



OFFICE OF FAIR TRADING

The Producer Responsibility Obligations
(Packaging Waste) Regulations 1997

Properpak Limited

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

March 1998

PROPERPAK LIMITED

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This document is one of a series of reports by the Director General of Fair Trading on his examination of the effect on competition of waste recovery compliance schemes, as required by regulation 31 of the Producer Responsibility Obligations (Packaging Waste) Regulations 1997. Earlier reports in this series can be obtained, free of charge, from:

Office of Fair Trading
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Hayes, UB3 1XB

<i>Order No</i>	<i>Title</i>	<i>Publication date</i>
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193b	Biffpack	July 1997
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193g	Recycle UK	October 1997
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213	Paperpak	February 1998
214	Cleanapak	February 1998
217	Pennine-Pack	March 1998

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1 GENERAL SUMMARY

- 1.1 I am authorised by the Director General of Fair Trading (the Director) under paragraph 7 of Schedule 1 to the Fair Trading Act 1973 to carry out a competition scrutiny of the Properpak scheme as required by regulation 31 of the Producer Responsibility Obligations (Packaging Waste) Regulations 1997 (the Regulations). This is my report.
- 1.2 Producer Responsibility Obligations for Packaging and Energy Recovery (known as Properpak) is a draft scheme to be established within the Compagnie Générale des Eaux group of companies. One UK company the Compagnie Générale des Eaux group operates is CGEA UK Ltd (CGEA). The scheme operator is to be Properpak Ltd, a wholly owned subsidiary of CGEA.
- 1.3 This advice has been prepared on the basis of the current draft membership agreement together with the current draft constitution of the Properpak scheme. It is based on the broad terms of the membership agreement and additional information which has been provided by the scheme operator and another company, Onyx (UK) Ltd (Onyx). Onyx is also a wholly owned subsidiary of CGEA. The advice is based on the premise that the scheme has no members at present.
- 1.4 The Director is content that the Properpak 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 Properpak Ltd as the proposed operator of the draft scheme in accordance with regulation 31(5) that you are satisfied that the Properpak scheme meets the requirements of the competition scrutiny.

2 THE PROPERPAK SCHEME

- 2.1 The Compagnie Générale des Eaux group of companies proposes to set up a scheme known as Properpak. Properpak Ltd will be the operator of the scheme (hereafter Properpak Ltd will be referred to as ‘Properpak’ or the ‘operator of the scheme’). Onyx, amongst its business activities, operates two energy from waste (EfW) plants (Tyseley Waste Disposal and South East London Combined Heat and Power).
- 2.2 Membership of the Properpak scheme will be open to all companies having a producer responsibility obligation under the Regulations, and the operator of the scheme will assume the responsibility for, and discharge on behalf of the scheme members, the aggregate recovery and recycling obligations of the members under the Regulations.

Operating plan

- 2.3 Properpak will contract directly with accredited reprocessors within the Compagnie Générale des Eaux group of companies and with other material re-processors and energy recovery plants to provide the necessary recovery and recycling capacity required to meet the aggregate of members’ obligations.¹ Previously, Properpak has been engaged in the sale of Onyx EfW-generated Packaging Waste Recovery Notes (PRNs) to third parties.²
- 2.4 If a scheme member possesses PRNs relating to its own-waste, these will be used in the first instance to offset that member’s obligation. Properpak would then contract for the remaining PRNs needed to fulfill the overall members’ obligations. Costs of obtaining the PRNs for each member will be directly charged to each member (along with a small percentage charge for administration and costs).
- 2.5 Properpak will contract at arm’s length with Onyx EfW facilities for recovery PRNs.³ It is stated that the prices charged to members for these PRNs will be the market price which will depend on such factors as the time of the contract, the charges/levies set by

¹ The Regulations impose an overall recovery obligation on obligated producers of packaging waste. This overall recovery obligation contains a material specific recycling obligation. In 1998, obligated companies must recover 38% of relevant packaging material, and within this overall target recycle 7% of each specific material for which they have an obligation. For a more detailed explanation of the Regulations, please see the Director General’s July 1997 report on the Valpak scheme.

² PRNs are not mentioned in the Regulations but were created by the Guidance Note first published by the environment agencies in July 1997.

³ Recovery PRNs issued by Onyx will be for the activity defined in regulation 9 of Part II of Schedule 3 to the Regulations: the use of waste ‘principally as a fuel or other means to generate energy’.

independent reprocessors in the same material and energy recovery sectors and the volume of packaging waste which any particular PRN represents. Properpak expects that up to 100% of the capacity from Onyx EfW plants can be bought by the scheme operator as most of these facilities are fuelled by municipal waste, delivered by local authorities without obligations under the Regulations.

- 2.6 Properpak is aware that PRNs available within the group will be largely energy recovery PRNs and that there will therefore sometimes be a need to 'balance' the obligations with material recycling PRNs arising from independent reprocessing facilities. For instance, Properpak may have an excess of recovery PRNs which it would sell to obtain recycling PRNs.

Membership

- 2.7 The majority of members will have an annual contract with Properpak. Membership may be terminated by Properpak if a member causes Properpak to fail to fulfill its scheme members' obligations, or brings Properpak and the scheme into disrepute. Membership may be refused if a prospective member's requirements would exceed the then capability of Properpak or if the prospective member appeared unable to fulfil obligations including payment of fees.

Background and markets

- 2.8 Further information on the background to the Regulations and on the markets for the various waste streams covered by the Regulations is given in the Director General's report on his competition scrutiny of the **Valpak** scheme, published in July 1997. Background information on the waste management sector is provided in his report of August 1997 on the **Jempac** scheme.¹

¹ See note on page 2.

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). Consultation letters were also sent out to various interested parties. The views of respondents are summarised below. Relevant competition issues raised by the consultation are considered in the next chapter.
- 3.2 While some respondents welcomed the development of additional schemes, some commented that the increasing number of compliance schemes being registered would lead to divided effort, and exacerbate problems relating to the shortage of reprocessing capacity in the UK. It was suggested that such a shortage could lead schemes to compete with each other and so force up the prices of PRNs. Increasing concern was also noted about the proliferation of schemes being set up by waste management companies. It was suggested that their objective is not 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 Onyx clients were favoured in any way or influenced to join the scheme. The majority of clients currently serviced by Onyx were from 'downstream' sectors which might mean that the scheme became unbalanced and operated in a way which was not equitable to all parts of the packaging chain.
- 3.4 It was also suggested that Properpak would have preferential access to EfW facilities that are in short supply in the UK. It was questioned how the scheme would ensure that there was free access to these facilities for other schemes or obligated producers. It was felt that Onyx and Properpak could potentially have market power which could be abused particularly when this was combined with their substantial and recently expanded collection infrastructure.
- 3.5 As it appeared that Properpak was to restrict membership of the scheme to the amount of recovery capacity available to it, the comment was made that this was restrictive and against the spirit of the Regulations since many smaller companies may well find themselves unable to benefit from the economies of scale potentially available to these schemes. This will particularly apply after 2000.
- 3.6 It was also suggested that the membership appeared to have no opportunity to participate in the development of the scheme.

4 ASSESSMENT

Competition in the market for meeting obligations

4.1 To date, eight compliance schemes have been registered with the environment agencies ranging from relatively small-scale local operations to large cross-sectoral national schemes (two further schemes, **Cleanapack** and **Paperpak**, have recently received competition scrutiny clearance by the Secretary of State).¹ Obligated companies have the choice of joining these schemes or of registering individually with the environment agencies. Obligated companies also have the option of arranging to discharge their obligations themselves or they may arrange for a waste management company to obtain PRNs on their behalf. A competitive market therefore exists in the industry created by the Regulations, and whether any one scheme can lead or be likely to lead to an abuse of market power is lessened by this competitiveness.

Barriers to entry

4.2 Regulatory barriers to entry to setting up a properly constituted scheme are not considered to be significant; there are also 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 Director that they were unlikely to enter into such contracts, and Properpak has similarly said that it does not envisage entering into any exclusive arrangements with reprocessors on behalf of the scheme. Properpak's connection with Onyx is considered in detail below.

4.3 Another potential barrier to entry is the difficulty which members may have in leaving existing schemes. Members of the Properpak scheme may leave after giving three months' written notice. It is unlikely that competition for new members between schemes will be restricted by Properpak in this way.

The limiting of membership numbers

4.4 Membership of the Properpak scheme is limited depending upon the ability of the scheme operator to meet the overall obligation on the Properpak members. The Director appreciates that the operators of schemes need to retain the ability to turn potential members away if the operator feels that they are unable to meet the additional requirements of the prospective member. The Director also considers that the market created by the Regulations is sufficiently competitive in that obligated companies unable to join the Properpak scheme will still be able to meet their obligations as viable alternatives for such companies do exist.

¹ See note on page 2.

Competition in the PRN market

- 4.5 Producers demonstrate that they have met their obligations under the Regulations in part by means of evidence of compliance in the form of PRNs. It is likely that those with an obligation under the Regulations will need to obtain PRNs up to the value of their total obligation, and present this information to the environment agencies in order to prove that they have met their obligations.
- 4.6 The scheme operator and Onyx are wholly owned subsidiaries of CGEA. Onyx is an accredited reprocessor able to issue PRNs for its recovery activities. From figures presented by Onyx to the Director's officials it appears that Onyx facilities will produce 150,000 tonnes worth of recovery PRNs¹ which approximates to one-third of the UK's capacity of EfW PRNs.
- 4.7 The Director's officials have been informed by Onyx that if an obligated company takes waste to an Onyx EfW facility they will be able to obtain PRNs if they request them. Any other accredited reprocessors within the Compagnie Générale des Eaux group of companies would deal with obligated companies on a similar basis.
- 4.8 In conducting competition scrutinies of schemes which are connected with waste management companies or accredited issuers of PRNs, the Director has paid particular attention to the question of access to PRNs. In this instance we have looked at the links between Properpak and Onyx. In the case of the Onyx facilities, Onyx states that the majority of waste is delivered by local authorities, who are non-obligated, who will not require access to the PRNs. The Director notes that in the case of obligated companies who bring in packaging waste for energy recovery, PRNs would be made available to those customers on request. In such instances the facilities would deal directly with the customer and any charge made for a PRN would be between the facility and the customer. The Director's view is that where waste is accepted by an accredited reprocessor, the reprocessor should be required to issue a PRN to the deliverer of the waste if one is requested, irrespective of whether the deliverer of the waste is obligated. At present there is no such requirement in the Regulations or Statutory Guidance, and the Director intends to continue to press for such a change to be made.
- 4.9 Onyx facilities will produce around one third of the UK's EfW PRNs. It is noted that it is expected that Onyx facilities will sell the majority of their PRNs to Properpak. It is however the case that the definition of recovery in Part II of Schedule 3 to the Regulations also includes the recycling of packaging materials. The 'recovery' part of an obligation could therefore be met by additional recycling. In practical terms recovery obligations under the Regulations can be viewed as a mixture of recycling

¹ PRNs for EfW activities are granted at a percentage level of the delivered waste. At present 19% of incinerated waste delivered to EfW facilities is classed as packaging waste and so PRNs can be issued on that percentage basis.

and EfW activities. The Director's officials calculate that although Onyx will produce one third of EfW PRNs, this will be approximately 5% of the total of recycling and recovery PRNs which will be needed in order to meet the overall UK recovery obligation in 1998.¹

- 4.10 In the Director's opinion, a recycling PRN can be used in place of a recovery PRN as the Regulations do not impose a maximum on the number of recycling PRNs that can be used to meet recovery and recycling obligations. It should be noted, however, that recycling PRNs for each packaging material are not necessarily substitutable for each other and that a recovery PRN cannot necessarily be used in place of every recycling PRN. It should also be noted that new competitors may develop in the EfW market between now and 2001 and expansion may occur in the industries who could also issue recovery PRNs (composting, for example). Finally it should also be noted that Properpak will negotiate with the Onyx facilities for PRNs at arm's length which will maintain normal competitive arrangements. Therefore, the Director is satisfied that neither Onyx nor Properpak will have market power in the supply of PRNs and that registration and operation of the Properpak scheme does not lead, and is not likely to lead, to an abuse of market power. The Director is also satisfied that registration and operation of the Properpak scheme will not have an appreciable effect on competition and so is not likely to restrict, distort or prevent competition. The Director will continue to monitor the question of access to PRNs in all markets

¹ The United Kingdom is estimated to produce 8.7 million tonnes of packaging waste. Overall recovery and recycling obligation in 1998 are therefore estimated to be 3.3 million tonnes and the recovery element 2.7 million tonnes. Onyx will produce 150,000 tonnes worth of PRNs.

5 CONCLUSION AND RECOMMENDATION

Conclusion

- 5.1 Having investigated the issues, the Director is satisfied that the Properpak 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.

Recommendation

- 5.2 I therefore recommend that you should advise the Environment Agency, and Properpak Ltd as operator of the draft scheme, in accordance with regulation 31(5), that you are satisfied that the Properpak scheme meets the requirements of the competition scrutiny.

March 1998

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

ANNEX

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

Cleanapack 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) Cleanapack, 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 Blocksidge
Office of Fair Trading
Competition Policy Division
Field House
15-25 Bream's Buildings
London EC4A 1PR

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