

Competition - Italy

Regulator opens proceedings against waste management consortia

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Background

The economic dynamics of the recyclable waste management sector have recently been scrutinized by the Competition Authority, which has raised several competition law concerns in relation to environmental consortia, particularly with regard to:

- allocation mechanisms for waste;
- potentially anti-competitive horizontal agreements between members; and
- the existence of potential conflicts of interests within consortia.

Regulatory history

The authority's focus on the Italian waste industry dates back to 2005, when it launched a sector inquiry into the packaging waste sector, which includes steel, aluminium, paper, wood, plastic and glass packaging. The authority published its conclusions in 2008.

On the basis of its analysis, in March 2010 the authority decided to open formal proceedings against Comieco, a consortium for the recovery and recycling of cellulose-based packaging. It focused on the criteria used to allocate paper packaging to member companies and on the economic conditions of such allocations.

Environmental framework

The Comieco proceedings relate to a sector that is governed by specific environmental regulations. The management of packaging waste in Italy is regulated by Legislative Decree 152/2006, which defines the responsibilities of the entities in the national waste management system. Producers are allowed to create consortia to coordinate the recycling and recovery of packaging waste; other options, such as organizing collection independently or operating a bail system, are also permitted.

The authority raised concerns about the consortium system when, in 1996, it examined the draft legislative decree implementing EU law on waste management plans. It expressed doubts about the obligation (under the draft) to create consortia among packaging waste manufacturers, but this provision was later amended to make the formation of consortia optional.

Most producers in Italy have opted to establish consortia based on the type of packaging material used: steel, aluminium, paper, wood, plastic or glass. All six existing consortia are represented by the National Packaging Consortium, which is empowered by law to (i) coordinate recovery and recycling activities for all types of packaging waste in Italy, and (ii) sign framework agreements with the National Association of Italian Municipalities to set out the operative and economic conditions for the collection of waste in public areas. These agreements establish a common framework under which local authorities, with exclusive rights to waste collection in public areas, collect materials that are then allocated to recycling consortia.

Sector inquiry: the authority's view

In August 2008 the authority published the final conclusions of the sector inquiry on packaging waste. The investigation lasted for over two years and covered various aspects of the packaging waste system, some of which related directly to the consortia's activities.

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New economic basis for agreements

The authority emphasized the need for a more competitive structure, particularly in light of the value of the industry, which is worth around €25 billion. Various options have been suggested to improve the system.

A proposed measure to ensure that full value is achieved takes account of the fact that the agreement between local municipalities (represented by the National Association of Italian Municipalities) and the National Packaging Consortium deals with both the operational and economic aspects of the collection of recyclable materials. Under the existing scheme, recyclable waste is mainly owned by consortia in the National Packaging Consortium system, which pay the municipalities a fee for the extra costs borne in collecting packaging waste separately. Each consortium then allocates the collected material to recycling manufacturers.

The authority considers that if the municipalities retained ownership of the recyclable waste, they could negotiate its sale directly with the companies operating in the sector. This would help to maximize the municipalities' profits, which could be used to finance waste collection and to reduce the cost to consumers of the separate collection of solid urban waste.

Allocation of materials

A second issue raised in the sector inquiry relates to the criteria that the consortia apply in allocating collected materials to recycling companies, which influences the purchase price of raw materials. The authority expressed a similar concern in opening proceedings relating to Comieco. In the inquiry, the authority noted that some consortia, including Comieco, apply non-transparent and anti-competitive methods in allocating collected waste material, mainly relying on a predetermined quota that relates to the manufacturing quantities of participating companies. The authority has also noted a tendency to apply uniform prices to waste purchasers. Only Corepla, the plastics consortium, was found to have implemented a different system based on competitive auctions. The authority clearly prefers this allocation mechanism and described it as recommendable. Organizing auctions to assign packaging materials would enable the more efficient use of secondary raw materials, reducing the overall cost of the system and, in turn, the fee passed on to consumers. Furthermore, an auction system would reduce - and potentially even remove - the consortia's influence on the availability of raw materials on the market.

Management of consortia

The authority has also raised the issue of the composition of the management of both the individual consortia and the National Packaging Consortium, indicating a possible conflict of interest between controller and controlees when waste manufacturers are granted management functions within the associations. The authority recommends increasing the representation of municipalities, consumers and other industry bodies to become board members of the National Packaging Consortium and of the waste recycling consortia. From a policy perspective, this would allow effective control to be exercised over the associations' decisions.

Brief comparison with the batteries and lead waste sector

Shortly after the conclusion of the investigation, the authority scrutinized the used batteries and lead waste sector. In particular, it focused on the conduct of COBAT, a mandatory consortium which is active in the collection and recycling of used batteries and lead waste in Italy. In 2009 COBAT was fined for several violations of Article 81 of the EC Treaty (now Article 101 of the Treaty on the Functioning of the European Union), including violations relating to the mechanisms used to allocate collected batteries to its members, and to contractual relations with certain categories of member (ie, recycling companies and collectors of waste). However, the Lazio Administrative Court overturned the authority's decision on the basis of the derogation to competition rules provided by Article 106(2) of the Treaty on the Functioning of the European Union for undertakings entrusted with the operation of services of general economic interest.

Comieco proceedings

On March 24 2010 the authority opened formal proceedings against Comieco for multiple suspected violations of Article 101. The authority is investigating (i) the criteria for allocating paper waste to member companies, and (ii) the fixing of a uniform component in the price paid for waste paper.

Comieco's internal resolutions provide that each associate entity receives a quota of waste to recycle according to the quantity of packaging that it produced in the preceding year.

The authority suspects that the allocation of raw material on predetermined criteria, such as a company's production capacity, could hinder the expansion of paper mills, as associated companies (as well as new entrants) would be prevented from competing to purchase waste paper. The resulting increase in inefficiency would impede industry growth and would be detrimental to consumer welfare. Waste paper is used as a raw material in the manufacture of paper and is vital to the Italian paper industry in view of

the scarcity of other sources.

The authority, mirroring its conclusions in the sector inquiry, has stressed that Comieco's possible adoption of tender procedures to allocate collected waste paper would have a significant impact on the competitive environment of the paper recycling market. Even paper mills unassociated with Comieco would compete in the acquisition of waste paper: instead of relying on a centralized consortium decision, they could decide independently how much waste paper they need.

On the issue of establishing a fixed uniform component in the price paid for waste paper, the authority has noted that an internal Comieco resolution requires each recycling company to pay the same mandate fee for raw materials (calculated on a monthly basis according to a raw material estimate by the Milan Chamber of Commerce).

In addition to this common fee, each Comieco member independently meets the cost of collecting waste paper from the place where it is initially processed. Such costs are compensated by the mandate fee, which is determined on a uniform basis at national level. If the mandate fee is lower, the difference is payable to Comieco.

The authority considers that the complexity of the system would, in principle, negate any possible efficiencies achieved by companies in the collection of waste, as it includes an obligation on the companies to collect the raw material from the points at which it is initially processed. The authority deems that under such rules, the raw material purchase price that the companies charge paper mills is not left to the influence of competitive market conditions, but is effectively established by the mandate fee, which is in turn determined by Comieco's resolutions.

The authority has identified Comieco's conduct as a possible violation of Article 101 on the basis that Comieco is considered an association of undertakings; thus, its resolutions are subject to competition rules. The authority explicitly excludes derogation from such rules under Article 106(2), which provides that undertakings entrusted with the operation of services of general economic interest are subject to competition rules only insofar as the application of such rules does not obstruct such an undertaking's performance. The authority deems that no competition limitation is justified in this case, as Comieco's statute gives it considerable autonomy in fulfilling the public function entrusted to it by law; moreover, Italian law does not specifically provide for a derogation from competition legislation.

A final decision is expected by July 2010, unless the authority extends this deadline.

Comment

The Comieco proceedings show the strength of the authority's interest in the competitive dynamics of the Italian waste industry. The approach followed in this case is consistent with the findings of the 2008 sector inquiry on packaging waste.

One of the main issues investigated in the proceedings and the 2008 inquiry is the allocation criteria adopted by the consortia in allocating raw materials to member companies. The authority seems to be sceptical about the criteria that Comieco applies, seeing the allocation of raw material based on predetermined criteria as a potential hindrance to the expansion of paper mills and an influential factor in the price of waste paper.

The authority would welcome an alternative model based on auction procedures. This would improve competition in the sector, linking the price more closely to market dynamics and reducing the cost to consumers, while also increasing transparency in the distribution of waste to manufacturers by limiting the role of the consortia in the system.

However, debate continues as to whether the auction mechanism is an appropriate solution for enhancing the sector's competitive dynamics. Moreover, there is no agreement on whether the waste management activities carried out by the consortia are subject to competition rules. The debate has been fuelled by the Lazio Administrative Court's decision to overturn the authority's 2009 decision on COBAT, in which it rejected the authority's analysis under the former Article 81 and its view of the allegedly offending conduct in light of COBAT's legally prescribed role.

In opening the Comieco proceedings, the authority has emphasized its view that no competition limitation is justified in such a case, as Comieco appears to have considerable autonomy in fulfilling its public role and Italian legislation does not provide for specific derogation from competition law.

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