

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 2 on Competition and Regulation**

**WASTE MANAGEMENT SERVICES**

-- Germany --

**28 October 2013**

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– Germany –

## 1. Introduction

1. This contribution outlines how competition was introduced into the German waste management sector by means of legislative changes and enforcement actions by the Bundeskartellamt and the European Commission. The paper first explains the legal framework and the characteristics of the market. After setting out the actions taken in this field by the Bundeskartellamt and the results achieved from them, the paper highlights some remaining issues and suggests possible solutions.

## 2. The legal framework of the German waste market

2. The German waste market is governed by the German waste management act (Kreislaufwirtschaftsgesetz). A basic distinction made within this framework is between industrial/commercial waste and waste from private households.

3. The area of industrial/commercial waste has been liberalised for some years and shows that a liberalised and competitive market for waste management services does not lead to a reduced level of environmental protection: there are neither complaints to the Bundeskartellamt nor are there reports about environmental problems, like littering. This paper will therefore focus on waste from private households.

4. Waste from private households is generally subdivided into general waste and separately collected waste (packaging, electric and electronic equipment, batteries, etc.). General waste is governed by Sec 17 of the German waste management act (version of July 2012). This provision grants municipalities a monopoly on the collection of residual solid waste from consumers. This provision has to be seen against the backdrop of Article 28 of the German Constitution which guarantees the right of municipalities ‘to regulate all local affairs on their own responsibility’ (kommunale Selbstverwaltung). Exceptions from the monopoly exist for extended producer responsibility and charitable/commercial collections. Commercial collections can be banned by the responsible authority, if the collection endangers the economic viability of the waste management facilities of the municipality.

5. The collection of packaging waste from private households is mainly regulated by the packaging ordinance. The packaging ordinance requires producers and distributors trading packaged goods to organise the take-back and recovery of their packaging. The producers and distributors contract waste management companies for this service. These waste management companies (duale Systeme) organise the collection of such packaging free of charge from private households.

6. Initially, the entire system for the take-back and recovery of packaging waste from private households was handled by a single undertaking (Duales System Deutschland, DSD also known as “Der Grüne Punkt” - The Green Dot) which was set up by producers and distributors to ensure their take-back and recovery obligations.

7. Following interventions by the Bundeskartellamt, the European Commission and amendments to the legal framework, several new undertakings entered the market. The amendments of the packing ordinance allowed the organisation of local collections by undertakings other than the former monopolist DSD. To obtain a licence for the market for the take-back and recovery of packaging waste from private households an undertaking must apply to the Land (State) in which it wishes to provide the service. Such a licence is granted if the undertaking provides a comprehensive system for the collection of such waste for the *entire* Land, has coordinated the collection with the respective municipalities<sup>1</sup> and has organised the

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<sup>1</sup> E.g. whether and how often the material is collected from the home or from certain collection points and whether and how the waste is to be pre-sorted by the consumers. Packaging waste is typically sorted into

recovery of the waste. The collection has to be co-ordinated with the municipalities for practical and legal reasons. As mentioned above, municipalities are self-governed entities enjoying a certain level of constitutionally protected autonomy. Once a licence has been granted the undertaking has to ensure the free collection of the waste from consumers and compliance with the recycling quotas and to report yearly to the waste management authorities.

8. The requirement that undertakings have to ensure the collection for the *entire* Land in coordination with municipalities (currently there are around 400 different collection areas in Germany) creates specific competition problems as it means that the collection has to be organised jointly by the licensed undertakings.<sup>2</sup> Sorting and recycling processes are, however, managed individually.

9. Nowadays collections for the different areas/municipalities are tendered. In cooperation with the Bundeskartellamt it was ensured that competition is not restricted. Since 2011 the collection services for around 1/3 of the approximately 400 different areas are tendered annually. The contracts for the collection of waste have a three-year duration. Which licensed undertaking is in charge of tendering the collection services for a certain area is decided by lot. It is then responsible for organising the collection with the company winning the tender and has to bear the financial responsibility for more than 50% of the local waste collection costs. The collected waste is shared amongst the licensed undertakings according to their individual quota for which they were contracted by the producers and distributors.

### 3. Actions taken by the Bundeskartellamt

10. As detailed in the OECD Roundtable on Horizontal Agreements in the Environmental Context,<sup>3</sup> the Bundeskartellamt and the European Commission have taken a number of decisions in the area of the take-back and recovery of packaging waste. Four important areas are highlighted in the following.

1. The first actions in this area concerned DSD. While the Bundeskartellamt and the Commission initially tolerated that DSD bundled collection and sorting and contracted these services without a tender,<sup>4</sup> the Bundeskartellamt later prevented DSD from extending its services from private sources' packaging waste to packaging waste from commercial sources.<sup>5</sup> When the amended legal framework allowed for competitors to DSD, the Bundeskartellamt wanted to ensure that local collectors would not abuse their dominant position. Due to legal and factual reasons the local collectors, after having been contracted by DSD, had the exclusive right to collect packaging waste from private households in one area. This position of dominance should not be abused by refusing to contract with competitors of DSD for collection services (so called co-usage agreements).<sup>6</sup> The Commission thus issued a decision requiring DSD to end the usage of clauses which ensured that the local collector would exclusively work for DSD.<sup>7</sup> In 2002 the

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three categories: glass, paper/cardboard and lightweight packaging (plastics, composites, aluminium, etc.). Economically lightweight packaging is the most important element accounting for around 80% of the costs/turnover.

<sup>2</sup> Due to practical, legal and economic reasons it is not feasible that all undertakings collect their respective quantity of waste from all consumers.

<sup>3</sup> OECD (2010), "Horizontal Agreements in the Environmental Context," [DAF/COMP\(2010\)39](#).

<sup>4</sup> See Annual Report 1991/1992, BT-Drs. 12/5200, p. 132.

<sup>5</sup> Decision B10-82/93 of 24 June 1993, WUW/E BKartA 2561-2573. Further proceedings in this area were halted after DSD changed its policy, see Annual Report 1993/1994, BT-Drs. 13/1660, p. 128.

<sup>6</sup> As the services of the local collectors would not only be used by DSD but co-used by DSD's competitors.

<sup>7</sup> Decision 2001/837/EG *DSD* [2001] OJ L 319/1-29. The Commission additionally decided that DSD could not require licence payment for its trademark (Der Grüne Punkt) from producers and distributors of

Bundeskartellamt initiated proceedings to break up the cartel-like structure of DSD by 2006. As a result the structure of DSD changed: the waste management companies providing collection, sorting and recovery services left the DSD in 2003 and in 2004 a financial investor bought DSD.<sup>8</sup>

2. As explained in the 2010 OECD Roundtable Contribution<sup>9</sup> the Bundeskartellamt in 2007 issued a decision in a used glass purchasing cartel case.<sup>10</sup> Waste glass is used in the production of container glass – drink bottles, food jars, etc. There is an economic incentive for using waste glass: waste glass as a secondary raw material creates considerable cost savings for the glass producers, not only because it is cheaper than primary raw material but also because of its lower melting temperature, leading to considerable energy savings.

The German container glass producers set up a glass recycling company “Gesellschaft für Glasrecycling und Abfallvermeidung” (“GGA”) in 1993 to jointly purchase the entire waste glass recovered from household collections. GGA purchased centrally from the waste management companies and organized the delivery of waste glass to special recycling plants. GGA then passed on its purchasing costs for the waste glass and transportation to member companies (all container glass manufacturers with production sites in Germany) in the form of standard tonnage prices.

In an attempt to defend this purchase cartel it was claimed that the joint purchasing was necessary for environmental protection reasons. However, the investigation of the Bundeskartellamt ascertained that the cartel was not necessary for those purposes, in particular to guarantee the recycling quotas for waste glass, which for years had exceeded 80 per cent. The environmental claims were assessed within the traditional framework of Art. 101 (3) TFEU and Section 2 ARC. The purchasing cartel led to the elimination of competition covering a substantial share of the waste glass markets and the environmental recycling goals could be attained without such a far-reaching elimination of competition. For the Bundeskartellamt this case illustrates that there is hardly ever substance to alleged conflicts between competition law and environmental protection. Furthermore, the case showed that the existing legal framework allows for a balance to be struck without the need for a special exemption.

3. Beyond this GGA case, the Bundeskartellamt has been actively promoting competition in the packaging waste area. It frequently receives enquiries and complaints. In many cases the Bundeskartellamt was able to settle the issues without formally starting proceedings.<sup>11</sup>

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packaging if these had contracted a competitor of DSD to carry out the take-back and recovery. Since 2009 the DSD has unbundled its licence agreement and waste management agreement, so that it is now possible to use the DSD trademark without also contracting DSD for the take-back and recovery of packaging from private households, see Annual Report 2007/2008, p. 155.

<sup>8</sup> See Annual Report 2003/2004, BT-Drs. 15/5790, p. 178.

<sup>9</sup> OECD (2010), “Horizontal Agreements in the Environmental Context,” [DAF/COMP\(2010\)39](#).

<sup>10</sup> Decision of 31 May 2007, B 4-1006/06 available at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell07/B4-1006-06.pdf?navid=37>.

<sup>11</sup> Some of the statements of objection by the Bundeskartellamt are mentioned in the Sector Inquiry Dual Systems (B4-62/12) Final Report December (2012) page 101ff. available at [http://www.bundeskartellamt.de/wDeutsch/download/pdf/Publikationen/2012-12-03\\_Abschlussbericht\\_Sektoruntersuchung\\_Duale\\_Systeme.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Publikationen/2012-12-03_Abschlussbericht_Sektoruntersuchung_Duale_Systeme.pdf)

4. In December 2012, the Bundeskartellamt published the final report of its sector inquiry into packaging waste from private households.<sup>12</sup> The sector inquiry evaluated the time period from 1993-2011. It established that the system which started as a monopoly held by DSD had been transformed gradually into a competitive system. The main driver spurring competition was the decoupling of the three different steps: collection, sorting and recovery/treatment. Moreover, the new tendering procedure developed in cooperation with the Bundeskartellamt ensures that distortions of competition are kept to the minimum. The tendering system provides financial incentives by means of assigning the main financial responsibility. These incentives in turn ensure competition between the different undertakings tendering the collection services for the different areas.

The inquiry also showed that the market is still not fully liberalised and that certain problematic areas remain. The current system for collection could be made more efficient in economic as well as ecologic terms.

Such improvements are limited by the requirement to arrange the collection in agreement with the local municipality. The mutualisation of costs in certain areas still leads to inefficient structures. One example relates to ancillary charges which are paid by the group of licensed undertakings to the municipality for help desks and the provision and maintenance of areas for the waste collection containers. Another example is the collection of packaging waste together with other solid waste in certain municipalities. In these municipalities the collection has not been tendered and the financial responsibility is shared amongst all the licensed undertakings thereby eliminating the incentive to save costs. Costs in those areas are 40-100% higher than in the other areas. Although one would expect these higher costs to at least translate into a higher rate of recycling per resident, this is not the case. In fact, the rate in some areas is even lower than the average. The Bundeskartellamt continues to advocate and negotiate with municipalities and undertakings to ensure efficient tendering and financial responsibility.

#### **4. Impact of competition law interventions and legal changes**

11. In the area of the take-back and recovery of packaging waste from consumers the different enforcement actions and the changes in the regulatory regime have led to substantial cost savings as well as improvements in environmental performance.

12. The market for take-back and recovery formerly monopolised by DSD has now 9 further competitors and DSD's market share is down to about 44% (2011). Increased competition has led to substantial cost savings and improvements in terms of recycling quality. Recycling costs have fallen from 2 to 1 billion € per year. For a family of four this means a saving of roughly 50€ per year.<sup>13</sup> The sector inquiry showed that the introduction of competition has not led to a breakdown of the German waste management system, which some had feared. The recovery levels for packaging waste are the same and the recycling quota has not fallen. Instead introducing competition has spurred innovation. While the recycling quota declined during the DSD monopoly, it increased once new competitors entered the market. This result also makes sense from an economic point of view. Many components of the packaging waste have market value. Once sorted and separated they can serve as an additional source of revenue. Competition also stimulated innovation in sorting: while new sorting techniques were already available during DSD's monopoly, they became widely established only after competition was introduced. Hence, competition has not led to a race to the bottom in terms of the recycling level but instead to a race for a higher yield in secondary resources from packaging waste.

<sup>12</sup> Sector Inquiry Dual Systems (B4-62/12) Final Report December (2012)

<sup>13</sup> See Sector Inquiry Dual Systems (B4-62/12) Final Report December (2012) p 40ff.

## 5. Remaining issues

13. While the area of the collection of packaging waste from private households has been liberalised, such liberalisation has not taken place with regard to other solid waste from private households. The 2012 changes to the waste management act reaffirmed the position of municipalities in this area. Although options to introduce more competition were discussed in the legislative process, the final version abandoned such liberalisation. Municipalities enjoy a statutory monopoly for the collection of mixed wastes from private households (residual waste). According to Section 17 of the German waste management act the municipalities are also in the position to influence whether and to what extent competition for paper, biodegradable waste and bulky waste is allowed.

14. While introducing competition into the area of the take-back and recovery of packaging waste from private households has been a success, certain obstacles remain. The obligation to provide coverage for a whole Land means that a certain form of co-operation between licensed undertakings is necessary. The Bundeskartellamt ensures that such agreements restricting competition will not go beyond what is necessary in order to benefit from the exceptions provided under Article 101 (3) TFEU and Section 2 ARC.<sup>14</sup>

15. Moreover, ensuring the separate tendering of collection services is particularly important. This safeguards that competition in sorting and processing is not distorted. The tendering process needs to be designed in a way that any sharing of costs for collection services is kept to a strict minimum.

16. In the ongoing debate about the future design of waste management and the take-back and recovery of packaging waste from private households, municipalities and certain parts of the waste management industry have recently suggested a system change: A single central organisation, the municipalities for instance, should be in charge of tendering the services (so-called re-municipalisation). However, such a system would effectively turn back the time to the beginnings of DSD: a local monopoly would be created. The reduced competitive pressure would over time lead to a loss of efficiency which had been gained by introducing competition to this area. The change would increase the revenue of the municipality at the expense of competition, consumers and the environment: competing companies would be excluded, consumers would face higher costs, and the lower recycling rate would not be in the interest of the environment.<sup>15</sup>

## 6. Way forward

17. Taking as a starting point the good experiences in the area of the take-back and recovery of packaging waste, two options for further liberalisation in the waste sector and in particular for the currently municipality-controlled areas of residual waste, paper, biodegradable waste and bulky waste might be put forward: competition for and competition within the market.<sup>16</sup>

18. A “competition for the market” approach could even be adopted where the municipality has a monopoly. The municipalities could be required to tender the different services: collection, sorting and recovery/treatment. This would guarantee that even companies owned by the municipality would face

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<sup>14</sup> See e.g. Case Report B4-152/07 Bundeskartellamt (18.4.2011) available at [www.bundeskartellamt.de](http://www.bundeskartellamt.de).

<sup>15</sup> It seems important to note that the critique is not directed at any economic activity of the municipalities but rather at the problematic competitive structure envisioned. Economic activities by the municipalities can also increase competition, as their recent activity in the energy market shows.

<sup>16</sup> See Andreas Mundt ‚Die Liberalisierung der deutschen Entsorgungswirtschaft‘ in Peter Kurth and Anne Baum-Rudischhauser (2011) Ressource Abfall: politische und wirtschaftliche Betrachtungen anlässlich des 50-jährigen Bestehens des BDE p 178-191 available at [http://www.bundeskartellamt.de/wDeutsch/download/pdf/Stellungnahmen/Festschriftbeitrag\\_Andreas\\_Mundt\\_zur\\_Festschrift\\_des\\_BDE.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Stellungnahmen/Festschriftbeitrag_Andreas_Mundt_zur_Festschrift_des_BDE.pdf)

competition, thereby reducing inefficiencies and costs for consumers. For example the introduction of a tendering procedure led to a reduction in costs of around 30% in the time between 2003-2005 when DSD still had the monopoly for organising the collection of packaging waste from private households.

19. Preferable from a competition policy point of view is competition within the market. The municipalities' monopoly could be abolished and consumers would buy waste management services. Such a system is already in place for industrial and trade waste and used by consumers in telecommunication and energy. To safeguard against potential problems in terms of security of supply and environmental protection, appropriate regulation could be put in place. The problem of littering, i.e. the disposal of waste without consent at an inappropriate location, could be countered with an obligation to surrender waste to the municipality if proof is not provided that an appropriate waste management company has been contracted.

## **7. Conclusion**

20. The German experience shows that the area of waste management can be liberalised. While certain areas are not liberalised yet, the market for industrial and trade waste is fully liberalised and the market for the take-back and recovery of packaging waste has been liberalised over the last decade(s). The liberalised markets in Germany deliver good results, both in terms of efficiency and environmental protection. The innovation generated by inducing competition has led to considerable cost savings while and because the recycling quota has increased.