection and recovery**.

69. The various systems apply different rules as regards the determination of the level of fees. Such fee arrangements may, under certain circumstances, also infringe competition laws. For example, the payment provisions of DSD's licence agreement required the obliged companies to pay for all their packaging placed on the German market with the Green Dot trademark, irrespective of whether DSD actually provided its exemption service to them or not. This contractual arrangement violated the **principle of "no service, no fee"**. Under the agreement, abuse occurred where an obliged company used DSD's exemption service only for some of its packaging or dispensed entirely with DSD's exemption service in Germany, but took part in a Green Dot system in a different Member State. In these cases, the DSD system either led to a double payment situation for participating companies; or it forced them to introduce double-packaging lines as the packaging taking part in the DSD system must bear the Green Dot. In both situations the contractual arrangement had the effect of dissuading the companies from contracting with competitors of DSD. On 20 April 2001, the Commission adopted a decision under Article 82 EC, according to which DSD's fees must relate to the exemption service actually provided and not to the use of the Green Dot.[38]

[38] See footnote 1.

70. The same reasoning applies if a dominant system tries to force all producers whose products bear the "Green Dot" to use the services of the system. This would be a particular disadvantage for third-country packaging that is marked with the "Green Dot" (e.g., because the producer is in another Member State member of a "Green Dot" system requiring the use of the "Green Dot") and distributed in several Member States.

71. The fee structure of a dominant system can be abusive if it offers rebates designed to attract the entire amount of packaging of an obliged company.

b. All or nothing rule

72. Some systems require that the participants transfer all of their obligations to the system, i.e., the members may either contract for all of their packaging or for nothing. The effect of the all or nothing rule is to deny alternative systems the possibility to compete for the collection services. At the same time, the rule may prevent undertakings from choosing the most cost-effective "mix" of compliance options. The all or nothing rule has the effect of restricting competition between systems and alternative solutions. It also prevents obliged companies from contracting only a certain amount of packaging of one material with an existing system and the remaining amount with a new entrant that cannot yet cover the entire amount.

73. The all or nothing rule therefore constitutes a practice of tying severable services. As such, the rule infringes Article 81(1) EC to the extent that it gives rise to appreciable restrictive effects on competition and appreciable effects on trade between Member States. The effects are appreciable in case of systems with high market shares or in case of systems with relatively small market shares if there are cumulative effects of parallel networks of similar agreements. The all or nothing rule may also infringe Article 82 EC in case the systems are dominant.

74. In 1998 and 2000, the Commission in a number of cases accepted the all or nothing rule under Article 81(3) EC given that the operation of the rule was **necessary to encourage vital investment** in the UK's collection and recycling infrastructure (comfort letters in the Valpak, Biffpack, Wastepak and Difpak cases).

75. However, the all or nothing rule cannot be exempted when it becomes evident that further substantial investment in waste collection infrastructure is no longer necessary to fulfil the obligations under the Packaging Directive and/or the rule may no longer be regarded as an effective means of securing new investment. Consequently, in all Member States with established systems that reach the recovery and recycling targets, the all or nothing rule cannot be regarded as indispensable for the functioning of these systems.

2.4. Relationship between systems and collection/recovery (recycling) companies

76. In some cases collective systems may have as shareholders businesses active in the recycling of secondary materials.[39] There may thus be a danger that collective systems privilege contracting with their own shareholder companies for the treatment/recycling of the materials. A possible way to mitigate this risk is to ensure that collective systems use transparent and non-discriminatory tendering procedures.

a. Exclusive collection agreements

aa. Exclusivity in favour of the collection/recovery companies

77. Many collective systems contract with only one collector for each collection district. This establishes an exclusive contractual relationship in favour of the collection/recovery companies.

78. According to Article 3(1) of the Block Exemption Regulation on vertical agreements (BER verticals),[40] exclusive agreements with a duration of five years or less[41] are exempted if the market share of the supplier does not exceed 30%. The market share of the recycling companies is therefore relevant. For example, if the relevant product market is the collection of household packaging waste and is regional in scope (e.g., corresponding to the respective collection district), the recycling company which provides services for a dominant system will normally be dominant as well and its market share will therefore exceed 30%, thus rendering inapplicable the block exemption under the BER verticals. However, if the product or geographic markets are defined wider, the market share of each recycling company might be below 30%. In this case a withdrawal of the benefits of the BER verticals according to its Article 6 may be considered if the system establishes a network of exclusive agreements.

79. Article 3(2) BER verticals which refers to the market share of the buyer, i.e., the system, only applies to agreements containing exclusive supply obligations. Such exclusivity in favour of the system is in principle not accepted.[42]

80. If the BER verticals does not apply, a case-specific analysis is necessary taking into account the market conditions, the market position of the collective system and the duration of the collection agreement. The relevant market for the collection and

[39] This is not necessarily the case. For example, in Germany, the Bundeskartellamt obliged the recycling companies to leave DSD already prior to the acquisition by an independent US investor. In the Austrian ARA system, recycling companies have no voting rights in case of conflicts of interest.
[40] Regulation 2790/99 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999 L 336/21.
[41] See Article 5 BER verticals.
[42] See para. 83 of this paper.

sorting of **household packaging waste** is characterised by very specific supply-side conditions (strong network economies, disposal traditions of consumers, container instalment constraints). For this reason, efficiency gains, but also considerations of reliability and continuity favour contracting with only one collector. A certain duration of the agreement is necessary in order to enable the collectors to achieve an economically satisfactory return on their investment. For these reasons, exclusivity may be accepted under Article 81(3) EC if it must be regarded as indispensable under the specific circumstances of the case. At the same time, a strict limitation of the duration will give those collectors which were not selected by the collective system in the first round the possibility to bid again for collection agreements more quickly. It may also allow those collectors that do not currently hold a collection agreement to better "survive" economically the period for which they did not obtain the contract. Such exclusivity would much less likely be justified for commercial packaging waste.

81. In the *DSD* decision, the Commission scrutinised long-term exclusive agreements, based on a detailed economic analysis which used an important amount of data provided by a sample of recycling companies, and required a significant reduction of the duration by four years. As a consequence, the tender for new service agreements started four years earlier than initially foreseen by DSD, i.e., in 2003 instead of 2007. The new service agreements reduce DSD's costs for the collection and sorting of plastic packaging by more than 20% (about € 200 million per year). This will lead to a reduction of the fees which DSD charges to its clients. It also demonstrates that decisions in this area have an immediate consumer impact by providing greater supplier choice and lower prices. For future collection agreements, a number of elements will have to be taken into account including, e.g., the market power of the system, the positive network effects and the necessary investment. As a general matter, a duration exceeding three years for household packaging waste collected for a dominant system should not be considered indispensable. In the *ARA* decision, the Commission accepted a binding contract duration of three years (after these three years, ARA is free to terminate the contracts). ARA undertook to terminate the agreement and to carry out a tender procedure after a five-year period at the latest.

82. The individual conditions of the tendering procedure may also have an important impact on the competitive environment in the market. For example, following a large number of uneconomic offers in the first round of DSD's tendering procedures in Germany, DSD – at the suggestion of the German Bundeskartellamt – amended the tender rules and adopted the following two measures: (i) companies with a recycling turnover exceeding €50 million could neither work together in working groups nor act as sub-contractors for each other (this prevented large companies capable of submitting independent bids from cooperating with other large companies rather than submitting own bids); (ii) DSD carried out separate tendering procedures for the collection and sorting of light packaging (this prevented that medium-size companies without sorting

facilities refrained from submitting own bids on the ground that large companies would deliberately withhold such sorting facilities).

bb. Exclusivity in favour of systems

83. As regards exclusivity clauses in favour of the systems, it follows from the DSD and ARA decisions that collectors and recyclers should not be obliged to contract exclusively with one system. Both DSD and ARA undertook not to impose exclusivity clauses on their collectors.

b. Shared use of the collection infrastructure

84. As mentioned earlier at para. 80, the relevant market for the collection and sorting of **household packaging waste** is characterised by very specific supply-side conditions (network economies, disposal traditions of consumers, container instalment constraints), which in many cases render the **duplication of existing collection infrastructures at households economically not viable**. Therefore, unrestricted access to and the unlimited sharing of the collection facilities of the collectors working for the dominant system is essential for competition on the down-stream market for organising the take-back and recovery of packaging waste. The collectors operating these facilities must not be prevented from offering the same facilities to competitors of the dominant system.

85. The requirement to share collection infrastructure is one of the key principles developed in the DSD Article 81 decision which was confirmed in the ARA decision.[43] In view of the vital importance of unimpeded access to the collection infrastructure in a market characterised by special supply conditions, the Commission imposed conditions in the decision to the effect that DSD/ARA could not prevent its collectors from opening their facilities to competitors of DSD/ARA. The conditions of such shared use were discussed at length, e.g., in the ARA decision.[44] Difficulties may arise if dominant systems under a shared use obligation attempt to create obstacles for their competitors. In this context a question may also arise whether competing systems may cooperate in order to share certain costs (e.g., consumer information costs).

c. Marketing of secondary material

86. Collected and sorted packaging material (e.g., paper, glass, metal, plastic) may be reused as a secondary material for various new products. Some systems enter into agreements which provide that the collector is not entitled to market the collected materials itself. For a competition law analysis of such a restriction, a distinction

[43] See footnote 1.
[44] See footnote 1, at paras. 288 *et seq*. In this context the issue of adequate reimbursement as regards the shared use of the facilities may arise.

needs to be made between systems in which the collectors become owners of the material and systems in which the systems retain ownership.

87. On the basis of, e.g., the Commission decision in ARA,[45] it can be argued that restrictions on marketing may be accepted in cases in which the system retains ownership, i.e., the system may then be able to determine the recovery company to which the collector must deliver the collected packaging waste. Conversely, collectors that are owners of the material should not be prevented from exploiting the material commercially. The right to commercialise the materials would allow the systems to establish themselves as strong or even dominant suppliers of secondary material. In systems where collectors obtain ownership, a restraint on commercialisation may only be accepted if there are negative market prices (e.g., due to lack of demand) for a particular material (e.g., plastic). In these cases, the collectors usually have little incentive to appropriately recycle the materials in question and the systems may thus be better placed to use or otherwise deal with the materials.

III. End-of-Life Vehicles

A. The ELV Directive

88. The ELV Directive has the objective of preventing waste from ELVs and of promoting the reuse, recycling and recovery of their materials and components to protect the environment.

89. Under the ELV Directive, the Member States shall take the necessary measures to ensure that economic operators increase the rate of reuse and recovery to 85% by average weight per vehicle and year by 1 January 2006, and to 95% by 1 January 2015, and to increase the rate of reuse and recycling over the same period to at least 80% and 85%, respectively, by average weight per vehicle and year (Article 7 par. 2).[46] The Directive states in Article 7(2) that the targets to be achieved by 2015 shall be re-examined by the European Parliament and the Council on the basis of the Report from the Commission by the end of 2005.

90. The Member States must take the necessary measures to ensure that economic operators set up collection systems for the collection of all ELVs and, as far as technically feasible, waste used parts from cars that are repaired. They must also ensure the adequate availability of collection facilities within their territory (Article 5 par. 1). It is important to note in this respect that the ELV Directive does not set common standards for ELV collection and treatment but leaves it to

[45] See footnote 1, at para. 255.
[46] Less stringent targets may be set for vehicles produced before 1980 but not lower than 75% for reuse and recovery and not lower than 70% for reuse and recycling.

the Member States to define how the prescriptions of the ELV Directive should be implemented in their territory.

91. The Member States must ensure that all ELVs are transferred to authorised treatment facilities (Article 5 par. 2) and set up a system according to which the presentation of a certificate of destruction is a condition for deregistration of the ELV. This certificate shall be issued to the last holder and/or owner when the ELV is transferred to a treatment facility (Article 5 par. 3). The ELV Directive requires the Member States to ensure that certificates of destruction are mutually recognised throughout the EU.

92. The last owner of the vehicle shall be able to dispose it without any cost (**"free take-back" principle**).[47] The producers, i.e., the vehicle manufacturers or the professional importers of a vehicle into a Member State, must meet all, or a significant part of, the cost of applying this measure (**principle of "producer responsibility"**; Article 5 par. 4). This obligation applies (i) as from July 1, 2002, for vehicles put on the market as from this date and (ii) as from January 2007 for vehicles put on the market before July 1, 2002.

93. According to Article 9 par. 1, Member States shall provide a report to the Commission at three-year intervals with information about distortions of competition between or within Member States.

B. Implementation in the Member States

1. Legislation

94. The ELV Directive had to be implemented by April 21, 2002 (Article 10). All Member States have implemented the ELV Directive into national law to date. Implementation is outstanding in Finland (limited to Alan islands), France, Ireland, Poland and the United Kingdom.[48]

95. The ELV Directive leaves a broad discretion to the Member States as to its implementation. In particular, there is no indication as to how the systems (individual or collective) are to be organised. It is therefore not surprising that the regulatory options chosen by the Member States to implement the ELV Directive vary considerably from country to country. For example, some Member States have stipulated an own-brand approach, i.e., each car producer is responsible to take back its own cars (e.g., Germany, Italy) while other Member States do not

[47] As mentioned earlier under para. 14, depending on the implementation of the Directive, competition concerns may arise if non-manufacturers of cars are foreclosed.

[48] For a report on the status of the implementation of the ELV Directive as of March 2004, see http://www.dti.gov.uk/sustainability/ELV_Implementation_MS_Report.pdf .

limit the take-back obligation to own-brand cars. The financing methods of the systems may also vary.

2. Factual Situation

96. A collective system for the recovery and recycling of car wrecks had been set up in the Netherlands prior to the ELV Directive and the system continues to be in operation. Following notification of the system, the Dutch NCA ruled in October 2001 that the contractual arrangements between the operator of the system, Auto Recycling Nederland BV (ARN), the car dismantling companies, collectors and recycling companies did not infringe Dutch competition law.

97. The car recycling system operated by ARN is based on a voluntary agreement among the interested parties and includes a flat fee of € 45 to be paid to ARN by car producers and importers for each registered car. The agreement is declared binding by the government for a three-year period, on a renewable basis, to all car producers and car importers under Dutch law. The proceeds of the fee are used to cover the cost of dismantling and recycling car wrecks. The system is not granted exclusivity by the government. The car producers and importers may obtain an exemption if they can demonstrate that they take care of their ELVs in an equivalent way. They are thus free to set up alternative systems or to adhere to eventual alternative systems. As a practical matter, however, this may not be a realistic option at least for smaller importers.

C. Competition principles

98. In the area of waste management systems for ELVs, the Commission has to date adopted one decision in the area of State aid as regards the Dutch system ARN.[49]

99. As a general matter, it is noteworthy that the physical characteristics of packaging waste, WEEE and ELVs vary appreciably which may also influence competition analysis. In particular, ELVs differ considerably in terms of size and weight from other types of waste. In contrast to the WEEE Directive, the ELV Directive only covers one type of product, namely car wrecks. In addition, car wrecks are generally much bigger, bulkier and heavier than packaging waste or most types of WEEE. Car wrecks also contain a number of dangerous parts and substances (e.g., batteries, fluids) that require particular treatment. Finally, the number of car wrecks is relatively limited compared to, e.g., packaging waste or most types of WEEE. Despite these physical differences, a number of competition principles that have been established in the packaging waste sector may also apply in the ELV area.

[49] Commission Decision of 30 October 2001 on the waste disposal system for car wrecks implemented by the Netherlands, OJ 2002 L 68/18.

1. Market definitions

100. Due to the lack of precedents and because the various markets relevant in the ELV sector are only starting to emerge, it is too early at this stage to delineate the relevant product markets in great detail. Similar to packaging waste, at least three principal levels of activity may arguably be distinguished as regards waste management systems for ELVs, namely (i) the organisation of systems to fulfil the obligations under the ELV Directive, (ii) the collection/treatment of ELVs and (iii) the recovery/marketing of secondary material and spare parts. However, these definitions are tentative; different and/or additional product markets may emerge or be identified as the implementation of the ELV Directive proceeds and systems are established in the Member States.

1.1. The market for the organisation of systems to fulfil the obligations under the ELV Directive

101. At this level, systems organise the collection of ELVs for the companies obliged by the national laws implementing the ELV Directive. Under the ELV Directive "economic operators" shall set up the systems. The term economic operator is defined broadly in Article 2 No. 10 and includes producers, importers, distributors, collectors, motor vehicle insurance companies, dismantlers, shredders, recoverers, recyclers and other treatment operators of ELVs, including their components and materials. The Member States have to ensure that the reuse and recovery targets are attained by the economic operators and that the producers and importers pay for the costs of the free take-back of ELVs.

102. The ELV Directive does not stipulate the type of system that should be established in the Member States and gives a broad discretion to the Member States as to its implementation. Systems could include collective systems, in which a small/large number of (or all) car producers/importers participate or individual systems set up by certain car producers/importers.

1.2. The market for the collection and treatment of ELVs

103. In this market, the systems obtain the collection and treatment services for ELVs from specialized undertakings.

104. This market would be characterized by collection and dismantling companies that collect the ELVs from the collection points in order to subsequently dismantle them. During the dismantling process, engines, tires and other vital parts are sorted out and removed from ELVs as these components have a value as used spare parts. Used spare parts may thus form a separate product market. The remainder, in particular the body of the ELV is then delivered to and crushed by shredders. Shredders may either be independent undertakings or be integrated with the dismantling companies. During the shredding process, ferrous and non-

ferrous metals are sorted out and recovered. The remaining shredder residue, containing, e.g., pieces of resin, rubber, glass and other items, is either recycled or disposed of. Dismantling and shredding may thus constitute two separate markets due to the fact that different companies carry out the two activities and different technical facilities are required.

105. The actual storage and treatment of ELVs is also subject to strict control, in accordance with the requirements of Article 6 and Annex I of the ELV Directive and of Directive 75/442/EEC.[50]

106. In the event producers/importers decide to establish individual systems for their own cars, the fragmentation of systems may lead to a corresponding fragmentation of collection and treatment facilities and the development of sub-markets for the collection and treatment of certain car brands.[51]

1.3. The market for recovery services and secondary material

107. The third level would be that for recovery services and secondary material. Recovery companies offer their services to the systems which in turn organise the delivery of the collected and dismantled materials to the recovery/recycling companies.

108. In general, each material to be recovered (e.g., metal, plastics) may constitute a separate market but may also include other types of waste from the same material (e.g., metal not coming from ELVs).

1.4. Geographic markets

109. The geographic market for the **organisation of the systems** would appear to be national due to the differences as regards the legal framework and the practical operation in the various Member States.

110. The geographic market for the **collection and treatment of ELVs** would also seem to be national or, possibly even regional, in scope. The exportation of ELVs appears to be time-consuming and administratively burdensome although cross-border trade does take place to a limited extent.[52]

[50] See footnote 10.
[51] Even though producers and importers should be free to also engage in recycling activities, it would appear to be important not to foreclose independent recycling companies.
[52] Para. 73 of the ARN decision states: "*Trade in car wrecks may be very limited, but it exists.*"

111. The geographic market for **spare parts**[53] as well as for **recovery services** and for **secondary material** would appear to be at least national and possibly EU-wide in scope.

2. Possible competition concerns

2.1. General considerations for the setting up of waste management systems for ELVs

112. The ELV Directive stipulates that Member States shall ensure that the economic operators set up collection systems to fulfil the environmental obligations. As a practical matter, competition problems could, for example, arise, if car manufacturers and importers are legally designated as the only organisers of the systems (thereby potentially allowing them to take control of the ELV resource markets).

113. This may lead to a cooperation between obliged companies. Thus, in a number of Member States the obliged companies may cooperate in order to establish a waste management system for ELVs. Such cooperation may give rise to competitive concerns. It is important to note in this respect that the fact that the ELV Directive envisages the possibility of systems, including collective systems, does not in itself prejudge their legality under the EC competition rules.

114. Collective and comprehensive systems established by economic operators will have to be closely scrutinized under Articles 81 and 82 EC. With regard to Article 81(3) EC in particular, any effects of economies of scale and the passing on of beneficial effects to consumers as well as the "indispensability" of the system will have to be clearly established. Considerations of economies of scale would appear to be less relevant in the ELV sector than, e.g., in the household packaging waste sector. Fewer collection points are needed for ELVs and it would seem economical and efficient to operate parallel networks of collection points, at least in the larger Member States (but possibly also in smaller Member States). Each system will have to be examined individually.

115. For further considerations as regards the state action defence, Member State liability as well as Article 86(2) EC, see paras. 49 *et seq.*, above.

2.2. Cooperation between obliged companies

116. In view of the large number of economic operators that may participate in a system to fulfil the obligations under the ELV Directive (e.g., car producers, importers, dismantlers, shredders, insurance companies, etc.), this Paper does not

[53] Para. 73 of the ARN decision states: "*Spare parts are internationally traded, and indeed increasingly so*."

attempt to set out all the potential concerns that may arise in the context of such cooperation on the horizontal level. Competitive concerns are most likely to arise with respect to a cooperation among car producers/importers and will therefore be the focus in the following. However, it is to be noted that, depending on the implementation, cooperation between producers/importers may potentially not be necessary.[54] As mentioned earlier at para. 56, competitive concerns in this regard may arise with respect to (i) **spillover effects** and (ii) **effects of bundling**.

a. Spillover effects in the car market

117. The cooperation of car manufacturers/importers to fulfil the obligations under the ELV Directive may have spillover effects in the market for the manufacture and sale of cars. Cooperation among car producers/importers and the resulting spillover effects will have to be more closely scrutinized where the companies are in direct competition. For example, a cooperation between two premium car producers is likely to be more problematic than a cooperation between a premium car producer and a producer of low- or mid-range cars. The following factors would, for example, appear to be of relevance as regards spillover effects.

118. First, under the aspect of **communality of costs**, it would seem that the cooperation of car producers/importers under the ELV Directive would have a limited impact on the actual production costs and sales prices of cars as the collection/recycling costs account for a small part of the final car price only. However, due to the intense competition in the car market, even small cost factors may have important effects and the considerations set forth at paras. 57 *et seq*. above will also have to be taken into account for ELV management systems.

119. Second, it will have to be examined whether such cooperation leads to an exchange of sensitive information (resulting, e.g., in the development of common technical standards) and the fixing or alignment of prices among competitors, in which case Article 81 EC would be violated.

b. Effects of bundling of demand for collection and treatment services

120. Instead of dealing with a vast number of individuals, collectors/treatment operators will, following the establishment of the respective systems, have to deal with only a few or, possibly even only one, system(s). From a collector's/treatment operator's perspective, the demand side may thus be considerably more concentrated as a result of the cooperation of car producers/importers to fulfil the obligations under the ELV Directive.

[54] It is, for example, possible to envision a fully decentralized "free take back" system where recycling companies that fulfil certain technical standards operate independently of car producers and importers and where recycling quotas may also be fulfilled by obliged companies through the purchase of certificates of destruction.

Competitive concerns as regards the bundling of demand would appear limited where only a few and/or small producers/importers cooperate since the effects of bundling would seem to largely depend on the market share of the respective car producers/importers. Conversely, in large collective systems the effects of bundling for the collection and treatment services may be very significant. In addition, the adverse consequences of bundling do not appear to be counter-balanced in the ELV sector by considerations of network economies which would seem to be limited.

c. Considerations as to the legal assessment of cooperation among car producers/importers

121. It is very difficult to ascertain the level of market power that may be accepted for a cooperation among car producers/importers under the ELV Directive. The market shares of the cooperating car producers/importers in the respective car markets will constitute the most appropriate yardstick in this regard. The cooperation among car producers/importers has both horizontal and vertical effects. However, to the extent that the principal effects of a cooperation relate to the **vertical** relationship between producers/importers and collection/treatment companies, it could be argued that guidance could be drawn from the Commission's policy regarding vertical restraints (see Article 3 of the BER verticals). On the basis of this assumption, competitive concerns would be limited in case of cooperations of producers/importers representing together a market share of less than 30% in the market for the manufacture and sale of cars which is likely to reflect their share of demand in the market for the collection and treatment services. The 30% threshold would ensure the existence of at least four different systems. However, it needs to be emphasized that the 30% threshold is by no means to be regarded as absolute and is merely put forward in this Paper as an approximate benchmark. The exceeding of the 30% threshold would not lead to an automatic prohibition of a system but would merely indicate that closer scrutiny may be warranted.

2.3. Relationship between systems and obliged companies

122. Similar issues as described above under paras. 67 *et seq.* for packaging waste systems may arise with respect to systems that fulfil the obligations under the ELV Directive. For example, in the case of collective systems fees should reflect the costs of the collection and recovery of ELVs in order to provide an incentive for producers to improve the recyclability of their products. Moreover, uniform fees may lead to communality of costs. Also, collective systems should apply objective, transparent and non-discriminatory conditions as regards membership criteria and with regard to fees levied by the system.

2.4. Relationship between systems and collection/treatment companies

a. Exclusive collection/treatment agreements

aa. Exclusivity in favour of collection/treatment companies

123. To the extent that systems contract with only one collection/treatment company, an **exclusive contractual relationship in favour of the collection/treatment companies** arises. Depending on the market position of the respective system and the duration of the collection agreement – Articles 81 and 82 EC may apply.[55] The higher the degree of bundling of demand, the more important are the adverse effects of exclusivities within the system(s). In particular for collective systems in the ELV sector it may thus be questionable whether and to what extent exclusive contracts may be concluded by the systems with collection/treatment companies.

124. In cases where exclusivity may be justified, tender procedures will have to be carried out. Such tender procedures by the system(s), e.g., for collection, treatment or recovery contracts, must be open and based on transparent and non-discriminatory criteria. The contracts resulting from a tender procedure must be of limited duration. The duration will depend on the contracts in question but, in general, it is unlikely that a period exceeding three years can be accepted.

bb. Exclusivity in favour of systems

125. As regards exclusivity clauses in favour of the system(s), it follows from the DSD and ARA decisions that collectors, treatment operators and recyclers should not be obliged to contract exclusively with one system. Exclusivity clauses between systems and collection/treatment companies in the ELV sector should therefore in principle not be provided for.

b. Marketing of secondary material and spare parts

126. The dismantling and shredding of ELVs produces a number of materials (e.g., spare parts, glass, metals, plastics, etc.) that may be reused as a secondary material to repair damaged cars or for new products. Car manufacturers may have an interest in reusing the materials that were recycled from their own cars. It is possible that systems may attempt to restrict the commercialisation of secondary material in order to allow for such reuse (also in cases where the treatment/recovery company is the owner of the material). Thus, it may be that certain deviations from the principle discussed under paras. 86 and 87 above in the context of packaging waste (i.e., that recovery companies should be free to commercialise secondary material owned by them) are justified in the ELV sector.

[55] As to the application of Article 3 BER verticals see paras. 78 and 79.

Concerns may arise, for example, if car producers attempt to eliminate competition from used spare parts obtained by dismantling companies in order to protect their own OEM (Original Equipment Manufacturer) products.

IV. Waste electrical and electronic equipment

A. The WEEE Directive

127. The WEEE Directive[56] aims to increase the recycling of electrical and electronic equipment (hereinafter "EEE") and to limit the total quantity of waste going to final disposal. To achieve these objectives, the WEEE Directive imposes obligations not only upon the Member States, but also (although indirectly[57]) upon EEE producers (**principle of "producer responsibility"**) and, for certain types of waste, even upon EEE users.

128. The Directive distinguishes, on the one hand, between WEEE from private households and WEEE from non-private households, and, on the other hand, between WEEE from products put on the market before 13 August 2005 ("historical WEEE"[58]) and WEEE from products put on the market after that date ("new WEEE").

129. According to Article 5(2) of the WEEE Directive, the Member States had to ensure, with regard to new and historical **WEEE from private households**, that by 13 August 2005:

- systems are set up and the necessary collection facilities are made available and accessible to allow final holders and distributors to return such waste free of charge;
- when supplying a new product, distributors take back the WEEE free of charge on a one-to-one basis as long as the equipment is of equivalent type and has fulfilled the same functions as the supplied equipment;
- producers are allowed to set up and operate individual and/or collective take-back systems for WEEE from private households, provided that these are in line with the objectives of the Directive.

130. Member States must ensure by the same date that the producers finance the costs of the collection, treatment, recovery and environmentally sound disposal of the WEEE deposited at the collection facilities set up under Article 5(2).[59] More in

[56] Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE), OJ 2003 L 37/24, as amended by Directive 2003/108/EC of the European Parliament and of the Council of 8 December 2003, OJ 2003 L 345/106.
[57] Directives are addressed to Member States and therefore cannot be a direct source of obligations for individuals. However, the WEEE Directive expressly requires Member States to ensure that producers are also made responsible for the achievement of the objectives set out by the Directive.
[58] Article 8(3) of the WEEE Directive.
[59] Article 8(1) of the WEEE Directive.

particular, each producer must finance - either on an individual basis or by joining a collective scheme - the collection, treatment, recovery and environmentally sound disposal of the **new WEEE** which originates from his own products.[60] With regard to the **historical WEEE**, however, the responsibility for the financing of those costs "shall be provided by one or more systems to which all producers, existing on the market when the respective costs occur, contribute proportionately, e.g. in proportion to their respective share of the market by type of equipment".[61]

131. With regard to new **WEEE from non-private households**, Member States must ensure that producers (or third parties acting on their behalf) provide for the collection of such waste.[62] Member States must also ensure that, by 13 August 2005, producers finance the costs of the collection of new WEEE, as well as the costs of its treatment, recovery and environmentally sound disposal.[63] However, for **historical WEEE being replaced by new equivalent products or by new products** fulfilling the same function, the financing of those costs must be provided for by producers of those products when supplying them. Member States may, alternatively, provide that users other than private households also be made, partly or totally, responsible for this financing. For **other historical WEEE**, the financing of the costs shall be provided for by the users other than private households.[64] Producers and users other than private households may, without prejudice to the Directive, conclude agreements stipulating other financing methods.[65]

132. According to Articles 6 and 7 of the WEEE Directive, Member States must also ensure that producers or third parties acting on their behalf set up systems on an individual or on a collective basis to provide for the treatment and for the recovery of WEEE.

133. Finally, Member States must ensure that certain collection and recovery targets are achieved by 31 December 2006.[66] However, Greece and Ireland,[67] the Czech Republic, Estonia, Hungary, Latvia, Lithuania and Slovakia,[68] as well as Cyprus, Malta and Poland,[69] are all allowed to extend this deadline by 24 months. Slovenia is allowed to extend the deadline by 12 months.[70]

[60] Article 8(2) of the WEEE Directive.
[61] Article 8(3) of the WEEE Directive.
[62] Article 5(3) of the WEEE Directive.
[63] Article 9(1) of the WEEE Directive as modified by Directive 2003/108/EC.
[64] Subparagraphs 3 and 4 of Article 9(1) of the WEEE Directive as modified by Directive 2003/108/EC.
[65] Article 9(2) of the WEEE Directive as modified by Directive 2003/108/EC.
[66] Articles 5(5) and 7(2) of the WEEE Directive.
[67] Article 17(4) of the WEEE Directive.
[68] Council decision 2004/312/EC of 30 March 2004, OJ L 100/33.
[69] Council decision 2004/486/EC of 26 April 2004, OJ L 162/114.
[70] Council decision 2004/312/EC of 30 March 2004, OJ L 100/33.

B. Implementation in the Member States

1. Legislation

134. Member States had to adopt the laws, regulations and administrative provisions necessary to comply with the WEEE Directive by 13 August 2004. However, Member States and EEE producers had one additional year (i.e. until 13 August 2005) to comply with the collection obligations for WEEE from **private households** as well as with the financing obligations for the collection, treatment, recovery and environmentally sound disposal of all types of WEEE.

135. Most Member States have by now adopted national measures implementing the WEEE Directive. A report of May 2004, commissioned by the UK Department of Trade and Industry to Perchards consultants (hereinafter the Perchards Report),[71] provides an extensive overview of existing WEEE related measures and implementation plans in a number of Member States.[72]

2. Factual situation[73]

136. According to the Perchards Report, only five Member States (Austria, Belgium, the Netherlands, Portugal and Sweden) have so far adopted regulatory frameworks for the collection and recovery of WEEE. These regulations, however, will have to be partially amended and/or complemented in order to fully comply with the obligations of the WEEE Directive.

137. In Austria, lamp retailers and recyclers must participate in a nationwide collection and recycling scheme. For this purpose, Umweltforum Lampen (UFL) was set up to organise and finance lamp collection and recycling, and to collect statistics on quantities sold, taken back and recycled. To comply with similar obligations, retailers of refrigerators, freezers and air conditioning units set up Umweltforum Haushalt (UFH).

138. In Belgium, the three Regions (Flanders, Wallonia and Brussels) each have their own regulations on WEEE, which impose similar take-back obligations upon producers, distributors and retailers and which are coordinated by an inter-regional agreement of 19 February 2001. To comply with the collection, treatment and recycling obligations concerning WEEE throughout Belgium, in 2002 producers/importers of EEEs set up Recupel.[74] Recupel is funded through a

[71] The Report is available at http://www.dti.gov.uk/sustainability/weee/Perchards_Report.pdf.
[72] As it was published in February 2004, the Perchards Report only contains very limited information concerning the ten new Member States. However, further updates of the Perchards Report are published quarterly on the DTI website. The latest available quarterly update of April 2005 can be found at http://www.dti.gov.uk/sustainability/weee/WEEE_Transposition_Report_April05.pdf .
[73] This section is based on the information contained in the Perchards Report.
[74] In July 2003, Recupel had 960 members. At the end of 2004, it had 1812 members.

recycling premium paid by purchasers of new equipment. The level of the premium is based on an estimate of the number of appliances returned per year and the estimated costs of collection, treatment and recycling. The premiums are passed through the chain from the final retailer to his supplier, and then to the manufacturer or importer who transfers the money to Recupel.

139. In the Netherlands, a decree establishing rules for taking back and processing WEEE was adopted in 1998. According to the decree, local authorities must provide for the separate collection of WEEE from households, and provide a site where suppliers can dispose of products taken back from households if they wish. Manufacturers and importers (including parallel importers) are responsible for taking back and reprocessing the WEEE taken back or collected by suppliers and local authorities and delivered to them. They are also responsible, both organisationally and financially, for the further disposal of discarded equipment and appliances (they can either carry out this duty themselves or subcontract it to a third party). To comply with these obligations, producers have set up in January 1999 the NVMP system. The system is financed through a disposal levy which covers all WEEE. A similar system, ICT Milieu, was set up in the Netherlands by 160 participating manufacturers and importers of IT and office equipment and telecommunications equipment.

140. In Portugal, Decree-Law No. 20/2002 of 30 January 2002 introduced producer responsibility for the take-back and recovery of WEEE. In order to comply with the collection and recovery obligations, producers may delegate the management of WEEE to an authorised 'integrated system' (i.e. a recovery organisation).[75]

141. Finally, in Sweden, the Producer Responsibility for Electrical and Electronic Products Ordinance of 2000 imposes producer responsibility for the collection and recovery of most WEEE. In practice, the local authorities organise and fund the collection points, and the producers organise and fund the recovery of all WEEE. A system is in place for the major product sectors, owned and run by the relevant trade associations and financed by fees paid by manufacturers and importers. The "service company" taking responsibility for producers' obligations under the Ordinance is El-Kretsen I Sverige AB, and El-Retur is the name used to describe the system jointly run by El-Kretsen and the local authorities. Companies choosing not to join the system have to demonstrate how they are setting up their own nationwide system.

[75] As an alternative, producers may opt for individual compliance, but this will need special authorisation from the INR (Waste Institute). This authorisation can only be given if at least the same level of performance is guaranteed as is offered by the integrated system.

C. Competition principles

142. To date, the Commission has not adopted decisions applying EC competition law in the area of management of WEEE.[76] Furthermore, the WEEE has either been implemented by the Member States only very recently or, in some case, has not been implemented at all to date. This Paper cannot therefore provide a precise description of all the relevant markets and of all possible competition concerns that might arise as a consequence of the future implementation of the WEEE Directive.

143. The WEEE Directive applies to a wide range of products characterised by important differences with regard to their weight, seize, materials, dangerous parts, and numbers of sales. These products may include, e.g., refrigerators, lamps, radiotherapy equipment, personal computers, smoke detectors and automatic dispensers for hot or cold bottles or cans.

144. Annex IA of the WEEE Directive groups these products into 10 categories, which seem to have comparable characteristics from a collection and recovery point of view.[77] The industry tends to differently classify products falling into categories 1 to 4 of Annex IA, namely: "white goods" (refrigerators, freezers, washing machines, etc.); "grey goods" (IT products, such as personal computers, printers etc.); and "brown goods" (audio-visual products, such as radio, television sets, video cameras, etc.).

1. Market definitions

1.1 The market for the organisation of systems to fulfil the obligations under the WEEE Directive

145. Under the WEEE Directive producers may fulfil their collection, treatment and recovery obligations either by taking part in a **collective system** or by opting for an **individual solution**. Therefore, the first possible relevant product market in the area of WEEE is the market for the provision of waste management systems/alternative solutions to producers of EEE in the context of their take-back obligations (hereinafter "the market for systems/solutions for WEEE").

[76] In 2002 and 2003, however, the Commission has been approached by a number of EEE producers seeking advice on the compatibility with EC competition law of intended cooperation agreements in view of fulfilling their obligations under the WEEE Directive (see below).

[77] The categories listed in Annex IA of the WEEE Directive are the following: 1. Large household appliances; 2. Small household appliances; 3. IT and telecommunications equipment; 4. Consumer equipment; 5. Lighting equipment; 6. Electrical and electronic tools (with the exception of large-scale stationary industrial tools); 7. Toys, leisure and sports equipment; 8. Medical devices (with the exception of all implanted and infected products); 9. Monitoring and control instruments; 10. Automatic dispensers

1.2. The markets for the collection, treatment, recovery services and secondary material

146. Similarly, like in the areas of packaging waste and car wrecks, also in the area of WEEE management two other principal levels of activities (or markets) might probably be distinguished, namely: the collection and treatment of WEEE and the recovery and sale of secondary material.

147. However, these definitions are tentative and broader or narrower product markets may emerge or be identified as the implementation of the WEEE Directive proceeds. It is worth noting, for instance, that in a notification to the Commission of a cooperation agreement concluded by producers of EEE in the context of the WEEE Directive, the notifying parties stated that most EEE-products were subject to the same or similar methods of disposal or recovery (e.g. "shredding") in the facilities or service providers irrespective or their weight, size, volume or their categorization as hazardous or non-hazardous waste. The notifying parties also expected that the providers of waste management services and related support services will offer the full range of their services in relation to all WEEE.

148. It cannot be excluded that, due to economies of scale and/or scope, the collection, treatment and recovery services for WEEE may all be provided, at least in some national markets, by the same operator. In these cases, there may be only one single service market for the management of WEEE for the provision of collection, treatment and recovery services under the WEEE Directive.

149. However, it would seem more likely that some of these services, e.g., the collection of WEEE, will be provided by municipalities or by other specialised companies, while the treatment/recovery of WEEE and sale of secondary products will be carried out by other specialised operators. In particular, a number of products (other than small household appliances) will require pre-treatment prior to shredding (e.g., TVs, monitors, refrigerators). For these products there often are specialized recycling facilities or facilities with separate dismantling lines. In addition, different providers are active in these markets and prices for recycling differ considerably. The collection and sorting of electronic waste may, depending on the product involved, also constitute separate markets. Furthermore, it cannot be excluded that, due to specific national regulations or product specificities, further sub-markets for the collection and treatment of specific categories of WEEE (e.g. medical devices or lighting equipment[78]) might emerge.

[78] See in this regard the discussion paper of the European Lighting Companies Federation available on: http://www.elcfed.org/documents/let_there_be_light_brochure.pdf

1.3. Geographic Markets

150. Due to the differences as regards the legal framework and the practical operation of the **organisation of the systems/solutions for WEEE** in the various Member States, the relevant geographic markets would seem to be national in scope. A pan-European WEEE take back and compliance scheme for a number of countries was recently set up by four manufacturers of electrical and electronic appliances (ERP).[79] While this may indicate a certain internationalisation, it is to be noted that the respective compliance schemes under the ERP umbrella remain country-specific.

151. The markets for the **collection and treatment of WEEE** are likely to be of national or, possibly even regional, dimension.

152. With respect to **recovery services and secondary material** the geographic markets may be national or wider than national, possibly depending on the specific material in question.

2. Possible competition concerns

2.1. General considerations for the setting up of waste management systems for WEEE

153. The WEEE Directive provides that EEE producers may, *inter alia*, set up systems on a collective basis to fulfil their collection, treatment, and recovery obligations. Thus, in many Member States the obliged companies will cooperate in order to establish waste management systems for WEEE. As mentioned earlier, some EEE producers have already approached DG Competition and NCAs to discuss their plans to cooperate in this context.

154. Such cooperation may give rise to competitive concerns. It is important to stress that the possibility to cooperate in order to fulfil the obligations under the WEEE Directive does not rule out the application of EC competition law to such cooperation.

155. As a general principle, competition between several WEEE waste management systems should be possible. If collective systems are created, it is essential to ensure that they do not lead to unjustified restrictions of competition on the markets concerned.

[79] European Recycling Platform (ERP). ERP will focus on operations in Austria, France, Germany, Italy, Poland, Spain and the United Kingdom. Membership of ERP will be limited "to avoid ERP establishing any dominant position." Based on the four founding undertakings, ERP represents an estimated 15% of the European WEEE take back market. For more information on ERP, see ERP's website at www.erp-recycling.org.

2.2. Cooperation between obliged companies

156. As has been mentioned earlier in the context of the Packaging and ELV Directives, cooperation between obliged companies may, in particular, give rise to competitive concerns as regards (i) spillover effects and (ii) effects of bundling.

a. Spillover effects in the market for EEE

157. Cooperation between producers of EEE may also give rise to concerns if it has an actual or potential impact on the markets in which these producers are active, i.e., the manufacture and sale of EEE. In this context, cooperation among EEE producers will have to be more closely scrutinized where the companies are in direct competition. For example, a cooperation between two or more lighting equipment producers is likely to be more problematic than a cooperation between a TV producer and a producer of medical devices.

158. Cooperation of EEE producers may be more easily accepted where the **communality of costs** deriving from the cooperation is limited. There may be systems in the WEEE sector that could raise concerns in this respect. For instance, the costs of collecting and recycling certain types of WEEE lamps may account for a significant percentage of the retail price of the lamp.[80] Thus, a cooperation between large lamp producers in the context of the WEEE Directive may lead to high communality of costs, and therefore to the risk of price alignment of such manufacturers' final products.

159. The cooperation should not lead to the exchange of sensitive information. It may also raise concerns if the parties limit their ability to devise the characteristics of their products or the way in which they produce them (for that aspect see Horizontal Guidelines, para. 189).

b. Effects of bundling of demand for collection and recovery services

160. Large waste management systems for WEEE will normally exercise an appreciable demand side power. The extent of the demand side power will however depend on the exact definition of the collection and recovery markets. If, for example, separate recovery markets for washing machines on the one hand and other white products on the other hand can be defined, a system composed of nearly all washing machine producers and importers will be the dominant demand side on the relevant market for the recovery of washing machines.

161. Possible adverse effects should be balanced against possible **network economies** resulting from the bundling of demand. The network economies may be different

[80]See p. 12 of the discussion paper of the European Lighting Companies Federation available on: http://www.elcfed.org/documents/let_there_be_light_brochure.pdf

depending on the product (e.g., stronger network economies in case of small products sold in high quantities and collected at a large number of premises). As regards collection points, efficiency gains in the WEEE sector would appear to be more limited than in the area of packaging waste.[81]

c. Considerations as to the legal assessment of cooperation among EEE producers/importers

162. A market share threshold of 30% described at para. 121 above, would seem of limited practical value in the WEEE market. The products covered under the WEEE Directive differ considerably and a case-by-case analysis will be more useful than a fixed threshold. In addition, other than in the ELV sector, the market shares in the EEE product markets are less likely to reflect the demand position of the producers in the relevant collection and recovery markets as the markets for collection and recovery services may be wider in scope than the respective product markets (e.g., TV and computer screens might be part of the same recovery market but are not in the same product market).

2.3. Relationship between systems and obliged companies

163. Collective systems should apply objective, transparent and non-discriminatory conditions as regards membership criteria and with regard to fees levied by the system. Similar considerations as set forth in paras 67 *et seq*. and 122 above apply in the WEEE sector.

2.4. Relationship between systems and collection/treatment companies

a. Exclusive collection/treatment agreements

164. The considerations set out in paras. 123 to 125 above apply also with regard to the WEEE sector. In the WEEE sector, however, economies of scale for the collection and recovery of WEEE may play a more important role than in the ELV sector (but less so than in the household packaging waste sector) and will have to be considered under Article 81(3) EC. Transparent and non-discriminatory tender procedures will ensure that the most efficient service providers are chosen.

b. Marketing of secondary material

165. An analysis of the specificities of the collection and recovery markets which are still in the process of development will allow an appreciation of possible restrictions according to Art. 81 (1) EC and of possibilities for exception under

[81] For example, the German Bundeskartellamt estimates that there are 1 million collection points for household packaging waste in Germany but only 2500 municipal collection points for electronic waste.

Art. 81 (3) EC. As a general principle, systems should not prevent collectors, treatment or recovery companies from deciding on the marketing of the reusable parts and the secondary material owned by them. However, limitations of their choice may be justified to ensure or improve recovery (see para. 126 above).

V. Monitoring of the Directives

166. It is important that market and other (e.g., legal) developments are closely monitored and duly taken into account for any competition analysis in the waste management sector. Certain monitoring and reporting tasks have been provided for in the Directives. The ELV Directive provides for an explicit reporting requirement as regards "distortions of competition." These reports will contribute to better understand the functioning of the markets.

167. *Packaging Directive.* Article 17 of the Packaging Directive in conjunction with Article 5 of Directive 91/692[82] requires Member States at intervals of three years to send information to the Commission on the implementation of the Directive, in the form of a sectoral report which shall also cover other pertinent Community Directives. The Commission shall publish a Community report on the implementation of the Directive within nine months of receiving the reports from the Member States. Article 6(8) of the Packaging Directive (as amended by the Revised Packaging Directive) provides that the Commission shall present a report on the implementation of the Packaging Directive and its impact on the environment and the internal market.

168. *ELV Directive.* Article 9 of the ELV Directive stipulates that the Member States shall send reports at three-year intervals on the implementation of the Directive. The report shall contain relevant information on possible changes in the structure of motor vehicle dealing and of the collection, dismantling, shredding, recovery and recycling industries, leading to any distortion of competition between or within Member States. Based on this information, the Commission will publish a report on the implementation of this Directive within nine months of receiving the reports from the Member States.

169. *WEEE Directive.* Article 17(5) of the WEEE Directive stipulates that within five years after the entry into force of the Directive, the Commission will submit a report to the European Parliament and the Council based on the experience of the application of the Directive, in particular as regards separate collection, treatment, recovery and financing systems. Furthermore the report will be based on the development of the state of technology, experience gained, environmental requirements and the functioning of the internal market.

[82] Directive 91/662 of 23 December 1991 standardizing and rationalizing reports on the implementation of certain Directives relating to the environment, OJ 1991 L 377/48.