



OFFICE OF FAIR TRADING

The Producer Responsibility Obligations
(Packaging Waste) Regulations 1997

Cleanapack

**A report by the Director General of Fair Trading to the
Secretary of State for Trade and Industry on the
competition scrutiny of the Cleanapack scheme**

February 1998

OFT 214

CLEANAPACK

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1 GENERAL SUMMARY

- 1.1 I am authorised by the Director General of Fair Trading under paragraph 7 of Schedule 1 to the Fair Trading Act 1973 to carry out a competition scrutiny of the Cleanapack compliance scheme as required by regulation 31 of the Producer Responsibility Obligations (Packaging Waste) Regulations 1997 (the Regulations). This is my report.
- 1.2 Cleanapack is a scheme established and to be operated by Cleanaway Limited, a UK based waste management company.
- 1.3 This advice has been prepared on the basis of the current draft membership agreement which will form the basis of the constitution of the Cleanapack scheme. This assessment is based on the broad terms of the membership agreement and additional information which has been provided by the scheme operator. The advice is based on the premise of a scheme which has no members at present.
- 1.4 The Office is content that the Cleanapack scheme meets the requirements of the competition scrutiny under the Regulations: that is to say, it does not have, and is not likely to have, the effect of restricting, distorting or preventing competition, and it does not lead, and is not likely to lead, to an abuse of market power.
- 1.5 I recommend that you should advise the Environment Agency, and Cleanaway Limited as operator of the draft scheme, in accordance with regulation 31(5) that you are satisfied that the Cleanapack scheme meets the requirements of the competition scrutiny.

2 THE CLEANAPACK SCHEME

- 2.1 Cleanaway Limited (“Cleanaway”) intends to set up a compliance scheme known as Cleanapack. The scheme will be cross-sectoral and potentially open to obligated companies in all stages of the packaging supply chain. Cleanaway is a UK based waste management company operating 17 Local Authority contracts, and collecting over 2 million tonnes of dry waste a year, and which receives in excess of 3 million tonnes of domestic and commercial waste at its disposal facilities.

Registration of members

- 2.2 A single registration fee will be payable by members on registration or re-registration with Cleanapack. The fee will include the cost of registration with the Environment Agency, and will be the same for all companies regardless of size or type. On registration each member will enter into a contract with Cleanaway whereby the scheme operator adopts the member’s obligation and the member agrees to the rules laid out by Cleanaway. Membership of the scheme may be refused if it appears that the prospective company’s additional obligation cannot be satisfied by the scheme operator.

Meeting the obligation

- 2.3 It is anticipated that evidence of compliance, in the form of PRNs, will be obtained by the scheme operator in two main ways:
- (i) from members’ own packaging waste. It is expected that a number of scheme members will arrange for the recycling of certain amounts of their own packaging waste. Any PRNs generated by members from the recycling of materials will be used to offset that member’s obligation; and
 - (ii) Cleanaway’s non-obligated packaging waste. Cleanaway expects to carry out a significant amount of recycling of packaging waste. Of this recycling, a proportion will be from non-obligated sources where arrangements will be made with reprocessors to obtain PRNs. Cleanaway hope that this method will provide sufficient PRNs for each type of material to meet the remaining net scheme obligation. Any costs incurred in obtaining these PRNs will be apportioned among scheme members according to each member’s percentage of the net scheme obligation per material.
- 2.4 Cleanaway will negotiate the value of the material it delivers to reprocessors and anticipates PRNs will be issued as part of the transaction, to prove delivery of the

packaging waste. Cleanaway will contract reprocessing capacity to meet the needs of Cleanapack.

- 2.5 If sufficient PRNs have not been generated via the above methods, Cleanaway will purchase PRNs from reprocessors and larger non-obligated organisations for whom Cleanaway perform recycling services, including local authorities. The cost of the extra PRNs would be divided amongst the members and charged as a material specific levy in proportion to members' net obligation to the scheme.

Recovery and Recycling methods

- 2.6 Cleanaway will, where requested, advise scheme members on material storage and segregation methods with the aim of encouraging on-site segregation of waste. Cleanaway has a number of reclamation facilities where recyclables are collected from the waste stream, stored and baled before despatch to a reprocessor. Where appropriate, packaging waste that cannot be segregated at source will be segregated at these facilities.

Material levies

- 2.7 As stated, material levies may be charged by Cleanaway if it has to purchase PRNs on behalf of scheme members for one or more material types from reprocessors or other organisations, or if Cleanaway reduces its service charges to particular customers in order to retain PRNs from recycling activities. On 31 December of each year the cost of PRNs per material will be added together and divided among the members. Each member will pay a proportion of the costs according to its percentage obligations per material. Where a member brings sufficient PRNs to the scheme to cover all or part of its obligations for one or more materials, that member's percentage of the net scheme obligation for those materials will be reduced accordingly.

Cleanapack Forum

- 2.8 Cleanaway states that it is working with a number of companies to develop products made from recycled waste packaging, for use by members of the scheme. A *Cleanapack Forum* will be set up to encourage the use of such products. Membership of the Forum is to be elected by the members of the scheme and each scheme member will be invited to put forward a candidate. Representatives from reprocessors used by the scheme will also be invited to attend the Forum. Cleanaway hopes that the Forum will enable scheme members to put suggestions to the scheme and that it will enable dialogue between waste producers, reprocessors and consumers of recycled products.

Relevant markets

- 2.9 Further information on the markets for the various waste streams covered by the Regulations is given in the Director General's July 1997 report on his competition scrutiny of the Valpak compliance scheme. Background information on the waste management sector is provided in the August 1997 report on the Jempac compliance scheme.

3 COMMENTS RECEIVED FROM THIRD PARTIES

- 3.1 Consultation notices were placed in the week ending 7 November 1997 in *Packaging Week* and *Materials Recycling Week* (see Annex A). In addition, consultation letters were sent to a number of potentially interested parties. The views of respondents are summarised below.
- 3.2 While some respondents welcomed the development of additional schemes, some commented that the increasing number of schemes could lead to divided effort, and exacerbate problems relating to the shortage of reprocessing capacity in the UK. It was felt that such a shortage could lead schemes to compete with each other and so force up the prices of PRNs. Two respondents expressed increasing concern about the proliferation of schemes being set up by waste management companies, and said that their objective may not be to achieve a lowest cost solution to the environmental targets of the Regulations, but rather to exploit a business opportunity.
- 3.3 It was suggested that the scheme could be anti-competitive if current Cleanaway clients were favoured in any way or influenced to join the compliance scheme. The majority of clients currently serviced by Cleanaway were from “downstream” sectors which may mean that the scheme became unbalanced and operate in a way which is not equitable to all parts of the packaging chain.
- 3.4 The comment was also made that the membership appear to have limited opportunity to participate in the development of the scheme.
- 3.5 Concern was expressed that the outline plans for the scheme did not appear to address the situation in 2000 when many companies supplying a significant amount of unobligated waste will become obligated, and may withdraw their waste from Cleanaway’s services by deciding to join a competing scheme. It was also stated that, despite its declared intentions, the scheme operator may have to become involved in PRN trading.
- 3.6 The comment was made that the proposal to reduce Cleanaway’s service charges to particular customers in order to retain PRNs from recycling activities would seem to be unfair on other members of Cleanapack, or other Cleanaway customers.

4 ASSESSMENT

- 4.1 The Office has considered the level of competition Cleanapack is likely to face and whether the scheme is likely to restrict, distort or prevent competition.

Dominance

- 4.2 If it is registered, Cleanapack will face direct competition from other schemes, primarily the large-scale cross-sectoral national schemes such as Biffpack, Recycle UK, Valpak and Wastepack. It may also face competition from other smaller-scale schemes such as Difpak, Jempac, S.W.S. Compak and Wespack. Obligated companies also have the option of arranging to discharge their obligations themselves or they may be able to arrange for a waste management company to obtain PRNs to meet their obligation on their behalf.

Barriers to entry

- 4.3 As stated in previous reports, regulatory barriers to entry to setting up a properly constituted scheme are not considered to be significant; there are unlikely to be any significant sunk costs involved in setting up a scheme. A potentially more significant barrier to entry relates to exclusive contracts, in particular, contracts with the reprocessing industry. All compliance schemes so far approved have assured the Office that they were unlikely to enter into such contracts, and Cleanaway has similarly said that it does not envisage entering into any exclusive arrangements with reprocessors on behalf of the scheme.
- 4.4 Another potential barrier to entry is the difficulty which members may have in leaving existing schemes. Members of the Cleanapack scheme may leave after giving 30 days' written notice. It is unlikely that competition for new members between schemes will be restricted by Cleanaway in this way.

Links between the scheme and Cleanaway

- 4.5 As with other similar schemes, concern was expressed during the Cleanapack consultation about links between schemes and waste management companies. Such concerns appear to relate mainly to the fact that waste management companies are seen as being a significant source of PRNs. Cleanapack will partly offset its overall obligation by using PRNs obtained from the waste collected from non-obligated companies. Cleanaway accepts it may have to compensate these non-obligated companies financially, and any such costs incurred will be apportioned among scheme members.

- 4.6 Cleanaway has informed the Office that non-obligated customers such as local authorities will be given PRNs for the waste that Cleanaway collects if they request them, but that the cost of obtaining the PRNs will be passed on to these customers in addition to the normal waste collection charge. Obligated customers of Cleanaway, who are not members of Cleanapack, would also receive PRNs on their waste subject to any costs incurred. Where Cleanapack requires extra PRNs, Cleanaway will either seek to purchase them directly from the customers or it will reduce the waste cost to the customer in return for retaining the PRNs.
- 4.7 Cleanaway has told the Office that it collects about ½ million tonnes of packaging waste each year. In 1996, the UK was estimated to have a total of 8.7 million tonnes of packaging waste and Cleanaway therefore collects less than 6% of the UK's packaging waste. When this is considered alongside Cleanaway's intention to pass PRNs on to its customers where requested, it is unlikely that Cleanaway will be able to tie up a significant proportion of PRNs on behalf of the scheme. The Office welcomes the fact that Cleanaway accept that financial compensation may have to be provided to unobligated companies if it wishes to retain their PRNs on behalf of the scheme.
- 4.8 Another means by which a waste management company could use the existence of an in-house scheme to its advantage would be if scheme members had to have their waste collected by the scheme operator. It is noted that it is not a condition of scheme membership that Cleanapack members have to have their waste collected by Cleanaway.

Purchasing of excess PRNs

- 4.9 If a scheme member has, through the reprocessing of its own waste, PRNs over and above its individual obligation, Cleanaway will insist, as a condition of membership of the scheme, on being given 'first refusal' to purchase them. The scheme operator will have 21 days in which to purchase the PRNs at the offer price. If no satisfactory offer has been made by Cleanaway within 21 days, the member has the right to sell the PRNs elsewhere, but at a price not lower than that offered to Cleanaway. Cleanaway sees this as being an extension of the member's obligation to the scheme, in that the scheme member will be assisting the scheme in meeting its overall obligation. This proposal raises two possible concerns. First, that scheme members may be disadvantaged in that their ability to trade their excess PRNs on the open market may be restricted, and secondly, that Cleanaway will receive preferential access to PRNs which would otherwise be on the open market.
- 4.10 On the first concern, Cleanaway states that members will be free to accept offers to purchase their excess PRNs, but before selling them, they must first give Cleanaway the opportunity to match the asking price. If no requests to purchase excess PRNs

are made, then Cleanaway will offer to purchase the PRNs at the “market rate”. This market rate will be worked out in consultation with the member and will be based on the average market values for PRNs. As prospective members will be aware of this rule before joining, those who are likely to have excess PRNs can decide for themselves whether they wish to join and accept the conditions placed on their sale of excess PRNs.

- 4.11 On the second concern the question is really one of scale: it is unlikely that Cleanapack members will have access to sufficient numbers of own-waste PRNs to distort the overall PRN market. The Office would be concerned if a reprocessor who was a member of Cleanapack would be forced to supply all its PRNs to the scheme operator, but we have been assured by Cleanaway that if a member is a reprocessor, the requirement to offer excess PRNs would apply only to those PRNs relating to its own waste arisings and not to PRNs relating to waste of third parties.

5 RECOMMENDATION

Conclusions

- 5.1 As with the majority of schemes the Office has been asked to scrutinise under the Regulations, the main issue which we have had to consider is whether the scheme may be able to restrict the supply of PRNs in any way. Having obtained a number of assurances from Cleanaway as to how the scheme will operate, we are satisfied that the scheme will not restrict the supply of PRNs.
- 5.2 When obtaining PRNs from waste handled on behalf of non-obligated companies, Cleanaway accepts that such companies may expect financial compensation for the value of the PRN. It is also noted that when handling the waste of obligated companies, the PRNs (plus the costs incurred in obtaining them) will be passed on to the obligated company. It is unlikely that Cleanaway's proposal to purchase, on behalf of the scheme, those PRNs in excess of a member's obligation, will involve the purchase of a significant amount of PRNs. Those prospective members who consider themselves likely to have excess PRNs are free to decide whether to join the scheme on the basis that the excess may have to be sold to the scheme. We are also satisfied that as this policy does not relate to waste from a reprocessor's customers, the scheme operator will not be in the position of receiving preferential access to PRNs which relate to the waste of unconnected third parties.

Recommendation

- 5.3 Having investigated the issues, the Office is satisfied that the Cleanapack scheme does not have, and is not likely to have, the effect of restricting, distorting or preventing competition, and nor will it lead, or be likely to lead, to an abuse of market power.
- 5.4 I therefore recommend that you should advise the Environment Agency, and Cleanapack as operator of the draft scheme, in accordance with regulation 31(5), that you are satisfied that the Cleanapack scheme meets the requirements of the competition scrutiny.

February 1998

Henry L Emden
Assistant Director, Competition Policy Division
For the Director General of Fair Trading

A OFT NOTICE SEEKING COMMENTS FROM THIRD PARTIES

The following notice was placed in *Packaging Week* dated 6 November 1997 and *Materials Recycling Week* dated 7 November 1997.

OFFICE OF FAIR TRADING

Cleanapak and Properpak – notification of compliance schemes

*The Producer Responsibility Obligations
(Packaging Waste) Regulations 1997 ('the Regulations')*

Under these Regulations, certain businesses have obligations regarding the recovery and recycling of packaging. They can either act alone to meet the requirements of the Regulations, or join a registered compliance scheme which will assume this responsibility for its members.

The Director General of Fair Trading has a duty to undertake a competition scrutiny of all compliance schemes prior to their registration.

The Director General has received submissions concerning the operation of two separate compliance schemes. They are: (i) Cleanapak, a scheme to be operated by Cleanaway Ltd; and (ii) Properpak, a scheme to be operated by Onyx UK Ltd.

Both schemes will be open to all industry sectors and will cover all material types to which the Regulations apply.

The Director General invites comments from interested third parties in relation to the schemes to be operated by Cleanaway Ltd and Onyx UK Ltd. They should be addressed to:

*David Blockidge
Office of Fair Trading
Competition Policy Division
Field House
15-25 Bream's Buildings
London EC4A 1PR*

Please contact Mr Blockidge if you require summaries of the proposed schemes. To be considered as part of this consultation, comments must be received by 28 November 1997.