EPR Schemes | EuRIC Position

Circular Economy – Fair competition – State-of-the art recycling

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Executive summary

Recycling creates value by turning waste into recycled materials, while saving energy and GHG emissions compared to extracting new raw materials. Over the last decades, Extended Producer Responsibility (EPR) Schemes for different waste streams have been set up to shift the polluter-pays principle from governments, local authorities and end-consumers to producers placing products on the market. The recent multiplication of EPR Schemes pose a serious risk to the recycling industry.

In line with the principles of proportionality and subsidiarity, EPR Schemes shall only be set up when there is a need and should refrain from setting unnecessary requirements. Preserving free and fair competition among European recyclers is vital for the industry to strive. Monopolies whether by law or otherwise should be avoided by safeguarding the right of waste operators and downstream users to access waste, own their output and trade it. It is also essential to ensure that EPR Schemes effectively boost design for recycling of products placed on the market and are managed in a way which does not result in unfair competition between recyclers and EPR Schemes. This paper seeks to outline the position of the European recycling industry on EPR across waste streams. It emphasises:

i) The need to assess the intrinsic value of a waste stream prior to the decision of setting up an EPR Scheme to check whether the waste stream at stake has or not an overall positive value i.e. raw materials recovered from that waste stream pay for the costs of collection and proper treatment. In such a case, this waste stream should not be made subject to EPR Schemes.

ii) For streams falling under EPR Schemes, it is essential to ensure that waste ownership is retained by the recycling company entrusted with the responsibility to process the waste. EPR Schemes should also be prohibited from having an operational role in the market they regulate.

EPR should support investments made by recycling operators in research and development and not be solely driven by the lowest costs as is often the case. The European recycling industry's profits are already low and therefore EPR should not diminish margins any further.

Should these basic principles not be observed, not only free and fair competition will no longer be guaranteed but worse the transition towards a functional and competitive circular economy will be rendered impossible.

EuRIC represents the recycling industry at a European level. Gathering the vast majority of national recycling federations from EU/EEA Member States, the Confederation represents about 5,500+ recycling companies – from market leaders to SMEs – generating an aggregated annual turnover of about 95 billion EUR by treating various waste streams such as household or industrial & commercial waste including ferrous and non-ferrous metals, end-of-life vehicles (ELVs), electronic waste (WEEE), packaging (paper and plastics), end-of-life tyres or textiles.

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1. Legal framework of EPR

EPR first appeared in the 1990s in a few EU Member States.
Certain EU waste-specific legislation prescribe EPR schemes to be set up but left a degree of scope to Member States how to implement them. This is currently the case for batteries, Waste Electronic and Electrical Equipment (WEEE)[1], and for the collection of certain End-of-Life Vehicles (ELVs)[2]. The legislation on batteries is undergoing a major revision and is aiming to considerably expand EPR obligations.

Though packaging currently has no EU obligations on EPR schemes, most Member States[3] have utilised the measures in Art. 8 of the Waste Framework Directive (WFD) and Art. 7 of the Packaging and Packaging Waste Directive (PPWD)[4] to set up national EPR schemes. There are some additional EPR Schemes for specific waste streams beyond those legislated for. This includes graphic paper (4 Member States) and oil products (11 Member States)[5]. Today, EPR Schemes are used across Member States for a much wider range of products.

2. EPR shortcomings and remedies for effective schemes

The most recent definition of EPR Schemes is to be found in articles 8 and 8a of the revised WFD, setting the framework and general minimum requirements.

i) Lack of assessment of the economic value of a waste stream prior to setting up an EPR scheme

EPR Schemes aim at obligating producers to design products by taking into consideration their entire life cycle and the financial responsibility for the subsequent management of waste, as outlined in article 8 and 8a of the WFD. **Yet, this definition is based on the assumption that all waste streams have a negative value and thus the costs of collection and proper treatment cannot be covered by income resulting from the sale of raw materials recovered during the sorting and material recovery processes.**

This assumption is wrong. Indeed, some waste streams have a positive value and therefore do not require setting up an EPR scheme to ensure proper collection and treatment. On the contrary, setting up minimum requirements at EU level and enforcing them at national/local level is sufficient to guarantee proper collection and treatment. Business to business (B2B) relationships are for instance the norm for some waste streams which are managed in an efficient way, from a material recovery standpoint. For end-of-life vehicles (ELV), EPR is limited to just a few Member States, which opted for an institutionalised scheme (such as Belgium for instance), to schemes having a purely organisational structure based on very low fees in proportion to the value of brand-new cars. The reason is rooted on the fact that ELVs have a comparatively high value enabling operators to carry out the various processing steps, namely depollution, dismantling and material recovery, in an environmentally sound manner while remaining profitable. As a result, ELV operators are bearing 88% of the implementation costs and are capable of reaching 95% of recovery targets as set by the ELV Directive[6].

[1] Directive 2012/19/EU […] on waste electrical and electronic equipment. Art. 7. "Producer responsibility" is directly referenced in this case.
[2] Directive 2000/53/EC […] on end-of-life vehicles. Art. 5. EPR is not directly referenced, however "economic operators" must set up schemes for the collection of ELVs.
[3] Expra (2016).
[4] Directive 94/62/EC […] on packaging and packaging waste. Art. 7. Refers only to Member States setting up necessary measures to ensure that systems are set up for the return, collection, and recovery systems.
[5] Deloitte (2014) Development of Guidance on Extended Producer Responsibility. Final report for European Commission.
[6] Supporting the evaluation of the Directive 2000/53/EC on end-of-life vehicles, Final Report, August 2020, Presented by Trinomics.

Therefore, it is essential that the effectiveness of the existing collection, sorting and recycling value chain is assessed at EU level prior to the implementation of a new EPR Scheme. This can be realised by:

- Assessing whether problems could be solved by employing other policy instruments instead of implementing a fully-fledged EPR Scheme;
- Carrying out independent third-party audits at Member State level in order to assess the costs supported by all stakeholders for the collection and treatment[7] of end-of-life products, taking into consideration the applicable regulatory constraints;
- Deciding on the most appropriate form for the EPR Scheme (financial EPR or organisational EPR).

The decision to set up a new EPR Scheme shall be taken based on this evaluation, taking due consideration of the costs / economic balance assessment. The governance of the EPR Scheme shall reflect cost sharing among stakeholders in a proportional manner. As a result, the representation of the recycling industry within the governing body(-ies) of the EPR Scheme shall be proportional to the operational costs borne for the actual recycling of the waste stream.

The responsibilities and form of the EPR Scheme shall be proportionate to its goals. If the objectives should be solely to collect data, or whenever data is collected by an EPR that involves the disclosure of business confidential information, it shall be required to appoint an independent third-party responsible for collecting, aggregating, and anonymising all data to prevent any conflict of interest and ensure proper handling of this data.

This prior evaluation and the appointment of an independent third party to collect data is fully in line with the core principles of EU law, namely proportionality and subsidiarity.

ii) Ownership of waste processed by recycling companies falling under the scope of EPR Schemes and protection of recycling companies' expertise

There is a tendency for EPR Schemes to claim ownership of raw materials recovered by recycling companies which have won the tender to process end-of-life products falling under their scope. This practice is unacceptable and legally challengeable.

Recycling companies compete with extracted raw materials (which still have a strong competitive edge as markets fail to reward the environmental benefits of recycling). To compete, recycling companies have gained:

- The expertise to create value by turning waste into recycled materials allowing recyclers to be competitive. This know-how encompasses intellectual property, worker training and expertise in assembling and running complex processes which are often business secrets but not always covered by patents;
- the ability to sell recycled raw materials which enables recyclers to be competitive and profitable and is the only way to continue investing in new machines and processes that enhance recycling's capacity and quality.

If recycling companies are deprived of ownership of waste falling under EPR Schemes, they will not be competitive with the extracted raw materials market. They will be deprived of their expertise which is the foundation of their core business. This will in turn render the transition towards a circular economy impossible since linear value chains will continue to have an ever-strong competitive advantage.

[7] Collection and treatment costs of collection, storage, depollution, extraction of raw materials (shredding and post-shredding sorting operations) and elimination of refuses (landfill, energy valorisation, etc.).

In line with basic principles aimed at ensuring fair market competition for waste streams falling under the scope of EPR Schemes, it is essential for the recycling industry to guarantee that a recycling company, which has won a tender to process end-of-life products falling under the scope of an EPR scope, retains ownership of t raw materials recovered from the waste it has processed.

iii) Insufficient safeguards regarding the governance of EPR Schemes and fair representation

In most EPR Schemes, the governing body is often solely composed of producers' representatives which financially contribute to the scheme. Representatives from the waste management and recycling sector are often absent from these governing bodies.

As a result, the interests pursued by EPR are not driven by recycling only but by other objectives, such as cost management, which can contradict the EPR's mission. If representatives from the waste management and recycling sector are not involved this undermines the objectives that EPR Schemes should pursue.

The transition towards a circular economy requires much stronger cooperation. The participation in the governing bodies of appointed representatives from the waste management and recycling industry, which are not directly involved as company representatives in tendering for calls opened by EPR Schemes, would greatly improve the efficiency of EPR Schemes. Waste management and recycling companies can contribute to implementing design for recycling or laying down rules ensuring fair conditions for the treatment of the waste streams.

The EPR Schemes for ELVs – FEBELAUTO in Belgium and SIGRAUTO in Spain – as well as for industrial packaging – VALIPAC in Belgium – include within their governing body (Board) representatives from the ELV recycling industry. This has not posed any issue. On the contrary, it has contributed to a better understanding of constraints along the value chain. These constraints have in turn been duly taken into consideration and therefore contributed to a smooth functioning of those EPR Schemes, in a highly competitive sector, namely ELV depollution/dismantling and recycling.

EuRIC recommends that EPR Schemes provide adequate representation of the waste management and recycling sectors as a minimum requirement. This will ensure that there is an appropriate balance of interest amongst the most relevant actors in the value chain. The representation in the governing body(-ies) of the EPR shall be proportional to the operational costs borne by the stakeholders falling within the scope of the Scheme. As with other Members of the Board, the composition shall be devised in a manner that prevents conflict of interest.

iv) Unfair competition – lack of strict separation between organisational and operational roles of EPR schemes

In some countries, EPR Schemes, including Schemes having a legal monopoly (no other EPR license granted by competent authority for the same stream), are tempted to become fully operational by recycling the waste stream they have been entrusted to organise and manage. This a direct breach of basic competition law. If an EPR Scheme becomes a market competitor for end-of-life products by moving into the market it manages it is very likely abusing its dominant position, in breach of Article 102 TFEU and well-established case-law.

No entity mandated by a public authority to manage a waste stream and being a total or partial monopoly by law can have an operational role on the market it manages and oversees. This a blatant breach of equality resulting from the abuse of a dominant position with private recycling companies, which must compete through tender procedures to obtain a share of the market falling under the scope of the EPR Schemes.

EU and national competition law, minimum requirements for EPR Schemes under the WFD and sectorial waste legislation shall expressly provide that EPR Schemes cannot have any operational role on the market i.e., treating waste for end-of-life products they have the responsibility to organise.

v) Transparent and non-discriminatory tender procedure

Tender procedures organised by EPR Schemes to allocate waste covered by that EPR shall be transparent, non-discriminatory and respect free and fair competition.

These principles are important to level the playing field between SMEs and larger operators which have a stronger ability to win tenders (larger geographical coverage, infrastructure, etc.).

Market power has become so important in some countries that when a recycling company loses the tender, they have no longer access to any waste and must shut down, which results in significant job losses and lost investments, that are often not compensated locally.

vi) Implementing eco-modulation to ensure design for circularity

EPR Schemes have to a large extent failed in driving design for recycling. As a result, a vast amount of products such as packaging, electronic and electrical appliances and tyres containing sealants (puncture-free) or foams (noise reduction) are placed on the market. At the same time, their design severely compromises or even eliminates their ability to be properly recycled when they reach end-of-life stage despite using best available techniques (BATs) in economically viable conditions.

With 80% of a product's environmental footprint determined at design stage and only 12% of raw materials used by European industry coming from recycling, design for recycling is instrumental to the circular economy transition for all waste streams, from packaging to e-waste or from batteries to textiles.

EuRIC supports scaling up the minimum requirements for design for circularity under article 8a of the WFD and emphasises the importance of recycled content targets. Binding recycled content targets have proved to be the most powerful regulatory tool at EU level to stimulate demand for circular materials and drive eco-design. These targets oblige designers, manufacturers, and recyclers to collaborate to achieve targets. The design for recycling of products should be optimal in order to recover materials when they reach end-of-life stage.