



Submission to the Department of Environment, Community and Local Government

Consultation on Corporate Governance Report – Annex to the RPS Review of the Producer Responsibility Initiative Model in Ireland

Submission S/13/004

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The Competition Authority
An tÚdarás Iomaíochta

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1. INTRODUCTION

- 1.1 The Competition Authority welcomes the opportunity to make a submission to the Department of Environment, Community and Local Government (“DECLG”)’s public consultation on the Report on Corporate Governance in the Producer Responsibility Initiative sector in Ireland (“the Consultation Document”).
- 1.2 In 2012, the DECLG commenced a wide ranging review of the producer responsibility arrangements in operation in Ireland (“the Review”).¹ The aim of that review is to explore the potential for the introduction of additional producer responsibility initiatives (PRIs) to help Ireland to meet its environmental objectives. One of the issues being examined is the level of competition in the various waste streams and whether there is a need for greater competition among compliance schemes.
- 1.3 The Authority has engaged with the DECLG in the area of Producer Responsibility Schemes (“PRSs”) on a number of occasions, in particular regarding packaging waste. The Authority is concerned that there is little competition among PRSs in Ireland. It is also unclear that the Irish regulatory system for PRSs is designed to allow effective competition.²
- 1.4 For a small open economy like Ireland, a key determinant of economic growth is international competitiveness. Effective competition supports our national competitiveness by keeping Irish-based companies’ costs down and our exported goods and services cheaper. Waste compliance costs represent one of the standard costs incurred by businesses in Ireland. Effective competition between PRSs would help drive waste compliance costs down for businesses and increase our national competitiveness.
- 1.5 The current Consultation Document is focused on the legal relationship between compliance schemes and the DECLG. It calls for the implementation of a coherent set of rules to (a) govern the legal relationship between the compliance schemes and the DECLG, and (b) define the Corporate Governance Code to which all schemes will be obliged to sign up. Most of the proposals outlined in the Consultation Document are standard and within the norms of Service Level Agreement (“SLA”) and Corporate Governance rules. However, some may have direct or indirect implications for competition between compliance schemes and among producers in their respective markets. The Authority’s submission addresses the competition implications of some of the proposals outlined in the Consultation Document.

¹In March 2011 the revised EU Waste Directive (2008/98/EC) was transposed into Irish law by the European Community (Waste Directive) Regulation 2011 (S.I. No. 126 of 2011) (the Transposition Regulations). The Transposition Regulations detail clear responsibilities for waste producers and holders. It is a duty on the State to ensure recovery in accordance with the EU Waste Hierarchy (with prevention at the top) and it is a responsibility for waste producers to treat waste or have it treated in accordance with the EU Waste Hierarchy. Producers involved in a particular waste stream should pay the full costs of waste management services provided including collection, treatment and disposal. A waste compliance scheme acts collectively on behalf of producers to meet the environmental outcomes specified in the legislation governing a particular waste stream.

² There are two schemes operating for both Waste Electrical and Electronic Equipment (“WEEE”) and Batteries. There is one scheme for packaging waste and one scheme for farm plastics.

- 1.6 This submission addresses the following proposals relating to the introduction of standardised SLAs:
- Achievement of targets,
 - Contingency funds, and
 - Cooperation with other schemes/self-compliers.
- 1.7 This submission addresses the following proposals relating to the introduction of Corporate Governance Code:
- Membership and representation on the Board,
 - Reporting, Transparency and Information, and
 - Cooperation with other schemes/self-compliers.
- 1.8 In summary, the Authority welcomes generally the proposals outlined in the Consultation Document, which sets out a clear, standardised, consistent and accountable relationship between the DECLG and compliance schemes. However, to facilitate effective competition among compliance schemes, the Authority recommends that
- proposals should limit restrictions on waste producers' ability to switch between compliance schemes where possible, and on the ability to switch to self-compliance;
 - proposals should limit the opportunities for waste producers and compliance schemes to share commercially sensitive information; and
 - regulatory functions - for example ensuring that Ireland achieves its recycling targets, having a reliable contingency plan in case of failing schemes, and educational and promotional activities for encouraging "reduce, reuse and recycle" - should rest with an existing state agency or Government department to avoid potential conflicts of interest.

2. BENEFITS OF COMPETITION

Policy objectives

- 2.1 Ireland must comply with specific European Directives and targets in specific waste streams.³ For each waste stream, these targets are set as a percentage of total amounts of waste being produced and imported into Ireland, by a certain date. If Ireland misses the targets, a fine is likely to be imposed on the State. Therefore, the primary objective of the DECLG is to meet the binding EU environmental targets.⁴
- 2.2 Business operators within the production chain (manufacturer, packer/filler, distributor, and importer) are responsible for the environmental impact of their products through the product life-cycle and for providing data on the amount of relevant waste they put on the market in relation to their products.⁵ Therefore, waste compliance costs are one of the standard costs incurred by most businesses in Ireland. It can be a substantial amount of money for some large businesses. For example, firms along the “packaging chain” paid €28 million levies in 2009 for packaging waste alone.
- 2.3 If waste compliance costs for businesses are higher in Ireland than they are in other countries, this could discourage international business from investing in Ireland, and resulting in job losses. Therefore, it is important to Ireland’s economic recovery that the overall waste compliance costs are kept as low as possible for businesses.
- 2.4 The correct balance should be found between lowering waste compliance costs and achieving national targets. Combined with effective regulation, competition policy and environmental policy can complement one another to facilitate and encourage the reduction, reuse and recycling of waste in line with the EU Waste Management Hierarchy.

Competition between Compliance Schemes

- 2.5 Waste producers have the option of transferring their environmental obligations to an external organisation, i.e., a compliance scheme, by subscribing to the compliance scheme at a fee. A compliance scheme co-ordinates the activities necessary for the recovery of waste on behalf of its members. In general, compliance schemes support the collection, sorting and recovery of the waste by making payments to firms for collection, sorting and recovery, referred to as subsidies.

³ The waste streams include packaging, WEEE, end of life vehicles, batteries, farm plastics and tyres.

⁴ A number of EU directives set out a range of policy principles, mandatory targets and regulatory frameworks which Member States must transpose into national law. For example, Packaging Directive (94/63/EC) specifies 60% of packaging must be recovered or incinerated with energy recovery by the end of 2011. WEEE Directive (2002/96/EC) specifies 8 Kg Separate collection of WEEE from private households per person per year by the end of 2008. Batteries Directive 2006/66/EC specifies a minimum 25% collection rate for batteries & accumulators by the end of 2011. In the case of farm plastics the EPA sets the environmental target.

⁵ Waste producer means anyone whose activities produce waste (original waste producer or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste, under the Waste Framework Directive (2008/98/EC).

- 2.6 Effective competition among waste compliance scheme operators could keep the administrative cost of the compliance scheme down, which could contribute to lower membership fees (waste compliance costs) for waste producers. In general, monopoly provision of services can result in inefficiencies and poor standards, since customers have no alternative source of supply. Effective competition among waste compliance schemes could play a key role in fostering more innovation and increased quality of services to waste producers. For example, compliance schemes could make the system easier and more user-friendly for members to submit their waste data which will reduce the administrative burden for both the compliance scheme and its members (the waste producers).
- 2.7 Effective competition among compliance schemes has been proven to bring a huge cost saving and can reduce waste compliance costs for businesses. For example, in Germany, the collection and recovery of packaging costs to packaging producers is recorded as being around €2 billion per annum when a monopoly compliance scheme was in place. By 2010, with competition in the market, the cost had fallen to around €1 billion per annum.⁶ Although introducing competition among compliance schemes is not the only factor that contributed to this huge reduction of packaging waste compliance cost, in Germany, there is a strong positive correlation between effective competition between compliance schemes and lower waste compliance costs.⁷
- 2.8 Most importantly, the systems in operation now in Germany, are reported to be reliable, environmentally friendly and stimulate innovation. This illustrates that effective competition can contribute to achieving environmental objectives rather than creating a race to the bottom.
- 2.9 In summary, combined with effective regulation, competition policy and environmental policy can complement one another to facilitate and encourage the reduction, reuse and recycling of waste in line with the EU Waste Management Hierarchy at minimal cost. However, it is not clear to the Authority that the current regulatory regime is conducive to effective competition. This is an issue we would be happy to discuss further with the DECLG in the context of the Review.

⁶ OECD roundtable on Horizontal Agreement in the Environmental Context-Note by the Delegation of Germany October 2010. ADF/COMP/WD(2010)88

⁷ The ownership structure of the Dual System Deutschland GmbH ('DSD'-the monopoly PRS for packaging in Germany) was also changed with the removal of firms involved in waste disposal and employment of open and transparent tendering methods.

3. REGULATING THE RELATIONSHIP BETWEEN THE SCHEMES AND THE DECLG: THE SERVICE LEVEL AGREEMENTS

Achievement of Targets

- 3.1 The Consultation Document states that “SLAs, once executed by the Schemes, have the advantage that responsibility for compliance with the obligations imposed on the Schemes rests with the Schemes”. It further states that “As the achievement of targets is of critical importance to the DECLG, the SLA should clearly enumerate the individual Targets each Scheme is required to meet for its individual waste stream”.
- 3.2 It is not clear from the above statement how the DECLG is to enumerate the individual targets each scheme is required to meet for its individual waste stream. Nor it is clear how individual targets for each scheme are to be linked to the national targets for its individual waste stream. Where there is one compliance scheme for a waste stream, such as Repak for packaging waste, would Repak be responsible for achieving the national targets for the packaging waste? Where there are two schemes operating for one waste stream - such as the Waste Electrical and Electronic Equipment (“WEEE”), i.e., WEEE Ireland and European Recycling Platform Ireland (“ERP”) - would each scheme be required to prove the recovery and recycling rate by its own members is equivalent to their proportions of the national target?
- 3.3 We understand that one of the objectives of the proposed SLA is to minimise monitoring requirements for the DECLG. However, in the Authority’s view the SLAs should avoid the situation where there is uncertainty regarding how each compliance scheme’s environmental obligations is associated with the national targets for their respective waste streams. This could potentially (i) foreclose competition by placing barriers to new compliance schemes entering the relevant market, and (ii) increase the subsidies that schemes pay the waste industry to recover and recycle the relevant waste to meet national targets.
- 3.4 It is important that the DECLG provides clear direction on how a compliance scheme’s environmental obligation is to be determined. Certainty with regard to the achievement of targets for all compliance schemes could facilitate entry and encourage investment. Therefore, the Authority recommends that the DECLG considers how individual targets for each scheme are to be linked to national targets for its individual waste stream in a manner which does not adversely affect competition.

Contingency funds

- 3.5 The Consultation Document states that the purpose of the Contingency Fund is to ensure the availability to the DECLG of sufficient resources for the continued delivery of each PRI in the event of failure of a Scheme. It adds that “Clearly, the SLA conditions should not have the effect of restricting freedom to switch between Schemes (where applicable) and it is possible to address these issues under both of the

proposals above (i.e. Fund becoming the property of DECLG or Fund remaining in the ownership of the Scheme held in trust for the DECLG)." The Authority welcomes the fact that the Consultation Document acknowledges that contingency funds should not have the effect of limiting producers from switching to different schemes. However, the Consultation Document goes on to state that *"It is recommended that the DECLG should restrict to a proportionate extent (either in quantum or in time) the ability of producers to fully recoup financial contributions to the Fund in circumstances where a producer is exiting a Scheme in order to self-comply"*.

- 3.6 The exclusive association of contingency funds with a particular scheme may be problematic. If producers have switched to self-compliance, the onus for compliance moves from the Scheme to them. Restricting a producer's ability to fully recoup financial contributions to the contingency funds in these circumstances could create barriers to switching. The SLA should avoid the situation where it creates unnecessary cost burdens that would discourage self-compliance. This is even more important for waste streams where there is only one compliance scheme in operation, as self-compliance is the only alternative that waste producers could use to fulfil their environmental obligations. The self-compliance option thus provides the compliance scheme with a certain level of competitive pressure.
- 3.7 If a waste producer who was formerly a member of a scheme switches to self-compliance, it is not clear why obligations related to that producer's responsibility, and the contingency fund contributions to meet them, should remain with that scheme.
- 3.8 If one of the purposes of the contingency fund is to ensure continued delivery of environmental targets in the event of residual exposure relating to that waste producer, it may be reasonable to expect the producer to continue to make financial contributions to a contingency fund. Indeed, it may be reasonable to expect all self-compliant producers to make such contributions. In light of this, contingency funds should not be the property of any individual scheme but should be available to the DECLG.
- 3.9 In summary, self-compliance - as one of the few competitive threats available to producers to push existing compliance schemes to improve their efficiency - is a very important option. The SLA should not create unnecessary cost burdens that limit the producers' ability to choose it.

Cooperation with other Schemes/Self-compliers

- 3.10 The Consultation Document states that *"Depending on the Scheme, the DECLG should specify provisions and obligations in respect of cooperation with another Scheme operating in the same waste stream (if there is more than one Scheme in the stream) and with producers who have chosen to self-comply. We would recommend that the DECLG also mandates that Schemes in different waste streams should cooperate where this would be of benefit (for example in the co-funding of a public awareness programme which could apply to a number of streams). In this regard it should be specified that cooperation between Schemes should at all times occur within the*

parameters of applicable competition law and in compliance with competition law and all other applicable regulations."

- 3.11 The Authority appreciates that the Consultation Document has stressed that cooperation between schemes whether they are within the same waste stream or among different waste streams should be compatible with competition law. However, it may be difficult for individual schemes to identify which type of cooperation among schemes could have anti-competitive effects.
- 3.12 Cooperation among competitors may prevent or restrict competition in the relevant market directly, where for example it facilitates the exchange of sensitive information such as price, or market share. Cooperation may have occurred for reasons other than the elimination of competition, but may nonetheless breach the law because of its anti-competitive effect. Cooperation among competitors has to be assessed on a case by case basis. To assist businesses comply with competition law, the Authority has published a number of Guidance Notes regarding horizontal cooperation among competitors and a series of information booklets that provide general information on complying with competition law.⁸
- 3.13 Co-funding a public awareness programme is mentioned by the Consultation Document as one type of cooperation between schemes. The Consultation Document suggests that schemes shall cooperate with each other to ensure that information provided to the public is clear and consistent. If the arrangement around this type of cooperation is not handled with care, it could have negative competition implications. For example, there are two basic questions raised from the awareness programme (i) how to share the cost of the awareness programme, and (ii) how to ensure that the awareness programme benefits different schemes equally?
- 3.14 The cost of educational and promotional activities for encouraging "reduce, reuse and recycle" practices should be shared according to the market share of the compliance schemes or even extended to self-complying producers. However, this should not lead to the sharing of confidential information between competitors. Therefore, if necessary, the DECLG or a central Government agency should be responsible for gathering information on market shares and for allocating these costs among producers and schemes.
- 3.15 Furthermore, if there is more than one scheme in a waste stream, it is vital that promotional activities do not favour one compliance scheme over another. If self-complying producers are obliged to share the cost, they should also benefit from such awareness programmes.
- 3.16 Therefore, it is logical and practical that functions, such as educational and promotional activities, are carried out by an existing state agency or government department which is currently performing these or similar functions. These functions can be funded by all waste producers. This may create synergies and cost savings compared to scheme co-funding a public awareness programme. Furthermore, it could avoid possible conflicts of interest between schemes (whose job

⁸ See <http://www.tca.ie/EN/Promoting-Competition/Guidance-Notes.aspx> and, <http://www.tca.ie/EN/News--Publications/Information-Booklets.aspx>

is to protect the interest of its members (the producers)) and the DECLG (whose duty is to protect consumers and promote reduce, recycle and reuse of waste).

- 3.17 In summary, certain regulatory functions - such as ensuring Ireland achieves its recycling target, having proper contingency funds and educational and promotional activities for encouraging "reduce, reuse and recycle" - should be assigned to an appropriate state agency or government department which is currently performing these or similar functions. The Authority would have concerns if PRSs were assigned the dual roles of regulator and representative body for the waste producer. If individual schemes are responsible for these regulatory functions, it is likely to distort competition between existing schemes and creates barriers to new entry.

4. REGULATING GOVERNANCE WITHIN THE SCHEMES: THE CORPORATE GOVERNANCE CODE

Membership and Representation on the Board

- 4.1 The Consultation Document states that *"A key issue will be bringing the correct mix of skills to the board of directors of the Schemes. It is possible to specify in some detail that, of the board of directors at any given time, a specified percentage should be made up of customers of the Scheme, industry and other specified stakeholders etc"*.
- 4.2 Having the correct mix of skills on a board of directors is important in supporting the performance of the compliance scheme. The Authority agrees that careful consideration needs to be given to the level of representativeness of the scheme board. It is important that the board of directors can play a productive and independent role on behalf of the scheme and its members in achieving the legislative environmental targets at reasonable cost.
- 4.3 The Authority would note that customers of the compliance schemes may be actively competing in their respective markets. For example, two competing electronics producers could be members of the same scheme. Vertical integration between collection and treatment within the waste sector is increasing, therefore, waste collectors and waste treatment firms could be competing with each other directly or indirectly. Therefore, it is critical that Board membership does not give Directors access to commercially sensitive information, such as information on customers, which may be misused to distort competition in the relevant market. Furthermore, the scheme's board should minimise the opportunities for potential competitors to meet and share sensitive information, which may prevent them from competing with each other.
- 4.4 We appreciate that the Consultation Document states that *"Directors must understand and manage potential conflicts of interest by making appropriate declarations of their interest and by refraining from voting on matters in which they have an interest."* Therefore, it is important that confidentiality, commercial sensitivity and potential conflict of interest should be taken into account in choosing the board of directors.

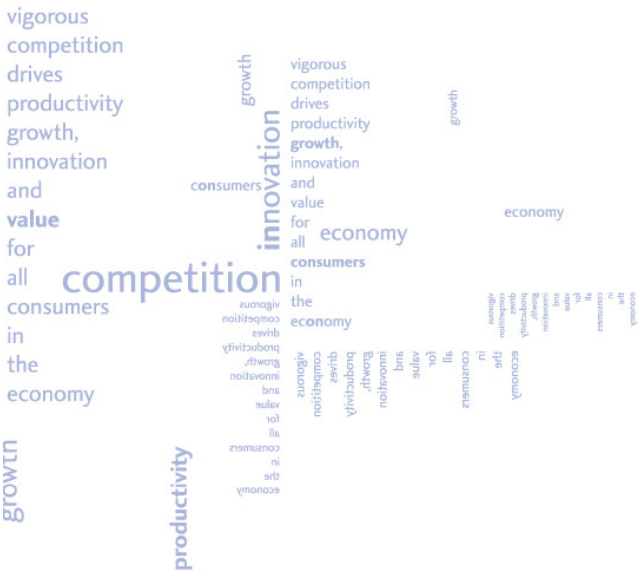
Reporting, Transparency and Information

- 4.5 The Consultation Document states that *"In order to ensure the effectiveness of reporting we recommend that the second chapter of the Code addresses transparency and impose information reporting requirements on the Schemes"*.
- 4.6 The Authority recognises that a greater level of reporting, transparency and information could ensure the effectiveness of reporting. However, it is important that such information is handled with care. Commercially sensitive information should always be treated as confidential. If commercially sensitive information is misused, it could affect competition (i) between schemes and (ii) among producers.

- 4.7 Schemes within the same waste stream are competitors and some of their members could be competitors in different markets. For this reason, for example, in the WEEE sector, the WEEE Register Society Limited is expressly prohibited from releasing any information in respect of market shares to any person, including the Registration Body itself.
- 4.8 In light of this, it is critical that the DECLG selects the required information with care. Information should be limited to ensure the effectiveness of reporting. If commercially sensitive information must be reported, the DECLG should not release any such information to third parties, including schemes and members of the scheme.

Cooperation between Schemes

- 4.9 The Consultation Document states that *"We recommend that the Code mandates that Schemes (either within a stream or across streams) shall cooperate with each other and with producers who have chosen to self-comply to ensure that information provided to the public is at all times clear and consistent, and that operational activities which might lead to synergies and cost savings are explored and undertaken where possible."* It further states that *"This may necessitate either a particular officer/director within each scheme being nominated as the responsible officer or it may require that a representative from each Scheme meets at specified intervals to ensure that this obligation is respected."*
- 4.10 This is similar to the proposal regarding SLAs which is outlined in paragraph 3.10 above. It suggests that schemes should meet at specified intervals to ensure that the obligation regarding cooperation with each other, is respected. We appreciate that there may be some synergies to be explored in the area of education and awareness initiatives. However, the Authority has concerns whether this mandatory requirement in the Code of Governance would serve this purpose.
- 4.11 It is difficult to see how schemes within the same waste stream or across different schemes would allocate costs across operators fairly and receive the same benefit in different education and awareness campaigns. The Authority believes that education and awareness initiatives are a regulatory function. It is better placed with an existing agency, which is currently performing these or similar functions. The agency could obtain levies from the producers which directly benefit from those initiatives. In addition, mandatory meetings may actually provide incentives for schemes to discuss membership fees or the amount of subsidies to the waste industry. This would ultimately reduce the incentive for schemes to compete.
- 4.12 In summary, any corporate governance code, should limit opportunities for sharing sensitive information, especially commercially sensitive information, among potential competitors. It should not create unnecessary interactions between actual or potential competitors, which could provide the opportunity for competitors to cooperate in an anti-competitive manner.



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