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

**Competition in the Circular Economy – Note by Spain**

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This document reproduces a written contribution from Spain submitted for Item 7 of the 140th OECD Competition Committee meeting on 14-16 June 2023.

More documents related to this discussion can be found at  
<https://www.oecd.org/competition/competition-in-the-circular-economy.htm>

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## *Spain*

### 1. Regulation and enforcement actions on packaging waste management sector

1. The European Packaging Directive, implemented in Spain via Law No.11/1997 of 24 April 1997 on Packaging and Packaging waste which was developed by Royal Decree 782/1998<sup>1</sup>, requires producers to manage the recycling of the packaging waste associated with the goods that they put on the market.

2. To comply with such obligations, producers may either establish their own Deposit and Return System or join a Producer Responsibility Organization (PRO). In 1996 Spanish producers, retailers and manufacturers founded ECOEMBALAJES ESPAÑA, S.A. (“ECOEMBES”), a monopolistic non-profit PRO paid for by producers, that organizes and finances the collection, sorting and recycling of packaging waste in Spain.

3. In Spain, local authorities are directly responsible for managing packaging waste in their territory. Thus they enter into collaboration agreements with ECOEMBES to establish the infrastructure and develop the separate collection of packaging waste, including all necessary procedures to ensure management and control of the entire recycling process.

4. Once final consumers deposit their packaging waste in the containers, local authorities collect and transport it to the selection plants that have previously been established by them. In the selection plants the packaging waste is classified into three “fractions”: metals (steel and aluminum), plastics (PET, HDPE, film and plastic mix) and used beverage cartons (brick packaging). Once the packaging has been classified, local authorities sell the waste fractions to ECOEMBES which designates the companies in charge of the recovery/ recycling of the various materials sorted in the plants. Additionally, ECOEMBES regularly awards tenders to recyclers of the packaging waste that has been sorted in the selected plants. However, only those recyclers that haven been certified by ECOEMBES can take part in the tenders.

5. Provided that ECOEMBES is the only PRO in Spain and that the recyclers need to be previously certified by ECOEMBES to participate in the tenders, ECOEMBES holds a dominant position, a monopoly, on the market of collection and recycling of packaging waste.

6. ECOEMBES has been previously investigated by the Spanish Competition Authority in two cases concerning a potential abuse of dominant position related to the recycling process, and more specifically, the tenders launched by ECOEMBES to designate the companies responsible for the recovery of the materials.

7. In October 2023, the Spanish Competition Authority, after carrying out a dawn raid in the headquarters of ECOEMBES, formally opened an infringement proceeding against ECOEMBES. The investigation concerns an abuse of dominant position which may breach Article 2 of Spanish Competition Act and Article 102 of the Treaty on the Functioning of the European Union (TFEU).

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<sup>1</sup> Please note that the aforementioned Spanish regulation has been recently repealed by Law No. 7/2022 of 8th of April on Waste and Soil Contamination for Circular Economy and Royal Decree No.1055/2022 of 27th of December on Plastic Containers and Packaging Waste.

8. Specifically, the Spanish Competition Authority is investigating a potential competition law infringement related to the lack of transparency in the tenders launched by ECOEMBES to designate the recyclers for the recovery of the materials. The procurement procedure would not guarantee the traceability and integrity of the bids submitted by the recyclers. Additionally, the Spanish Competition Authority is investigating whether ECOEMBES established barriers to entry for the recyclers to participate in the tenders which are not justified on technical, environmental or economic grounds.

9. In this course of the current investigation, the Spanish Competition Authority has adopted (December 2022) interim measures to ensure publicity and transparency in the upcoming tenders of PET and HDPE plastic waste organized.

10. Article 54 of the Spanish Competition Act establishes that the CNMC's Council may adopt, ex officio or at the request of any of the parties of the proceeding, interim measures to ensure the effectiveness of the final decision that may be issued once the infringement proceedings have already been opened. According to the mentioned article, interim measures must be motivated, proportional, and time-limited and must have the sole aim of ensuring the effectiveness of the final decision of the Council stating the potential existence of a competition law infringement.

11. Following Article 54, the Competition Directorate submitted an interim measures' proposal to the CNMC's Council to guarantee the transparency and publicity of the tenders launched by ECOEMBES.

12. The Council, after consulting the interested parties in the proceeding, issued a decision adopting the interim measures proposed by the Competition Directorate. These include:

- The participation of a public notary in the tender procedure with the purpose of guaranteeing the transparency, traceability and integrity of the bids submitted by the recyclers;
- A limit on the quantity that can be awarded to a single recycler in tenders for PET and HDPE plastic waste;
- Other measures ensuring the transparency of the tenders such as the publication on ECOEMBES' website of the call for tenders as well as the minutes issued by the public notary containing all the bids submitted for the tender.

13. The interim measures will remain in force until the end of the infringement proceeding or until ECOEMBES adopts an electronic tender proceeding as stated in Article 22(1)(d) of Royal Decree 1055/2022 of 27 December on Packaging and Packaging Waste.

## 2. CNMC's advocacy initiatives concerning the circular economy

14. The CNMC has been active in the debates concerning the role that competition policy and competition authorities have in the pursuit of sustainability goals, which have accelerated in the past few years.

15. As part of these conversations, [the CNMC published a position paper](#) in December 2020 in the context of the European Commission's public consultation on how competition policy can contribute to the Green Deal.

16. CNMC's commitment to sustainability and the promotion of the circular economy is also reflected in its [Activity Plan for 2023](#) as well as in its [Strategic Plan for 2021 - 2026](#). It is in the context of its aim to help achieve the Sustainable Development Goals, the

Advocacy Department is pursuing several projects in “green” sectors, including two ongoing market studies on [electric vehicle charging](#) and [packaging waste management](#).

## 2.1. CNMC’s position paper on the Green Deal

17. In 2020, the European Commission launched a public consultation on the European Green Deals, which aims at making Europe the first climate-neutral continent by 2050 by developing a fair and prosperous society that permits for the implementation of a modern and competitive economy using resources efficiently. The European Commission sought contributions from authorities, associations and operators in three areas: State Aid, prosecution of anti-competitive behaviour and merger control procedures. The CNMC participated in the public consultation by issuing a position document stating its opinion on these matters.

18. The CNMC’s position paper identifies two ways in which competition authorities can help sustainability. On the one hand, competition authorities may address their efforts towards interventions that favour sustainability, by using both enforcement and non-enforcement tools, such as market studies. On the other hand, competition authorities may integrate sustainability considerations into their substantive competition analyses. This must be done carefully.

19. As a starting point, while there may be more direct ways to promote sustainability, market competition is also a driver for sustainability. Indeed, competition encourages technological innovation and spurs companies to offer more sustainable products and services. Sustainability can be a differentiating factor of competitiveness that benefits consumers, one that competition policy must reinforce.

20. However, although, in general, competition and sustainability are complementary, sometimes they are not, so a balance that is satisfactory to society must be struck between the two. The necessity and proportionality test is the best way to determine this balance point.

21. In this regard, the CNMC believes that integrating sustainability considerations into competition analyses must comply with the following principles:

- Provide the necessary predictability to economic operators in terms of how their actions will be assessed under competition rules.
- Maintain the consistency and interpretation of competition rules within the EU and avoid the fragmentation of the internal market.
- Preserve effective competition in the internal market, so that it can be ‘fine-tuned’ without a radical transformation.

22. Moreover, a proactive effort for sustainability by competition authorities requires greater specialisation in these areas (professional skills, evaluation methodologies, etc.).

23. Concerning State aid, it is necessary to conduct a careful assessment of the risks involved in modifying the regulations on State aid. Each country should be allowed to reflect its sustainability concerns without distorting competition in the internal market. The specific proposals made by the CNMC include clarifying the regulations on electricity self-consumption, developing a network of recharging stations to achieve the true deployment of electric vehicles, and immature production technologies, together with reducing incentives for production activities that rely on fossil fuels when it is technically possible to use clean energy. Public procurement can also be an equally effective instrument to curb climate change.

24. As regards anticompetitive practices, agreements between operators that yield a clear environmental improvement and do not involve restricting parameters that are essential to competition are permitted by competition rules. Those agreements that, in addition to providing a clear environmental benefit, also restrict competition, are acceptable as long as they comply with the requirements of competition regulations (Art.101.3 TFEU and Art. 1.3 of Spain's Anti-Trust Law). However, there is a clear limit that must be respected: sustainability goals can never be an excuse to authorise cartels. The CNMC notes that, in order to stimulate the adoption of cooperation agreements in favour of sustainability targets, operators should be given greater legal certainty at the EU level on the types of actions they can carry out without breaching rules on competition and on the evaluation of efficiencies.

25. Finally, the CNMC notes that mergers can, in certain cases, have a negative impact on sustainability by reducing innovation or competition between sustainable operators. Another cause for concern is the so-called “killing acquisitions”, that is, mergers aiming at letting the acquiring company gain control of the acquired company in order to avoid developing or commercialising cleaner technology. By contrast, some business mergers may help advance sustainability objectives. Including sustainability criteria as part of the efficiency analysis would require a review of the evaluation instruments (concepts, tools and profiles).

## 2.2. Market study on packaging waste management

26. In February 2022, the CNMC announced the launch of a [market study on packaging waste management](#). The market study marks the culmination of the work relating to waste management issues undertaken by the Advocacy Department in the past few years, where it has supported the lawmaker during the drafting stages of new legislation (which transposes European Directives) by issuing several reports on draft regulations<sup>2</sup>. As a result of this work, the CNMC realised that, even though there was a regulatory reform on its way, there still seemed to exist various obstacles (both structural and regulatory) that hindered competition in the sector and deserved a thorough analysis.

27. The most obvious of all is that, since the introduction of Extended Producer Responsibility (EPR) in Spain in the late 1990s, only one collective EPR scheme has been created to manage light packaging waste (ECOEMBES) and glass packaging waste (ECOVIDRIO), leading to de facto monopolies, unlike in other waste streams or other countries. During 2022, a significant regulatory reform has been approved that has set into motion a significant transformation of the sector, which places it in a decisive moment to determine the competitive environment in the long term. Furthermore, the CNMC believes that the promotion of competition in the waste management sector has shown to be especially beneficial for sustainability, according to the experience of other countries in terms of waste sorting<sup>3</sup>, recovery, and recycling rates<sup>4</sup>.

28. The study began with a public consultation<sup>5</sup>, in which all stakeholders were invited to respond to a series of questions concerning the packaging waste management sector in Spain, both from the point of view of regulation and the functioning of the markets concerned. The public consultation was a success, with the participation of 49 stakeholders,

<sup>2</sup> See, for instance, the documents PRO/CNMC/001/21 and IPN/CNMC/041/21 (in Spanish).

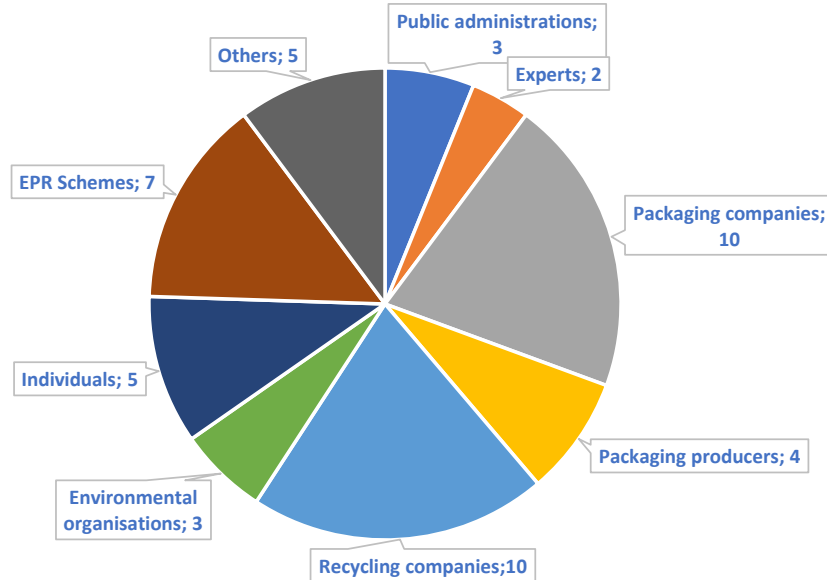
<sup>3</sup> Sektoruntersuchung duale Systeme, Bundeskartellamt, 2012.

<sup>4</sup> More information available here.

<sup>5</sup> More information available here (in Spanish).

including public authorities, experts, packaging companies, packaging producers, recycling companies, environmental organisations, individuals, EPR Schemes and others.

### Participation in the public consultation by type of participant (Total: 49)



29. The participants in the public consultation highlighted different areas of concern, such as:

- From the packaging companies' (subject to EPR) point of view, the fact that there is so far only one existing entity to fulfil the obligations given by extended producer responsibility means that they must accept the conditions or practices imposed on them by the monopolist, e.g., concerning green dot fees or governance of the system, among others.
- Several public administrations expressed dissatisfaction with their relationship with at least one of the existing monopolists (ECOEMBES). The administrations depend on the financing of this entity to carry out the management of packaging waste, and many state that this, in addition to their insufficient human resources, gives ECOEMBES more leverage in the negotiations of the financing agreements.
- Recycling companies complain about the homologation system set in place by ECOEMBES, by which they can only participate in material tenders if they pass homologation, even when complying with legal administrative authorizations. In addition, some recyclers have expressed dissatisfaction with the conditions under which material delivery occurs. Finally, they accuse the system of material allocation of lacking transparency, which, in fact, is under investigation by the Enforcement Department of our authority.

30. The work on the study is still underway, focusing on the legal analysis of the sector in Spain, the situation in other countries, the concept and implementation of extended producer responsibility, which is key in the packaging waste sector, and its implications on competition and the achievement of a circular economy.

### 2.3. Market study on EV charging infrastructure

31. One of the key challenges to tackle climate change and to reduce the economic dependency on non-renewable resources is decarbonizing the transport sector. In order to do so, most authorities have set forth ambitious plans to promote the adoption of electric vehicles (EVs). These include the development of a charging points' network, able to adequately serve this kind of vehicles (the Spanish government, for instance, has established a country goal of 80.000-110.000 public access charging points at the end of 2023, and of 340.000 in 2030).

32. However, it corresponds to public authorities not only to guarantee certain penetration objectives, but also to ensure that the new market of electric charging services functions properly from a competition perspective. That is why the CNMC has started a market study on EV charging infrastructure. It will incorporate input from a public consultation (to be opened in the next months), and it will focus on competition risks coming from the market structural characteristics, businesses practices, and administrative interventions.