

# EPR in Brazil and sectoral agreements: developments and critique

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## Abstract

In 2010, Brazil introduced the sectoral agreement: a contract between government and companies to regulate the extended producer responsibility (EPR) legally set up. Under the EPR, producers are responsible for their products until the post-consumer stage. Since sectoral agreements have a contractual nature, they only bind the parties, but being a party itself is not mandatory. Therefore, companies will only participate if any benefit is foreseen, meaning that free-riders are likely to appear. Signed in December 2012, the only the sectoral agreement so far targets automotive lubricant plastic packages, demanding their makers and retailers to implement a take-back program. However, it cannot be seen as a major advance because such recycling schemes had already been carried voluntarily since 2005. The sectoral agreement has had little concrete progress in recent years; take-back obligations and recycling targets should be binding for all agents of a certain waste stream. Japan follows such guidelines, which have been proving positive. Brazil should mirror some of these experiences for more effective waste management policies.

*Keywords: waste management, recycling, sectoral agreements, EPR, Brazil, Japan.*

## 1 Introduction

Enacted on August 2, 2010, the National Waste Policy Law (Act 12.305/2010) was the first act to comprehensively target waste management issues in Brazil at a federal level.

Until then, most waste management related regulation was set by the municipalities, which are constitutionally appointed for such a task at a local level; and by the States, which aimed at addressing environmental issues related to



residues (Yoshida [1]). There were some federal provisions on waste streams deemed highly pollutant, such as pesticides packages, automotive lubricants, batteries and tyres.

However, such legal arrangement has not produced positive results. IBGE [2] states that 73.3% of the municipalities discard the residues directly in garbage dumps. Also, SNSA [3] admits that the final destination of 20.9% of the domestic waste is unknown, assuming that about 51.9% of the residues are disposed in landfills, 23.1% are discarded in garbage dumps, 4.1% are allocated to sort selection or compost and less than 0.1% is incinerated. The recycling rate is 1.5%.

Aiming at fostering recycling, the National Waste Policy Law introduced two new institutes: the reverse logistic and the sectoral agreement. The former consists in a policy instrument to oblige companies to take-back certain end-of-use items from consumer, and to provide them with an adequate final destination. The latter is a contract to be used as an implementation instrument of the former.

In other words, by introducing the reverse logistic, the Brazilian Law has adopted the extended producer responsibility (EPR) Principle, which is to be enforced by sectoral agreements.

This paper will detail the sectoral agreement at the federal level, describe its current developments, criticise such institution and recommend what should be addressed for the future.

## 2 Reverse logistic

The reverse logistic is one of the pillars of the National Waste Policy Law. According to article 33, companies dealing with certain products shall implement a waste collection mechanism chaining consumers, retailers and manufactures.

More specifically, consumers are to hand their end-of-use products to retailers or wholesalers. Those shall transfer the collected material to manufacturers or importers, which are responsible for arranging the adequate final disposal, irrespective of the public waste management system. In other words, it is a take-back scheme.

Initially, the reverse logistic's targets are pesticides and their packages, batteries, tyres, automotive lubricant and their packages, electric lamps and electrical/electronic devices. The scope may be enlarged by decree or sectoral agreements.

The Federal Government created the Advisory Committee for the Reverse Logistic Implementation (the "Committee"), which is comprised of the Ministers of the Environment (chair), Health, Development, Agriculture and Finance. The committee has competence to set waste streams priorities and approve the sectoral agreements, among others (Decree 7404/2010, article 33).

### 2.1 EPR

By burdening the manufacturer with the responsibility to deal with its end-of-use products, Brazilian Law adopted the EPR principle. According to OECD [4], EPR is "an environmental policy approach in which a producer's responsibility,



physical and/or financial, for a product is extended to the post-consumer stage of a product's life cycle". The term EPR was used for the first time by Thomas Lindhqvist in 1990. However, the concept itself had already been adopted in public policies before or in parallel to its definition (Lindhqvist [5]).

Traditionally, the municipalities are in charge of dealing with urban residues. By shifting the responsibility from the municipality to the producer, it is expected not only to ease the burden of the waste management public services but also to provide manufacturers with incentives to design easy-to-recycle products.

### 3 Sectoral agreements

#### 3.1 Concept and background

The reverse logistic will be implemented through sectoral agreements, decrees or pledge agreements (Decree 7404/2010, article 15). However, sectorial agreements are deemed to be more important (Spatuzza [6]): it is an innovative way to regulate the law in Brazil, and the government established a detailed process their execution.

Since the decree is a conventional regulation instrument (Constitution article 84, IV) and the pledge agreement is a subsidiary one (Decree 7404/2010, article 32), they are not within the scope of this paper.

A sectoral agreement is a contract between the Ministry of the Environment and companies (e.g. manufacturers, retailers) of a certain economic sector, which defines the scope, targets, terms, geographical coverage, and operational details of the reverse logistic (Act 12.305/2010, articles 3, I; 33 and 34. Decree 7404/2010, article 23). This instrument was proposed by the National Confederation of Industry (CNI [7] and Soler [8]).

The reasons for the adoption and importance of this instrument traces back to the National Waste Policy's law-making process. The industrial sector opposed the new legislation, considering it a burden. Easing such tension demanded a negotiation-based implementation of the law, placing companies and government at the same level. That would strengthen consensus making, weaken any government attempt of making unilateral decisions and stimulate transparency. As a contract, the sectoral agreement fulfilled such role (Tiago [9]).

#### 3.2 Legal nature and binding effect

The legal nature of the sectoral agreement is contractual. However, since its purpose is to regulate the law, it is not an ordinary contract. The contractual freedom is considerably limited because principles, parties, scope, conditions and procedures are prescribed in law. In this sense, it is not a private agreement, but rather an administrative one (Loubet [10]).

Irrespective of its exceptionality, as a contract the sectoral agreement still demands the consensus of the parties to be formed, meaning no one shall be forced to sign one. In other words, companies are not obliged to be a party in a sectoral agreement (Conceição [11]). Also, the contractual nature of the sectoral agreement implies it only binds the parties.

Such binding effect brings important consequences. Since no one is obliged to contract, companies will only participate in a sectoral agreement if any benefit is foreseen. Furthermore, unless all companies in an economic sector become parties of such agreement, there will be some abiding by a certain take-back scheme, and others exempted from any burden. It means that free-riders are likely to appear.

Although important, the sectoral agreement is not the only instrument available. The government still may enforce the reverse logistic through decrees. The remaining question is how effective it will be to replace a consensus building mechanism for a decision unilaterally imposed.

### **3.3 Contents and procedure**

A sectoral agreement establishes a certain take-back scheme by defining: waste stream, geographical range, targets, deadlines, penalties and divisions of roles among consumers, companies and government (Decree 7404/2010, article 23).

The procedure for entering into such agreement is as follows: (a) the committee assesses the reverse logistic's technical and economic viability for a certain waste stream; (b) the Ministry of the Environment calls for proposals from the economic sector involved; (c) the companies elaborate and submit proposals; (d) the ministry evaluate and consolidate the proposals, submitting them for public consultation; (e) the committee approves the sectoral agreement; and (f) the sectorial agreement is published in the Federal Official Gazette, when it comes into force.

### **3.4 Sectoral agreements today**

The committee prioritized the call for proposals related to the following waste streams: automotive lubricants plastic packages, electric lamps, other packages, electro-electronic products and out-of-date medicine (Committee Deliberation N. 6). Pesticides packages, batteries, automotive lubricants and tyres do not necessarily need a Sectorial Agreement because their take-back schemes were set prior to the National Waste Policy Law and are still in force. (Yoshida [1], Souza and Castro [12]).

The first sectoral agreement was signed on December 19, 2012 and targeted automotive lubricant plastic packages. As for the other waste streams, the Ministry of the Environment is analysing the proposals submitted by the respective sectors.

## **4 The first sectoral agreement: critique**

### **4.1 Background**

A take-back scheme for automotive lubricants plastic packages had already been voluntarily carried on by the industry since 2005 (Agência Brasília [13]). Such scheme was the one adapted to fit the sectoral agreement framework. Therefore, the first sectoral agreement was not an unprecedented advancement of waste management in Brazil.

The process was kicked off on August 24, 2011, when the committee approved the technical and economic viability assessment report. On December 29, 2011,



the call for proposals was published, having three submissions from four automotive lubricant industry's associations: SINDICOM (National Syndicate of Fuel and Lubricants Suppliers), CNC (National Confederation of Commerce) and SINCOPE (São Paulo State Syndicate of Oil Products Retailers) along with REGRAN (ABC Region Syndicate of Oil Products Retailers).

The proposals were arranged into a single one and submitted to public consultation on June 18, 2012 for 60 days. After consolidating and commenting the opinions from the public, the sectoral agreement on automotive lubricants plastic packages (the "Agreement") was signed on December 19, 2012, published in the Federal Official Gazette on February 7, 2013. Nowadays, the Reverse Logistic of Automotive Lubricants Plastic Packages covers the south, southeast and northeast (except for the States of Piauí and Maranhão) regions; and the Federal District.

## 4.2 Contents

The Agreement targets one litre end-of-use packages of automotive lubricants sold in gasoline stands or automobile stores.

The parties are the Ministry of the Environment and the following companies' associations: SINDICOM, SIMEPETRO (Interstate Syndicate of Oil Products Mixers and Packagers), SINDILUB (Interstate Syndicate of Lubricants Trade), SINDITRR (National Syndicate of Fuel Retailers), FECOMBUSTÍVEIS (National Federation of Fuel and Lubricants Trade) and CNC. SINDICOM and SIMEPETRO associated companies comprise 95% of the automotive lubricants production market share (SINDICOM [14]).

The role-sharing is as follows: consumers hand the packages to retailers (e.g. gasoline stands). Retailers shall store the packages and pass them to the collectors pointed by the manufacturers or importers. These are supposed to receive not only the packages from retailers, but also those collected by the public cleansing service, and give all them a proper final disposal. Additionally, package makers shall use at least 10% of recycled material in their production.

The Agreement brings two kinds of targets; a geographical one and a quantitative one. The former states that such reverse logistic shall cover 70% of the municipalities of the south, southeast and northeast (except for the States of Piauí and Maranhão) Regions until 2014. The coverage shall rise to 100% until the end of 2016. Those regions comprise 84.3% of the population and 85.4% of the GDP in Brazil (IBGE [15] and IBGE [16]). The last refers to the amount of packages to be sent to recycling: until the end of 2016, 4,400t/year. Contradictorily, recycling is not stated as mandatory (refer to 4.4 below).

Finally, there are no penalties set forth for default of terms of the Agreement itself. The only references to sanctions are those prescribed on the Environmental Crimes Law and the National Waste Policy Law. These basically concern inadequate waste final disposal.



### **4.3 Who is responsible for what?**

Notwithstanding the binding effects issues mentioned before, the first sectoral agreement arose other two matters deserving attention.

Firstly, the companies participating in the scheme are not clearly defined. Since the parties in the Agreement are associations, presumably only their members would abide by the take-back obligations, hence non-members would not. However, the Agreement does not state which those companies are.

Also, the membership itself does not mean automatic adherence to the Agreement. Those associations represent the members' interests, especially in labour issues. If an association assume an obligation (e.g. reverse logistic) on behalf of the members, it may not necessarily match their interests. Additionally, SINDICOM's by-laws, article seven, for example, states that no member will answer for obligations assumed by the association (SINDICOM [17]).

Therefore, the members should previously agree on the take-back scheme, granting the association power to represent them in this issue. Such document is not in the Agreement process nor was required by the Ministry of the Environment.

The lack of a clear definition on those which assumed the reverse logistic obligations brings two important consequences. One, the Ministry of the Environment would have difficulties to enforce the Agreement because it would have to check if e.g. a lubricant maker indeed assumed a take-back obligation. Two, the average consumer would be confused about which e.g. gasoline stand shall collect the packages.

Finally, the role-sharing is also not clearly defined since the Agreement does not state which of the parties represent the retailers, the producers and the package makers respectively. It means that one cannot precisely affirm which of the parties is responsible for collecting or disposing the packages. Additionally, supermarkets and automobile stores are referred as example of Retailers, but the associations traditionally representing such business (Abrás and Fenabrave) are not parties in the Agreement.

Identifying the parties and their specific roles in the reverse logistic is fundamental for building an effective take-back scheme. In this sense, the next sectoral agreement should clearly state which companies and brands are being represented by the associations. Also, it should be precisely determined which role each of them will be responsible to. That could be easily achieved by a list or a schedule made available to the public.

### **4.4 Lack of recycling obligation**

The Agreement states that recycling is the preferred way of final destination of the packages. Other methods, including landfilling, may be applied provided that they do not harm the environment. In other words, since recycling is one of the final disposal options, it is not mandatory under the Agreement.

Recycling is not an obligation under the National Waste Policy Law either. The act states a hierarchy between the waste management method options as follows: non-generation, reduction, re-use, recycling, treatment and final disposal (article 9). However, since there are no criteria defining the exact circumstances



when a method prevails over the other, recycling ends up being recommendable, but not mandatory.

On one hand, since the companies have to take-back the packages, it is expected they will make use of them as an input, incorporating recycling in their business plans. Nowadays, irrespectively of legislation, some waste streams have a very high recycling rate. For instance, 98.3% of aluminium cans are recycled (ABRELPE [18]).

On the other hand, if clear obligations are not set, recycling or not will be subject to an economic cost-benefit analysis. In case the cost of raw material is lower than the recycled one, the likelihood of packages being disposed in landfills is higher. By setting obligations, at least a certain proportion of recycling would be guaranteed.

Another benefit is to make companies more familiarized with recycling and incentivize them to make more easy-to-recycle products. The recycling obligations are supposed to increase over time, along with the recycling capacity, which is expected to be higher in the future.

## 5 Conclusions

The National Waste Policy Law states that the EPR principle will be implemented mainly by sectoral agreements. The first one, on automotive lubricant plastic packages, has merits for promoting recycling in Brazil. Another positive point is to promote the consensus building between the government and economic sectors on how to regulate the law, forcing the Administration to act more transparently.

However, two issues may have a negative impact on the effectiveness of the recycling policy in Brazil.

Firstly, the Agreement lacks a comprehensible binding effect and does not clearly point out the ones responsible for the reverse logistic. Therefore, it will be difficult for consumers and for the Ministry of the Environment to precisely identify who is indeed obliged to execute the take back scheme and which are roles of the parties. Finally, the Agreement does not state recycling as mandatory, which may become a hurdle for the effectiveness of the scheme.

Take-back obligations and recycling obligations should be binding for all agents of a certain waste stream. The combination of both guidelines has been proving effective in Japan.

The Japanese Law does not have any institution such as the sectoral agreement, meaning that the recycling regulation, implemented since the early 90's, applies for all the actors of a certain economic sector. Producers of packages, electronics and automobiles are obliged to perform the material recycle of at least a part their end-of-use products. As a result, the recycling rate in Japan reached 20.4% in 2012 and the waste generation has been decreasing since 2000, both per capita and in absolute values. The rates verified in 2012 were equivalent to the middle 80's ones. (MOE [19]).

Sectoral agreements are innovative instruments for regulating the Law. However, it had few concrete progresses in the last years. In this sense, Brazil

should mirror the example of other countries, such as Japan, to evaluate and eventually reconsider the *modus operandi* of the National Waste Policy Law.

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