

COMMENTS ON THE EXTENDED PRODUCER RESPONSIBILITY DRAFT GUIDANCE BY EUNOMIA

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European Recycling Platform (ERP) welcomes the draft guidance on extended producer responsibility (EPR) and appreciates the huge effort that has gone into it. As pan-European producer responsibility organisation (PRO) for waste electrical and electronic equipment (WEEE), batteries and packaging, which has helped to implement EPR in several countries of the European Union and beyond and which operates at the very interface between producers, consumers, waste collectors, recyclers and municipalities, we know the practical challenges and inefficiencies arising from different regulatory settings and, therefore, fully support the European Union's efforts with regard to harmonisation. With this paper, we want to share some of the operational experience and expertise we gained from effectively implementing EPR over the last 20 years and draw attention to some aspects we feel not sufficiently taken into account, thereby challenging some of the conclusions and implicit recommendations of this draft guidance.

Harmonization of fee modulation

The comprehensive research and the listed ideas on the criteria for the fee modulation as well as on a required clearing mechanism for a modulation in a competitive environment will help to implement the Article 8a(4b) Waste Framework Directive (WFD). At the same time ERP wonders whether a strict list of criteria (instead of the discussion of possible criteria) would not provide more guidance to the Member States aiming for a harmonization within the European Union single market.

Competition assuring necessary cost

ERP is deeply concerned by the stated arguments and conclusions in sub-chapter 3.5.1.1 regarding the referred effects of competition. In fact, competition is contributing by nature to achieve a level of necessary cost to run an EPR system while assuring maximal service levels to producers. PROs typically do not own the operations but organise the compliance of their customers subcontracting service suppliers like logistics, sorting and recycling companies, who might also be contracted by other PROs. As those companies charge the PROs for their services they also invest into the required infrastructure. PROs shall compete for the best market price running regular tendering processes optimising the waste collection and treatment cost as well as their own administrative cost. With this, a competitive PRO market itself is assuring the right price for producers at necessary cost and requires neither a minimum size of for PROs nor a maximum number of PROs. Moreover, we cannot follow the logic in sub-chapter 4.4.5.7 according to which the incentive to declare more "bonus" products and fewer "malus" products would exist only in a competitive environment. This risk exists in any setup.

Level playing field required

In any case, an EPR system, regardless of whether as single PRO or in competition, needs a clear set of rules for a level playing field (minimum quality standards, financial guarantees etc.), as foreseen in Article 8a(3) of the WFD. ERP also believes that an independent body for compliance monitoring and clearing (article 8a(5) WFD) is required in any setup in order to monitor the producers' declarations as well as the activities of the so called informal sector.

On the following pages we provide further, specific and more detailed comments. For the sake of clarity, we structured our remarks and proposed amendments in a way that corresponds to the five main chapters of the guidance.

Scope of costs to be covered (chapter 2)

Supporting services (2.3)

The draft guidelines mention enforcement costs as an example of those supporting services which are to be covered by producers. ERP would like to point out that enforcement is primarily a government task, not a private one. Hence, enforcement costs should generally be covered by the responsible authorities and not by producers/PROs. Authorities can refinance these costs by charging those actors who are non-compliant. The only enforcement related cost that are to be covered by all producers jointly are possibly the cost for an independent body who monitors compliance and runs clearing processes.

Observations on costs – Wider costs (2.6.3)

It is proposed that PROs should finance the costs for managing litter for EPR regulated products following a similar approach as defined in the single-use plastics directive for certain plastic items (e.g. packaging). However, this approach is not yet defined, in particular regarding how to calculate the share of product specific litter in the municipal clean-up, probably also considering seasonal and regional effects.

Necessary costs (chapter 3)

Approach to distribution of funds – Overview (3.4.1)

We would suggest do add the following element to the list of factors that would need to be taken into account when modelling the costs of waste management activities in case of transfer, sorting and treatment facilities:

- *Differences due to different competitive landscapes (supplier options)*

The reason is that we see also regional differences due to the competitive situation in a region. In some regions, there is only one option available while others see multiple suppliers. Actually, the situation of only one available option could also be supported by regional legal requirements to treat waste locally (prohibiting non-local options that might be more efficient or even more environmentally sound overall).

Approach to distribution of funds – Factors – Geographical differences (3.4.2.2)

We would suggest to amend the following paragraph:

Making collection systems adequate and acceptable may necessitate greater costs being incurred to provide services in some locations than in others. For example, where it is impractical for households to store multiple, large containers at home, it may be necessary to collect material more frequently. Where citizens are difficult to engage in recycling due to particularly diverse or transient populations, there may be a need for more expenditure on communication, ~~perhaps even including door-to-door visits to advise citizens regarding how to use the collection system correctly.~~ These additional costs should be reflected in the approach to the distribution of funds, so as to ensure that services in all parts of the Member State are adequately funded.

Door-to-door visits are among the most expensive communication measures without offering significant added-value in comparison to other measures. Therefore, those should not be highlighted towards Member States. In fact, there are already practices in place that have a similar effect, e.g. for kerbside collection of packaging the possibility of waste collectors to reject picking up incorrectly sorted waste and to request a correct sorting before the next pick-up by adding a corresponding sticker to the bin.

Approach to distribution of funds – Factors – Consistency (3.4.2.3)

We would suggest to add the following element to the list of arguments why Member States may consider introducing minimum levels of collection services:

- ensure the same principle of separation and collection including e.g. consistent colour codes for bins across the country – ideally EU-wide – avoiding confusion among residents and their guests as well as allowing service providers to reallocate bins to other municipalities/regions if needed;

Efficient service delivery – Systematic efficiency – Local efficiency (3.5.1.1)

ERP is deeply concerned by the arguments and conclusions in this sub-chapter regarding the effects of competition. These arguments and conclusions are mostly not in line with the experience we gained over the years as pan-European PRO.

First of all, we cannot support the conclusion that *“competition between PROs should have a relatively limited scope in itself to affect producers’ fees (...) and (...) is therefore likely to have the most beneficial effect where it is employed in the commissioning of operational services”*. While indeed the administration costs of PROs are small in comparison to the overall cost, PROs run tendering processes to optimise the waste collection and treatment cost. This procedure has significant cost impact for producers as it is always looking for the best market price from suppliers, but also as it prevents potential “gentlemen agreements” among few exclusive parties that can be costly for producers as historical evidence shows for countries that switched from monopoly to competing PROs.

Further, we would like to challenge the conclusion that *“Member States should consider how infrastructure investments will be funded, and any need for co-ordination between competing PROs within such a model, (including) some combination of a limitation on the number of competing PROs, centralised coordination of infrastructure investment between PROs or the operation of a strategic fund into which all PROs contribute”*. The market would regulate this without any risk for the Member State, provided that the framework is set up correctly. All PROs should fulfil minimum standards as defined in Article 8a (3) of the WFD. Possible compliance risks (e.g. that a PRO is stopping operations) can be mitigated by financial guarantees to be provided by PROs according to their respective market share. A PRO does not necessarily need to have own operations, but can contract those services from waste treatment companies. In fact, most PROs don’t have their own operations. Waste companies invest to get contracts from PROs to secure future business. Such investments are also always triggered by the legislation and its targets. No PRO (either in competition or as monopoly) should and could invest voluntarily into services that would exceed “necessary cost” (= cost necessary to fulfil the given targets). Thus, the situation described in this paragraph can only happen to vertically integrated PROs and only to those of them, who need to procure services in-house, which is not the typical market setup.

Moreover, it is not the task of a Member State to limit the number of PROs. This will be done far more effectively by the market itself. If each PRO needs to contribute to a central body on top of its own cost, it will need a certain size to remain competitive. If this is not given, it will not “survive” at the market. Pan-European schemes like ERP can also accept a smaller market share in specific countries since several operational aspects can be centralized for maximum efficiency (e.g. pan-European procurement of services). Such a limitation as suggested in this paragraph would be highly anti-competitive.

Most importantly with regard to competition are the following arguments:

- Competition helps to find the “right price” = necessary cost
- Competition assures maximal service levels to producers
- Competition stimulates innovation for best services
- Competition needs a clear set of rules for a level playing field (minimum quality standards, financial guarantees etc.), e.g. Article 8a(3) WFD
- Competition needs an independent body for compliance monitoring, clearing etc., e.g. Article 8a(5) WFD

Efficient service delivery – Systematic efficiency – Benchmarking (3.5.1.2)

ERP would like to point out that a benchmark as proposed in this sub-chapter would not be necessary in a Member State with a well-functioning competitive PRO market, where PROs always compete for best prices at best service levels. The Member State should limit its activities on ensuring enforcement and compliance of competing producers and PROs.

Efficient service delivery – Systematic efficiency – Governance (3.5.1.4)

The proposal to introduce clear reporting requirements does not help to ensure cost efficiency, if the benchmark is missing. And as mentioned above, the benchmark is difficult to generate if there is no competition. Further, a board representation for producers bears the risk of unequal treatment since only a limited number of producers can sit in the board and probably only large multinational companies will be able to afford this. Actually, the proposed alignment between the PRO's interests and those of the producers are best achieved in competition since then the producer can choose the PRO that is best aligned with its interests.

Efficient service delivery – Transparency and engagement (3.5.2)

This chapter is not only applicable to packaging producers and packaging EPR. At the same time, ERP would like to comment that it needs to be checked against national competition rules, how open the financial statements of the PROs can be while still following article 8a (3e).

Fee modulation (chapter 4)

Overarching Principles for Fee Modulation – Ensuring cost recovery (4.2.4)

With regard to the proposed bonus / malus system, we would like to point out that a two-step approach, i.e. standard fee and malus or standard fee and bonus, would be less complex while it could also be handled overall financially neutral by PROs.

Further, although we agree that the proposed variant of fixing the size of the bonus and then adjusting the malus accordingly would have a stronger incentive effect, we would like to raise attention to the fact that this would push the financial risk to the PRO since it can only request the payment at the end of the financial year when the volumes and thus the magnitude of bonus paid out is clear. Then, there is still the remaining risk that a producer does not pay its malus obligation, in particular as this point of time often coincides with the end of a contractual phase with the PRO. Thus, court cases might be programmed.

In contrast, a fixed malus paid upfront is much easier to communicate by the PRO. Also it is much better plannable for producers because an upfront malus is representing the maximum cost to be considered in their budgets avoiding surprises that are not plannable, simply because they don't know the total market and hence the malus to be expected.

Overarching Principles for Fee Modulation – Evidential Basis for Modulation (4.2.6)

ERP fully agrees to the importance of evidences, but would strongly recommend to describe the required evidence documentation more specifically, in particular with regard to the following questions:

- Which documents would need to be provided by producers?
- Are there any standardized documents proposed?
- What is the role of PROs in validating the evidences? Do they simply trust the producers' self-declarations for the modulation and enforcement actions are with authorities?

Overarching Principles for Fee Modulation – Accounting for Competing Schemes (4.2.11)

We very much welcome the idea to set the criteria / magnitude of the fee modulation centrally, ideally by a "body independent of private interests" (§8a (5) WFD) consulting all relevant stakeholders. However, we miss the strongly required clearing mechanism here and would suggest to add the following paragraph at the end of this sub-chapter in order to balance PRO specific customer base (modulated income) and same waste for all PROs (non-modulated waste cost).

Moreover, a clearing mechanism among PROs would need to be established balancing modulated income resulting from PRO specific customer base and the cost for non-brand sorted collection (basically all PRO facing similar non-modulated waste). Such a clearing is common practice to balance volumes according to market shares. An identical absolute modulation for all PROs would allow to add this aspect into the clearing with a probably reasonable effort.

Electrical and Electronic Equipment – Recommendations for implementation – Compatibility with competitive schemes (4.4.5.7)

We would suggest to merge this sub-chapter with sub-chapter 4.2.11 “Overarching Principles for Fee Modulation – Accounting for Competing Schemes” since it is not WEEE specific, but applicable to all waste streams.

Further, we would like to point out that the argumentation around the consequences of the net balance of modulations being larger or smaller than zero (last three paragraphs) does not only hold in a competitive environment, but also in a single PRO situation. Hence this argumentation should be moved e.g. to sub-chapter 4.2.4 (Ensuring cost recovery).

Moreover, ERP strongly disagrees that only in a competitive environment an incentive to declare more “bonus” products and fewer “malus” products would exist. The risk of false reports exists in any setup and actually is the reality already today for producer’s volume reports. Mitigating this risk requires market surveillance by authorities or an independent body on their behalf in any setup.

Equal treatment (chapter 5)

Elaboration of Key Principles – Point of Compliance (5.2.9)

We believe that as such a single point of compliance the national register could act and is existing in multiple countries. But also this setup would not necessarily know about commercial agreements between parties in the supply chain (e.g. producer or distributor) on who is finally reporting the volumes put on market avoiding multiple reporting of same volumes (if possible under the national legislation).

Elaboration of Key Principles – Competition (5.2.10)

The need for transparency over fees is fully understood and indeed in line with the producer pays principle / equal treatment. However, public disclosure of service prices (fees) might be non-compliant with national competition laws. This is to be reviewed or addressed in national legislation if desired by member states.

Recommendations – Reporting Requirements (5.3.2)

While ERP is strongly supporting harmonised fee structure / criteria for fee modulation, we cannot imagine that we can achieve harmonised fees between Member States, simply because of varying national cost as being discussed in chapter 3.4.1.

Recommendations – Fee requirements (5.3.4)

It is proposed that “fees covering PRO operational costs should be in proportion to the quantity of products or packaging placed on the market”. The motivation for this is understood and strictly following the polluter pays principle. However, the administrative cost of a PRO (e.g. handling registration and reporting of a producer) are not volume-triggered, but defined by administrative efforts for a specific customer. An administrative cost fee based on tonnage would not reflect this economic fact. Hence, larger producers would need to cross-subsidize this, which could be against the goal of equal treatment and might cause court cases, if not clearly required by law.

Recommendations – Setting De Minimis Thresholds (5.3.6)

We fully understand the motivation to reduce the administrative burden for smaller producers, but believe more clarification is required on how simplified reports following the proposed minimum reporting requirements would go with the fee modulation. A fee modulation would require a rather complex reporting including the delivery of significant evidence documentation. Which price should the PRO charge to a producer providing a simplified report not covering required information for a fee modulation – a malus price due to the absence of evidences for an eco-design qualifying for a bonus price? This might be against the principle of equal treatment and possibly the law requiring a modulation.

ERP fully agrees that the de minimis threshold should not be left to competition but should be set nationally for a level playing field (as also mentioned in chapter 5.3.8.) *“It should not be possible for PROs to compete by adjusting modulation or on the basis of volume produced. It should also not be the case that PROs can compete on any De Minimis threshold for reporting.”*

Tackling free-riding (chapter 6)

Awareness raising (6.6)

We would suggest to add the following sentence at the end of the sub-chapter *“In terms of awareness ...”* to add the following sentences. *“Moreover, the EU could aim to expand European enforcement networks to global networks.”* to consider the increasing global market with product shipments from outside the EU.

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About ERP

European Recycling Platform was founded in 2002 in response to the introduction of the European Union’s Waste Electrical and Electronic Equipment (WEEE) Directive. ERP’s mission is to ensure high quality and cost effective implementation of the Directive, for the benefit of its customers and the environment. In June 2014, ERP became part of the Landbell Group, an international supplier of service and consulting solutions for environmental and chemical compliance. ERP and Landbell Group have collected more than 7 million tonnes of packaging, more than 3.5 million tonnes of e-waste, and over 65,000 tonnes of portable batteries.

ERP is the first and only pan-European producer responsibility organisation authorised to operate in Austria, Denmark, Finland, Germany, Ireland, Israel, Italy, Norway, Poland, Portugal, Slovakia, Spain, Sweden, and the UK. By passing on the advantages of multinational recycling operations to customers, ERP has proved to be the most competitive solution for companies in the countries where it operates for WEEE, batteries and packaging compliance, as well as take-back services.

