The role of Producer Responsibility Organizations for batteries and electrical and electronic equipment in the Flemish waste market

15 July 2016
Synopsis
Synopsis compiled for the Federation of Electricity and Electronics (FEE) and in consultation with the Public Waste Agency of Flanders (Openbare Vlaamse Afvalstoffenmaatschappij, OVAM)

Initial study:

Maarten Dubois, Joachim Thieren, Juan Alleman, Mélanie Coppens, Bernard De Caevel, Patrick Van Cayseele, Christoph Vanderstricht (2015) Studie naar de rol van beheersorganismen in de afvalmarkt (Study investigating the role of PROs in the Waste Market), compiled for OVAM, Mechelen

Available on:

Table of contents

1 Introduction ................................................................................................................ 3
2 Economic and legal framework for competition .......................................................... 4
3 EPR market structure................................................................................................... 6
4 European, Belgian and Flemish legislation and jurisprudence................................. 11
5 Recommendations for current PROs for batteries and EEE in Flanders and Belgium.. 13
1 Introduction

In the past two decades, policy-makers have increasingly used ‘Extended Producer Responsibility’ (EPR) as an instrument for enhancing the sustainability of the management of waste and materials. In the meantime, more than 400 EPR systems were developed worldwide in regard of a wide range of products including packaging, batteries, electronics, lighting, cars, lubricants, tires, furniture, building materials and medicines. The EPR policy instrument places the financial and/or operational responsibility for the management of waste generated by consumers with their “producer”. The term producer refers to manufacturer, seller or importer of the product.

To efficiently satisfy the statutory requirements, producers have typically united in sector-wide organisations (Producer Responsibility Organizations - PROs) that control the collection and recycling of waste. To finance their operations, these PROs apply for PRO fees from producers in proportion to the number of products they have sold or in proportion to their market share.

The operation of sector-wide PROs is a point for attention to be taken into consideration by businesses, researchers and policy-makers. After all, horizontal agreements between competing companies quickly threaten to place restrictions on free competition in the product or waste market.

The objective of the study is to investigate the EPR policy in Flanders and Belgium within a legal and economic context. More specifically, this synopsis is directed at Electrical and Electronic Equipment (EEE) and batteries. In regard of the European framework, this analysis hinges upon the available economic and legal literature as well as on the legislation and case law. In regard of the Flemish and Belgian framework, this study takes into account Flemish legislation and Environmental Policy Agreements (MilieuBeleids-Overeenkomsten) concluded with the industrial sectors involved. Additionally, this synopsis uses the insights from semi-structured in-depth interviews with representatives of producers, PROs, waste contractors and municipalities.
2 Economic and legal framework for competition

Although national competition authorities have the power to deal with purely domestic issues, the European legislation and the European Commission play a crucial role in safeguarding competition within the EU. Indeed, the European framework is binding with regard to competition across the borders of EU member states. Moreover, the Commission has extensive powers, in which it does not only detect potential violations, but also takes on a prosecuting role and imposes sanctions on violations.

The legal and economic perspectives coincide to a significant extent in regard of competition in markets. On the one hand, competition law envisions the implementation of rules that promote competition between companies in order to give consumers more choices, more innovative solutions, higher-quality products and lower prices. Economists, on the other hand, investigate the impact of the market structure on general prosperity, in which the promotion of consumer surplus is a crucial element. Both perspectives strive for cost-efficiency to the benefit of the consumer, in which the environmental footprint is taken into consideration as an essential prerequisite.

To determine a market, consumer needs as well as the geographical scope will need to be considered:

- A product market is composed of all the products and services that the consumer deems to be mutually interchangeable with regard to characteristics, prices and objectives;
- A geographical market is composed of the surface area in which companies supply products or services and in which the conditions for competition are homogeneous.

Market power refers to the influence that a company can exert on pricing in the market. A player with a great deal of market power will demand higher prices from its customers and negotiate lower prices with its suppliers. In this case, high means with a large profit margin. Low, in this case, means with little or no profit. In a monopoly, a company has a great deal of power on the market because there is only one party offering the relevant products or services.

From the perspective of competition law having a great deal of market power or a dominant position is not objectionable; it is, however, the abuse of this dominant position that is prohibited. For example, companies with a dominant position are not permitted to impose additional entry barriers that will prevent new competitors from entering the market. More in general, the rules on competition prohibit companies, as well as government bodies, from concluding and/or taking part in all agreements and mutually coordinated acts and activities that impede, apply restrictions to or frustrate competition.
Agreements can, however, be made as an exception subject to the fulfilment of the following conditions:

- The agreements must contribute to an improvement in production or economic advancement;
- A substantial percentage of the advantages will benefit consumers;
- The cooperation is needed to ensure greater efficiency.

Within the framework of EPR, competing companies collaborate on a substantial scale to enhance the efficiency of collection and recycling of consumer waste. EPR schemes therefore typically are horizontal agreements with a dominant position. To verify whether the horizontal agreements satisfy the specific circumstances listed above (and are therefore allowed), competition authorities will assess each case individually. Factual elements, real impact and intentions play an important role in this assessment.
3 EPR market structure

EPR exerts a direct influence on three markets:

- The product market, in which producers sell products that generate waste following consumption;
- The compliance market, in which PROs offer a service to satisfy producer’s statutory EPR obligations. Producers pay a fee to the PRO for this service;
- The waste market, in which transport companies and waste contractors collect, transport and recycle waste generated by end users.

*Figure 1: Price structure of products subject to EPR*

Error! Reference source not found. shows how the markets for producers, compliance and waste are connected. The price paid by the consumer is composed of production costs, operational waste costs, PRO operations costs, the increase/decrease of reserves, the profits realised by various actors, and VAT. The term ‘profit’ is a simplification that in reality refers to the gross margin attained by companies, from which taxes and other costs still need to be deducted. The figure has only been included for the purpose of illustration: the size of the blocks is not representative for the actual scope of the costs involved. E.g. the EPR fee comprises in many cases only a fraction of the total product price.
Coordination costs can be incorporated into the consumer price either directly (through the EPR fee) or indirectly (through higher administrative costs, borne by the companies involved). For example, competition between multiple PROs on the compliance market requires a clearing house with a view to coordinating the operations. If this clearing house is funded by the PROs, they will charge this cost directly on to producers and consumers through the PRO fee. Indirect coordination costs can refer to the administrative quest that producers must embark on in order to gain greater insight into the rules and the available compliance services. Also, coordination costs can include the time that companies invest in setting up a PRO and the necessary follow-up in relation to this. Such indirect costs are not included in the PRO fee, but rather in the overhead of the producers involved.

The supervisory costs as proposed in Figure 1 emphasize that not all costs related to an EPR system are incorporated into the consumer price. Supervisory costs refer to the costs of coordination and monitoring, which are not borne by consumers or producers, but by the government.

This figure explicitly makes a distinction between the paid-out profits and the reserves of PROs. Considering that profits are generally paid to the shareholders of PROs, this will encourage the escalation of consumer prices. This effect can be applied solely with regard to profit-making PROs, considering that a PRO with a non-profit status does not distribute profits. Reserves are composed of profit that is not distributed and provisions for anticipated costs. Reserves that are built to finance future costs of projects do not cause consumer prices to escalate over the course of several years.

The following sections will provide an in-depth discussion of each of the three markets.

3.1 The product market
The manner in which PROs are financed can disrupt competition on the product market. Significant flat-rate PRO fees can provide a competitive advantage to large companies because they are able to spread the cost out over a larger volume in comparison to smaller companies. Most EPR systems are able to balance this risk by charging producers only small flat-rate fees, or none at all. The PRO fee is, in this case, composed largely of a fixed contribution per unit put on the market. In this way, every company will pay in proportion to its own volume without the application of any volume discount.

Another risk arises from the economies of scale applied to collection and recycling. Large collective PROs are often able to keep their costs lower than companies that supply the same services on a smaller scale. By excluding producers from the collective system, a PRO with a dominant position in the compliance market will therefore also be in a position to disrupt competition in the product market. To counter this risk, policy-makers seldom allow PROs with a dominant position to refuse individual producers’ affiliation.
3.2 The compliance market

The structure of the compliance market determines the operation of PROs. Table 1 summarizes the key advantages and disadvantages of the two most differing types of market structure presented in the professional literature: monopoly with a non-profit status and perfect competition. A monopoly means that there is only one PRO for a particular product or waste flow. Perfect competition refers to a term taken from economics in which a large number of suppliers without market power enter into competition. There are many other types of market structure, but a discussion of the two market types will help to explain the key elements.

Table 1: summary of the benefits and disadvantages of the two most differing types of market structure for the compliance market

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Monopoly with a non-profit status</th>
<th>Perfect competition</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No profit margin on account of the non-profit status</td>
<td>Lower prices on account of competition</td>
</tr>
<tr>
<td></td>
<td>Transparency and simplicity</td>
<td>Free access to the market</td>
</tr>
<tr>
<td></td>
<td>Economies of scale</td>
<td></td>
</tr>
<tr>
<td>Disadvantages</td>
<td>Risk of PROs becoming cumbersome</td>
<td>The need for coordination</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Risk of limited competition</td>
</tr>
</tbody>
</table>

3.2.1 Monopoly with a non-profit status

A PRO with a non-profit status will not distribute profit, while a profit-oriented PRO will typically distribute any surpluses to its shareholders. This distribution of profits leads to two problems. First of all, a monopoly company can raise its profit margin by means of its market power at the expense of the consumer, which has a negative impact on total economic prosperity. Secondly, there is the distribution of shares. Who is entitled to join in the decision-making process of the company and who benefits from the distribution of dividends? Higher contributions would, of course, be applied to all competitors, while the associated dividend payments will only benefit companies possessing shares. Such a scenario would therefore skew competition on the product market.

A monopoly situation in the compliance market will ensure greater transparency:

- Government bodies have only one central point of contact;
- Statistics are reported in a coherent fashion;
- It enables the general public to gain a clear grasp;
- Producers will quickly be able to gain an insight into the costs of the relevant EPR schemes (especially relevant in Europe with all the fragmented EPR markets);
- The cost of coordination will in most cases be lower for both producers and government bodies than in competitive systems.
A monopoly situation creates economies of scale. A single system for the collection of waste is more efficient than a fragmentary system. Additionally, the unique position of a PRO will bring it substantial negotiating power in issuing tenders for operational tasks in the waste market. This negotiation position can result in competitive prices, which will benefit the cost-efficiency of the system.

A disadvantage of being a monopoly with a non-profit status is the lack of challenge from the market, which could result in PROs becoming cumbersome organisations in the long term. This could be illustrated in the following aspects:

- A monopolist would be able to pay higher wages than the generally accepted market rates, and hire more personnel than necessary.
- Projects with a limited added value could be assessed only half-heartedly, as a result of which they would be able to retain their funding.
- The existing structure and collaboration with stakeholders will no longer be questioned or will simply be retained in order to refrain from ‘rocking the boat’.
- The bonds with existing suppliers could become too strong, which would detract from objectivity in the allocation of tenders for collection and recycling and cause sub-contractor prices to increase.

The well-considered composition of supervisory boards can contribute to (but not guarantee) keeping PROs dynamic and efficient. A supervisory board composed entirely out of producers will always strive for the most competitive prices for the services offered. Conversely, companies that supply services for the collection and processing of waste will have conflicting interests if they hold a seat on the supervisory board. Lower rates for waste services are, of course, to the benefit of producers and consumers, but not for the individual waste contractors.

3.2.2 Perfect competition
If there is sufficient competition, the profit margins of PROs will remain low, regardless of their status (profit-oriented or non-profit organisation).

Because access to the market is free, producers can establish PROs. However, waste contractors can also offer a compliance package as an additional service. Therefore, this type of market allows a substantial diversity and innovation in regard of the services offered.

If there is competition in the compliance market, coordination is needed between the competitors on topics such as communication towards the citizen about sorting methods, allocation with regard to regions and cities, financial guarantees, reports and monitoring of free-riders. A central clearing house could take on the task of this tricky coordination, but the organization of such a clearing would also give rise to greater complexity and additional costs.
The key challenge is, however, the organisation of sufficient competition. After all, economies of scale could cause the market to get bogged down in a quasi-monopoly, in which the disadvantages of competition will be visible, while the advantages will only be used in part. A review of European schemes emphasizes that most compliance markets with multiple PROs are far from ‘perfect’ and include a dominant player that controls two-thirds or more of the market.

3.3 The waste market
Waste management consists of collection, transport, sorting and processing. The primary policy objective in this market is efficient execution of sustainable waste management. A transparent and objective allocation of orders, based on price and quality, is a logical approach in this respect. The market power of the PRO will help to establish competitive prices among waste contractors. To make sure that sufficient suppliers remain active in the market, the PRO can limit the term of its contracts or allocate the market to multiple parties.

Vertical integration is a long-term agreement (of at least several years) between a PRO and a waste contractor. The ultimate long-term contract of a PRO comprises an investment made in an operational installation or the take-over of a waste contractor. Vertical integration can avert competition in the waste market because orders are not tendered anymore in a competitive way. Additionally, it can also create a threshold for access to the compliance market for new PROs if necessary waste-related activities are involved that cannot easily be offered by other actors on the market. Vertical integration in the case of a PRO with a dominant position is only possible if it contributes to the benefit of society and is needed with a view to attaining the envisioned benefits.
4 European, Belgian and Flemish legislation and jurisprudence

European legislation imposes EPR for EEE and batteries, but allows member states ample freedom in choosing the structure of the EPR system. At Belgian level, the powers for EPR legislation are vested in the regions (Flanders, Brussels, Wallonia). In Flanders, the Flemish government determines, through its legislation (Materialendecreet en uitvoeringsbesluiten), the general framework. However, the Environmental Policy Agreements (Milieu-BeleidsOvereenkomsten) determine the functioning of the EPR system and the structure of the PROs. The content of the Environmental Policy Agreements is determined via mutual consultation between producers and the government, after which they are published as a legal obligation.

Flanders has one recent Environmental Policy Agreement for solar panels and one Environmental Policy Agreement for all other EEE. This text refers only to the latter. There are two legislative texts that apply to batteries: the Environmental Policy Agreements for discarded car batteries and the Environmental Policy Agreements for discarded portable and industrial batteries. The legal texts impose, among other, the following obligations on the structure and operation of the PROs:

- Non-profit status;
- Collaboration with the municipality and compensation of costs for the collection of waste at centralized facilities;
- Tendering is carried out on the basis of a set of specifications and transparent criteria;
- Refusal of affiliation towards producers is not accepted;
- A financial buffer of at least six months (only applicable to the Environmental Policy Agreement that applies to portable and industrial batteries).

The European competition rules will remain fully in effect in Flanders, regardless of the national legislative framework with regard to EPR. The European Commission has already initiated prosecutions with regard to the abuse of a dominant position in Germany (DSD), Austria (ARA), and France (Eco-Emballages). One of the basic principles applied by the European Commission is that producers must be able to retain the freedom to fulfil their obligations with regard to EPR separately from the existing PRO. Companies can, to this end, organise collection and recycling on an individual basis. However, this option is seldom attractive due to the economies of scale that apply to waste management. In addition, dissatisfied producers should be free to seek affiliation with an alternative PRO that also satisfies the statutory requirements.
With regard to PROs, the following entry barriers are a point for attention among competition authorities:

- Difficult and long procedures to obtain permission to access the market;
- High financial guarantees when starting up a system;
- Technical requirements that are tailored exclusively to the current monopolist;
- Exclusivity contracts in which waste contractors are not allowed to work for competing PROs;
- Reserves that are retained as an argument for not transferring to another PRO or to launch aggressive campaigns to impede the entry onto the market of a competitor;
- Contracts with producers in which exclusivity is demanded.
5 Recommendations for current PROs for batteries and EEE in Flanders and Belgium

To collect and process discarded EEE, producers have founded seven different PROs, each with its own supervisory board. These seven non-profit organisations, together with the sector federations for EEE, are the founders of the implementing non-profit organisation Recupel. Recupel collects approximately 40% of all EEE put on the market. Considering that it primarily collects flows in which the cost of collection is higher than the profit from recycled materials, its market share varies to a limited extent in proportion to fluctuations in the prices of raw materials. Private waste contractors collect the remaining discarded EEE.

The non-profit organisation Bebat organises the management of discarded portable and industrial batteries in Flanders and Belgium. The executive board and the General Meeting of Shareholders are composed of producers of batteries, deputising members of the Federation of Electricity and Electronics (FEE) and OVAM. In comparison to other EPR flows, the volume with regard to collectable portable and industrial batteries is rather small. After collection, these volumes disperse into even smaller flows because every type of battery requires its own processing method.

The non-profit organisation Recybat provides monitoring and reporting services to the collection of discarded car batteries. The executive board is composed of representatives of car battery producers, car dealers, car parts distributors and the OVAM as an external observer. Considering that car batteries have a positive value, the intervention of Recybat in the market for the collection and processing of batteries is limited.

The following sections will discuss the most important recommendations for these PROs in the markets for products, compliance services and waste management.

5.1 The product market

Two existing measures help to safeguard competition in the Belgian product market: the requirement of PROs to offer of free member access to producers and a PRO fee per sold item without application of a volume discount. Within the context of EPR for EEE and batteries, no additional policy intervention is currently required in the product market.

However, an investigation is recommended with regard to batteries into the possibility of differentiation with regard to the PRO fee per type of battery. Different types of batteries are subject to the same fee, while the costs of collection and processing strongly differ.
5.2 The compliance market
To determine the most efficient structure for the compliance market in Belgium and Flanders, the benefits and disadvantages of various market structures must be taken into consideration. The Flemish government and the producers have concluded an Environmental Policy Agreement in which a coherent choice was made in favour of collective PROs with non-profit status that are controlled by producers. Although, from a legal perspective, the existence of multiple PROs is possible, the producers have currently opted to maintain one PRO per product flow. The current operation of the PROs ensures transparency, makes use of economies of scale with regard to waste management and is in line with the existing legal framework.

However, the following points should be taken into consideration:

- In line with the vision supported by the European Commission, it must be possible for additional PROs to enter this market. Policy-makers as well as PROs should refrain from creating artificial thresholds for market access;
- Taking into consideration the required term (typically two years), negotiating an individual Environmental Policy Agreement would constitute a virtually uncrossable threshold for access to the market to new PROs. New PROs could, however, make use of an existing Environmental Policy Agreement to establish themselves on the short term. The Environmental Policy Agreement is therefore not permitted to contain conditions that are tailored specifically to the existing PRO. However, Bebat plays an explicit and central role in the Environmental Policy Agreement for batteries. From the perspective of competition, a more generic Environmental Policy Agreement without any connection to the current PRO would be better;
- Vertical integration into the waste market of PROs with a dominant position would only be possible if duly substantiated and on the basis of a market survey. Should a new PRO access the market, this body should also be granted access to all essential links in the waste market chain at reasonable prices;
- Bebat built a battery sorting facility, Sortbat, in order to increase the quality and reduce the costs of sorting. This investment concerns a vertical integration. Prior to investing, Bebat consulted the market. Additionally, the investment contributed substantially to approaching Bebat’s ultimate objective and raison d’être: the improved sorting and recycling of batteries. This vertical integration is therefore in line with the legal framework;
- Both Bebat and Recupel currently hold large financial reserves (to the value of various years of operation). Unallocated reserves can, however, form a threshold for switching should a second PRO access the market. Moreover, it is not efficient to park large reserves within a collective non-profit organisation. During the interviews with Recupel has emphasized that the reserves for EEE without a clear allocation will be phased out on the medium-term. A more formal planning with timing and milestones is however recommended. It is similarly recommended for Bebat to start making plans to phase out its unallocated reserves.
5.3 The waste market

The horizontal collaboration between competing producers allows PROs to hold a dominant position within their waste flow as a purchaser in the waste market. On the one hand, this position can lead to lower prices for waste management, which is to the benefit of economic efficiency while, on the other hand, a dominant position could disrupt competition in the waste market, or have a limiting effect on the market in terms of diversity. Therefore, PROs will need to take note of the previously communicated recommendations of the European Commission in respect of competition. This means that PROs will have to issue their tenders in a transparent and objective manner and that the terms of the ensuing contracts must remain limited. The tendering methods currently employed by Recupel and Bebat in respect of waste management is in line with these principles.

However, the following points should be taken into consideration:

- In the interviews, various stakeholders request that, in specific cases, longer-term contracts can be concluded with contractors with a view to promoting innovation and investments. The European Commission has already indicated that this is possible, subject to the condition that the benefits for the environment and consumers are substantial enough and that the longer duration of the contract is necessary to enable the investment to be realised;
- PROs can only impose conditions on waste contractors if they are connected with environmental goals or cost-efficiency. More specifically, PROs must, subject to unchanged environmental quality and cost-efficiency, allow waste contractors freedom of choice with regard to the deployment of secondary raw materials;
- At the start of the study, various stakeholders formulated questions with regard to the obligations that Recupel imposes on its contractors with a view to satisfying the WEEELABEX standard for the processing of discarded EEE. Considering that this standard aims to improve the quality of recycled resources in Europe, this obligation does not constitute a violation of the competition rules;
- A similar question concerned the requests for quotation from Recupel for the collection and transport of waste based on kilometres (rather than per drop). This type of quotation does not constitute a violation of competition rules, taking into account that Recupel consults the market in a transparent manner that aims to bring about a decrease in costs and an increase in efficiency.
- A PRO can impose a fixed format on its contractors with a view to reporting the results of its collection and processing operations;
- A more intensive form of collaboration between the PROs in Flanders and Belgium could possibly further optimise the transport of waste flows.
EY

Assurance | Tax | Transactions | Advisory

About EY

EY is a leading global provider of professional audit, tax, transaction and consultancy services. The insights and high-quality services provided by EY help to strengthen the confidence in the capital markets and economies around the world. We train leading managers, who are able to fulfil all our stakeholders’ expectations through collaboration. This allows EY to play a significant role in creating a better environment for our employees, clients as well as the general public.

EY refers to the global organisation, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients.

For more information about our organisation, please refer to ey.com.

© 2016 EYGM Limited.

All rights reserved.
ey.com/be