

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 June 2001

relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement

(COMP/34.950 — Eco-Emballages)

(notified under document number C(2001) 1611)

(Only the French version is authentic)

(Text with EEA relevance)

(2001/663/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by Regulation (EC) No 1216/1999 ⁽²⁾, and in particular Article 2 thereof,

Having regard to the application for negative clearance and the notification for exemption, submitted pursuant to Articles 2 and 4 of Regulation No 17 on 17 December 1993,

Having regard to the summary of the application and notification published ⁽³⁾ pursuant to Article 19(3) of Regulation No 17,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

A. INTRODUCTION

- (1) Eco-Emballages SA (hereinafter 'Eco-Emballages') organises on French territory a system of selective collection and recovery of household packaging waste. The system is designed to meet the requirements laid down by the French Packaging Decree. The notification relates to the agreements governing the system's operation. This

Decision covers the notified contracts as they currently stand, i.e. incorporating the amendments made during the proceeding and effected by Eco-Emballages at the Commission's request, as explained below.

B. REGULATORY FRAMEWORK IN FRANCE

- (2) Decree No 92-377 (hereinafter 'the Decree') implementing, with regard to packaging waste, Law No 75-633 of 15 July 1975 on waste disposal and recovery, as amended, was adopted on 1 April 1992 and has been in force since 1 January 1993. Member States also have obligations in this matter arising from European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste ⁽⁴⁾.
- (3) Article 1 of the Decree stipulates that it applies to all packaging held by households as end-users. According to the definitions in Article 2, a 'producer' means anyone who packages products or has products packaged with a view to placing them on the market and 'packaging' means any form of container or the like intended to contain a product and to facilitate its transport or presentation for sale.
- (4) Article 4 of the Decree stipulates that any producer or importer whose products are marketed in packaging or, if the producer or the importer cannot be identified, the person first responsible for placing the products on the market is required 'to contribute to or organise the disposal of all of its packaging waste' (hereinafter, the

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ L 148, 15.6.1999, p. 5.

⁽³⁾ OJ C 227, 9.8.2000, p. 6.

⁽⁴⁾ OJ L 365, 31.12.1994, p. 10.

term 'producer' includes any person covered by this requirement). It also stipulates that the producer may either apply to a body or firm (hereinafter a 'body') when referring to a collective system) approved by the authorities to carry out its disposal operations or recover the packaging itself by establishing a deposit system or organising collection points specifically for that purpose (individual system).

- (5) The second paragraph of Article 4 of the Decree requires producers belonging to a body to identify their products. According to that provision, 'it shall identify the packaging the handling of which it has entrusted to a body [...] under the arrangements they determine as provided for in Article 5 below'. Article 5 stipulates that persons [...] who have recourse, for the disposal of their packaging waste, to the services of a body [...] shall enter into a contract stipulating in particular the nature of the identification of the packaging, the estimated volume of waste to be taken back each year [...]. Article 10 provides that producers that choose to establish a deposit system must show this clearly on their packaging and that producers organising specifically designated packaging collection points must have the arrangements for monitoring their system approved by the competent authorities. On 21 December 1999 the obligation to show the establishment of an individual system on the packaging was deleted from Article 10 of the Decree.
- (6) Article 6 of the Decree provides that bodies may obtain approval to carry out such operations from the competent ministers (in the first instance, the Ministry of the Environment). Approval is valid for a maximum of six years. The body in question should negotiate agreements with producers and with waste collection/recovery firms and local authorities. An application for approval must be accompanied by specifications indicating the method of calculating the financial contribution required from producers to allow the body to supply packaging with zero or positive value sorted by type of material. Likewise, the specifications must indicate the method of calculating the payments which the approved body makes to ensure that local authorities are reimbursed the extra costs which they may incur in sorting waste.
- (7) Under Article 8 of the Decree, the approved body is required each year to submit to certain authorities an activity report and the results of its recovery and salvage operations.
- (8) The Order of 23 July 1992 on the approval provided for by the Decree set up an advisory approval committee comprising 33 members: five representatives of central government, six of the local authorities, seven of trade organisations representing industries producing packaged goods, five of trade organisations representing the packaging and packaging-materials industries, two of

trade organisations representing the distributive sector, two of trade organisations representing waste-disposal and material-recovery firms, three of environmental protection associations, and three of consumer organisations. The committee is consulted among other things on applications for approval and is informed of the activity reports of approved bodies.

- (9) When a body submits a set of specifications relating to its system for approval by the competent ministers, the authorities check compliance with a number of predetermined general criteria and may still impose conditions over and above those for the approval application or decide not to take up the proposals put forward in the application.
- (10) Price scales, both upstream (i.e. contributions by producers belonging to the selective collection and recovery systems) and downstream (i.e. financial support for local authorities), are currently determined in identical fashion by the authorities for approved bodies performing the same role. The most recent proposal for the price scales of each body is based on one and the same independent study (by the market research institute Sofres) of the costs of selective collection of household waste and system management. To the costs thus estimated for each material, but without any differentiation by local authority, are added the body's structural costs. The French authorities argue that different price scales downstream would prompt local authorities to move towards the highest prices, and this might result in higher prices upstream and hence higher consumer prices. Conversely, the existence of different scales upstream would prompt producers to deal with bodies offering the lowest prices. The French authorities thus claim that the existence of different scales would be harmful to a system's economic and financial balance, proper implementation and sustainability. They argue that the existence of two or more approved bodies performing the same activities thus leads to uniform price scales, although this does not rule out the possibility of differences regarding, for example, the quality of service and back-up provided to local authorities or the possibility of outbidding as bodies propose more efficient services or innovative solutions when approvals are being renegotiated.

C. THE NOTIFYING PARTY AND ITS ACTIVITIES

- (11) Eco-Emballages is a private limited-liability company set up in 1992 and located in Levallois-Perret, France. Its shareholders are the Compagnie pour le financement d'Eco-Emballages (Ecopar), which is made up of producers and their trade associations (70 % of the capital), the five sectoral networks concerned, i.e. steel, aluminium, paperboard/paper, plastic and glass (each with 4 % of the capital), distributive firms and their trade bodies and, as required by its articles of association, its directors.

(12) It was approved by the competent ministers to take charge of packaging waste in respect of which producers or importers of products consumed or used by households have entered into a contract with it. The first approval was issued on 12 November 1992, to run for six years from 1 January 1993. It was renewed on 30 August 1996 for a further six years from 1 July 1996 and again on 11 June 1999 for six years from 1 January 1999.

(13) It has concluded and concludes contracts with:

- the company Pro Europe for the use of the Green Dot logo and trademark (hereinafter 'the Green Dot mark'),
- producers that do not wish to organise waste disposal themselves. By joining Eco-Emballages, the producer meets its obligation under the Decree. Eco-Emballages is financed out of contributions paid by the producers which participate in the system,
- local authorities, i.e. individual municipalities or groupings of them, which are required under French law to dispose of household waste. It is the local authorities, either on their own or with the help of a subcontractor, which look after refuse collection. By concluding a contract with Eco-Emballages, they receive financial support for that task from it,
- industrial firms, referred to as 'sectoral undertakings', which undertake to process the recovered raw materials. Once sorted, domestic packaging is passed on to the take-back firm(s) for recovery. Eco-Emballages regularly receives reports from the local authorities indicating that recovery has actually taken place.

It has also drawn up a standard 'operational take-back' contract, to be concluded between designated take-back firms and local authorities, and a standard 'research and development' contract.

(14) In 1997 Eco-Emballages had a net turnover of FRF 565,6 million (from producer contributions) and, after it drew on provisions to cover future costs, its total operating income was FRF 1 463 million. In 1998 net turnover was FRF 504,5 million and total operating income FRF 790,5 million. In 1999 the corresponding figures were FRF 600 million and FRF 1 042 million. The firm generated turnover of FRF 1 120 million in 2000.

D. THE NOTIFIED AGREEMENTS

(15) The notification covers the articles of association of Eco-Emballages, the contract governing use of the Green Dot mark, the standard producer contract, the standard local authority contract, the sectoral contracts, the standard operational take-back contract (annexed to the sectoral contracts) and the standard research and development contract.

(16) During the proceeding Eco-Emballages updated or replaced some of the notified contracts. With its agreement, this Decision relates to the notified contracts as they currently stand.

1. Articles of association

(17) According to its articles of association, the purpose of Eco-Emballages is, *inter alia* to organise systems for waste disposal and the recovery of materials and, more particularly, to take charge of the packaging of firms subject to the obligations arising out of the abovementioned Law No 75-633 and the decrees implementing it.

2. Contract governing use of the Green Dot mark

(18) The Green Dot mark is used in the Eco-Emballages system to identify the products of producers which belong to the system, as required by the Decree.

(19) Since 10 December 1996 it has been the contract concluded by Eco-Emballages with the Packaging Recovery Organisation Europe or Pro Europe SPRL (Pro Europe) that grants the former its exclusive principal licence to use the Green Dot mark and to grant sublicences to members in France⁽¹⁾. Eco-Emballages is, moreover, required to inform its members that use of the Green Dot mark outside France is subject to authorisation from the competent party.

(20) Since 4 December 1998 Eco-Emballages has also been required by a third supplementary agreement concluded with Pro Europe to grant sublicences to regional systems and/or systems dealing with specific materials in France, provided that the latter comply with the requirements on the collection and recovery of packaging waste arising from Directive 94/62/EC and with certain predetermined conditions. It has in fact granted the company Adelphe SA (hereinafter 'Adelphe') a non-exclusive sublicense for the use of its Green Dot system on French territory up to 31 December 2002. Adelphe is required to pay to Eco-Emballages an amount corresponding to its share of the costs claimed by Pro Europe.

⁽¹⁾ The licence was formerly granted to Eco-Emballages by a contract with Der Grüne Punkt-Duales System Deutschland AG (DSD).

3. Producer contracts

- (21) Eco-Emballages offers producers either a standard membership contract or a simplified contract designed for small individual contributors or for syndicates or federations of contributors with an annual pre-tax turnover on packaged products intended for households on French territory of less than FRF 2 million.
- (22) The producer acquires the right to affix the Green Dot mark to its packaging (it is actually an obligation because the products covered by the system must, in accordance with the contract, be so identified). According to Article 3(1) of the standard contract, this right extends to all the products manufactured, imported, marketed and/or placed on the market by the co-contractor. In return for payment of the contribution, Eco-Emballages relieves the producer of its packaging waste disposal, sorting and recovery obligations.
- (23) It is up to the producer to complete a posteriori a declaration on the basis of which its contribution is calculated. This has to include packaging bearing the Green Dot mark which it places on the market in France.
- (24) The producer's financial contribution is determined according to a price scale. Since January 1999 the price scale has been composed of a flat-rate amount and a contribution determined according to weight and specified for each material. The weight-based contribution takes account of the financial needs specific to each material and incorporates a portion for non-attributable costs.
- (25) The contract stipulates that the price scale will change over the contract period. Eco-Emballages may decide to adjust the amount of the contribution, although not more than once a year and subject to the agreement of the price committee (made up of shareholders) and the price management committee (comprising representatives of producers, sectoral undertakings and Eco-Emballages) set up in the context of approval. These proposals are then submitted to the board of Eco-Emballages and finally to the authorities for approval. Under the terms of the 1996 and 1999 approvals, the adjustment is carried out according to the extent by which Eco-Emballages' activities with local authorities increase and according to an assessment of the financial needs for each material, as defined by Article 6 of the Decree and based on economic, technical and ecological assessments, as well as with a view to reducing the quantities (weight and volume) of packaging waste at source. The price scale must not 'introduce unjustified discrimination between packaging materials'. The funds raised by applying the price scale are intended to ensure that the system remains in balance economically and financially and does not give rise to operating surpluses at the end of the financial year. All of the financial support paid for each material, including the portion for non-attributable costs, should be covered by the contributions received for the material in question. The funds raised must also ensure a progressive and significant increase in the extent of collections, without any threshold being imposed and with medium-term transparency for producers.
- (26) The specifications proposed by Eco-Emballages and annexed to the 1999 renewed approval also contain the following 'principles': The price scale for producers is common to all approved companies: it is calculated according to those companies' overall share. Financial transfers may be organised between approved companies to take account of the specific characteristics of their share in terms of contributing materials. The activity forecasts of approved companies take these financial transfers into account, with the objective of achieving a zero balance for the transfers to be carried out in each financial year⁽¹⁾.
- (27) According to the standard contract originally notified, membership contracts ran for three years and were renewable by tacit agreement for further periods of one year unless notice of termination was submitted six months before the expiry of one of the one-year periods of tacit renewal. Approximately 75 % of the contracts in force at the end of 1998, accounting for some 94 % of contributions, were of this type. Under the 1996 renewed approval, the contract term was increased to six years, renewable by tacit agreement for three years. Early termination is possible under Article 13 of the standard contract in the event of default by one of the parties.
- (28) The July 2000 version stipulates that interest on arrears — at the legal interest rate plus two percentage points — is to be applied for the late payment of contributions to any members joining after 31 December 1993 'so as to avoid causing discrimination between members'.
- (29) Lastly, the producer contract stipulates that Eco-Emballages must guarantee total confidentiality with regard to all financial or commercial information communicated to it by producers or to which it might become privy during the contract period.

⁽¹⁾ According to Eco-Emballages, such transfers are as of now non-existent. If there were any, they served as the consideration for the take-back service. In effect, only a few of Adelphe's obligations relating to materials other than glass were in the past transferred to Eco-Emballages and it received corresponding financial compensation.

4. Local authority contracts

- (30) The contributions paid by producers are redistributed to local authorities on the basis of several types of contract. While in the past Eco-Emballages has entered into 'single-material', 'relay' and 'pilot-site' contracts, it now concludes only 'long-term programme' (programme de durée) contracts for establishing multi-material collection. The standard contract states that its purpose is 'to regulate the relationship between Eco-Emballages and the local authority, which undertakes to develop a project for the selective collection of the five materials'.
- (31) Under the terms of its approval, Eco-Emballages is required to enter into a contract with any local authority which so requests, to the extent of the quantities of packaging equivalent to those for which producers have themselves entered into a contract with it. The contract must comply with the requirements of the General Local Authorities Code (legislative part) and the Municipalities Code (regulatory part).
- (32) The long-term programme contract, in its version of 8 July 1994, is concluded for a six-year period. Under Article 12 of the contract, Eco-Emballages must, on each occasion its approval is renewed, offer local authorities a supplementary agreement renewing the contract for a period to be determined between the parties but which may not exceed the duration of the new approval. According to Eco-Emballages, the six-year period meets the wishes of local authorities, which, in view of the substantial investment involved, seek a degree of durability in their relationship with Eco-Emballages. Termination is possible under Article 14 of the contract in the event of default by one of the parties.
- (33) Under a long-term programme contract, Eco-Emballages offers local authorities the guarantee that household packaging waste collected and appropriately sorted by them (i.e. in accordance with minimum technical requirements (the MTR) will be taken back from them for the purposes of recovery. Local authorities remain free not to opt for the guarantee with regard to some or all materials.
- (34) When an authority does opt to accept the take-back guarantee, the contract stipulates that, for the contract period, it must supply the entire tonnage of materials collected and sorted in accordance with the MTR to the designated take-back firm(s). According to Eco-Emballages, this requirement was adopted to allow its support to be calculated and to permit verification that all packaging had indeed been recycled.
- (35) Nevertheless, in cases where the local authority identifies a new and innovative means of recovery during the contract period, an exception may be made to the principle of take-back by the designated take-back firm. Application of such an exception has to be approved by the sectoral undertaking which would normally carry out recovery.
- (36) When the local authority does not opt for the take-back guarantee in respect of one or more or all materials, the contract stipulates that it must ensure that the take-back firms selected by it do take back all of the packaging sorted in accordance with the MTR and proceed to recycle this packaging using technological processes which permit effective recovery and that those firms inform both the local authority and Eco-Emballages accordingly every three months. The name of each of the take-back firms selected by the local authority must be specified in the long-term programme contract.
- (37) Under the terms of the long-term programme contract and the latest approval, Eco-Emballages must pay the following support to the local authority, irrespective of whether or not the latter has opted for the take-back guarantee:
- an amount per tonne sorted in accordance with the MTR, with the amount varying according to the material concerned,
 - a financial contribution towards energy recovery,
 - support for local communication,
 - temporary support corresponding to the specific situation: start-up, high-rise housing and dispersed rural communities, 'sorting ambassadors' in the context of youth employment schemes, etc.,
 - aid for the provision of bottle banks for use by the public.
- (38) The amount of support under each item is calculated in accordance with the price scale approved by the public authorities and is stipulated in the contracts. It takes account, *inter alia* of the population actually covered by selective collection.
- (39) The minimum take-back price paid by the designated take-back firm to the local authority is laid down in the long-term programme contract. Under the terms of both the initial approval and the subsequent renewals, this price is, subject to certain restrictions, positive for steel, aluminium and glass and zero for paper/paperboard and plastic.
- (40) If the local authority has not opted for the take-back guarantee and enters into a contract with a take-back firm of its choice, it must, as Eco-Emballages' 1996 approval application stated, sell the products on market terms.

5. Sectoral contracts and operational take-back contracts

(41) Sectoral contracts (or take-back agreements) regulate the relationship between Eco-Emballages and the industrial firms which undertake to take back and recycle the packaging collected, provided that it complies with the MTR. There are five sectoral undertakings, namely:

- steel: initially Sollac SA, whose rights and obligations were transferred to Usinor-Packaging SA in 2000,
- aluminium: France Aluminium Recyclage SA,
- paper/paperboard: Revipac,
- plastic: Valorplast SA,
- glass: Chambre syndicale des verreries mécaniques de France (CSVMF).

(42) Eco-Emballages does not enter into contracts simultaneously with several firms or bodies for the same material.

(43) Following their renewal, the agreements will expire on either 30 June 2004 (steel) or 31 December 2004 (aluminium, paper/paperboard, plastic and glass). A decision on whether to extend them further will, in each case, be taken not later than three months before the corresponding expiry date.

(44) A management agreement is also annexed to the take-back agreements. It defines the terms of reference, organisation and functioning of the two committees set up between Eco-Emballages and the sectoral undertaking concerned and provides for the establishment of a materials account, which is the share of Eco-Emballages' net resources allocated to each material. In addition, there is a correction method involving the application of a weighting to take account, in particular in the allocation of non-attributable costs, of varying performances and different recovery rates for the various materials.

(45) In the context of a take-back guarantee, it is not the sectoral undertakings which actually take back packaging waste but rather firms designated by each of them. These are known as 'designated take-back firms'. Eco-Emballages claims not to have any influence on the choice of designated take-back firms. However, the contracts concluded between the designated take-back firms and the local authorities (operational take-back contracts) are based on standard contracts 'so as not to undermine the guarantee given by the sectoral undertakings'. A specimen model for each contract, except the one for plastic, was therefore proposed by Eco-Emballages.

(46) The different take-back contracts must stipulate that, if there is a take-back guarantee, the local authority must grant the sectoral undertaking or take-back firm an exclusive right to take back all the quantities sorted on

its territory for the duration of the contract between Eco-Emballages and the local authority concerned.

6. Research and development contracts

(47) Eco-Emballages' involvement in research and development is essentially financial. In return, its co-contractor undertakes to implement a given process industrially or to allow Eco-Emballages to do so. These contracts regulate matters of industrial property.

E. RELEVANT MARKETS

(48) The Commission has identified three relevant markets. The first market in which Eco-Emballages operates is that for services rendered to producers in the context of taking over their obligations to contribute to or organise the disposal of household packaging waste: this market could be called the 'market for collective systems for taking over the obligation to take back and recover household packaging' or the 'membership market'. Individual and collective systems could also be considered as belonging to the same market, which would then be the market in systems for taking back and recovering household waste. Nevertheless, this does not change the analysis which follows.

(49) The second relevant market is that for the selective collection and sorting of all types of household packaging by local authorities: the 'selective collection market'. In this market, approved bodies give support to local authorities in return for collection and sorting services or, conversely, local authorities contribute to the operation of the Eco-Emballages system in return for financial compensation.

(50) The third relevant market is that for the recovery of materials by take-back firms and sectoral undertakings: the 'recovery market'.

(51) It is not necessary in the case in point to define the relevant service markets more precisely since the contracts do not give rise to competition problems.

(52) The geographic market for the first two service markets above is France. Eco-Emballages has approved status and operates its system throughout French territory. Its rights with regard to the Green Dot mark are likewise limited to that territory. With regard to the third service market, it is not necessary in the case in point to determine with precision if it also corresponds to French territory or if it extends to neighbouring or nearby countries.

- (53) These definitions of the relevant product market (membership market) and geographic market (territory of the country concerned) are similar to those adopted in the Commission Decision of 20 April 2001 on the system operated by Der Grüne Punkt-Duales System Deutschland AG (DSD).

F. STRUCTURE OF THE MARKETS

- (54) Eco-Emballages' official recovery target is 75 % of its member producers' household packaging by June 2002. At present, more than 60 % is collected and recycled.
- (55) By the end of 1997 Eco-Emballages was contractually bound to 9 664 municipalities grouped into 281 local authorities, there being more than 36 000 municipalities and more than 2 000 local authorities in France. By the end of 1998 it was contractually bound to 533 local authorities representing 13 862 municipalities; by the end of 1999 the figure was 19 487 municipalities, and by the end of 2000 it was contractually bound to 1 114 local authorities representing 24 013 municipalities.
- (56) In 1997 the number of affiliated producers was 9 135, of which more than 700 were outside France; in 1998 there were 9 311. In 1999 the number was 9 419 and in 2000 there were 9 593.
- (57) Of the 4,845 million tonnes of domestic packaging placed on the market in France in 2000, 3,395 million tonnes came from members of the Eco-Emballages system. The figures are as follows for the various materials involved: 1,37 million of the 2,55 million tonnes of glass, 0,79 million of the 0,9 million tonnes of plastic, 0,88 million of the 1,0 million tonnes of paper/paperboard, and 0,355 million of the 0,395 million tonnes of metal ⁽¹⁾.
- (58) As regards competition from rival collective systems, Adelphe obtained approval on 5 February 1993 initially to collect and recycle packaging produced in the wines and spirits sector. Adelphe's approval was extended on 15 October 1996 so that it could 'enter into contracts with [producers] whose activity relates primarily to the wine and spirits sector for the purpose of recovering the household packaging in respect of which the contract has been entered into'. It was therefore permitted from that point onwards to receive packaging from such firms, irrespective of the material involved. At the end of 1997 almost 12 000 producers, including four outside France, were contributing to its system. The share of domestic packaging in the wine and spirits sector handled by Adelphe in 1997 was, according to its own statements, some 88 %. On 28 February 2000 its

approval was renewed for a further six-year period from 1 January 1999 and, since then, it has been able to enter into contracts with firms from all sectors in the same way as Eco-Emballages. Its contracts with local authorities are currently concentrated on largely rural *départements*.

- (59) The association Cyclamed has also been approved to operate an individual system for medicinal product packaging and the large retailer E. Leclerc has an arrangement for its shopping bags. These individual systems are not, however, required to achieve the same collection and recovery targets as the collective systems.

G. AMENDMENTS MADE AND UNDERTAKINGS GIVEN AT THE COMMISSION'S REQUEST

- (60) On 18 January 2000 the Commission departments informed Eco-Emballages of their view that certain clauses of the agreements were liable to fall within the scope of the ban in Article 81(1) of the EC Treaty and did not, as they stood, qualify for exemption under Article 81(3).
- (61) On 28 February 2000 Eco-Emballages offered to amend those clauses in order to respond to the Commission's comments, and subsequently further clarified those commitments and offered additional undertakings. With regard to the notified agreements, it has amended and/or added the following provisions and given the following undertakings:
- (a) Even if Eco-Emballages may require each of its member producers to fulfil its obligations under the Decree and consequently to contribute to or organise the disposal of all its packaging waste, only a member's products for which it declares its packaging to Eco-Emballages are covered by the system. Each producer is therefore required to declare to Eco-Emballages only the product household packaging in respect of which it has entered into a contract with the company. This means that the producer can enter into a contract with Eco-Emballages for certain types of material only and for some or all of the packaging using such material.
- (b) Since the Eco-Emballages system concerns packaging for products intended for the French market, if a producer has (mistakenly) declared to Eco-Emballages packaging for products that are exported, it may, provided it supplies adequate documentary evidence, request Eco-Emballages to regularise its situation.
- (c) Each producer now has the right to terminate its contract at the end of each twelve-month period subject to six months' notice.

⁽¹⁾ The figures for 1997 were as follows: 1,24 million of the 2,3 million tonnes of glass, 0,81 million of the 0,9 million tonnes of plastic, 0,89 million of the 1,0 million tonnes of paper/paperboard, and 0,36 million of the 0,4 million tonnes of metal.

- (d) Although Eco-Emballages may require each local authority to collect and sort all five materials, the latter may enter into a contract with Eco-Emballages for one or more materials only and with another body for the others.
 - (e) Each local authority may, at any time, unilaterally terminate its contract without being required to pay any compensation. Should it do so, at the local authority's request Eco-Emballages will provide it with any necessary information concerning its offer to enable the local authority to compare offers from different bodies in respect of each material.
 - (f) All operational take-back contracts between local authorities and designated take-back firms may be amended without requiring Eco-Emballages' agreement.
 - (g) As regards use of the Green Dot mark by systems, in accordance with the third supplementary agreement concluded with Pro Europe (see recital 20) Eco-Emballages considers itself under the obligation to grant any competing system, where appropriate, a sublicense with the same territorial and material scope as its principal licence.
 - (h) The framework contract between Eco-Emballages and Adelphe was amended on 16 February 2001 such that neither party may demand the other's list of members, but either party may request the other to confirm within a period of one week whether or not a given producer affixing the Green Dot mark to its products is a member.
 - (i) Eco-Emballages never receives from producers any amount other than consideration for taking over their obligation under the Decree.
 - (j) In the case of a hybrid system (the producer belongs to Eco-Emballages for some of its packaging and, for the remainder, there is an individual system approved by the authorities of which it is a member or which it has set up), if the packaging covered by the Eco-Emballages system accounts for most of the producer's packaging, the producer is allowed to affix the Green Dot mark to all its packaging, including that covered by its individual system. The producer must be able to provide, at Eco-Emballages' request and not systematically, a statement from its auditors attesting to the quantity of packaging covered by the individual system. If, on the other hand, the packaging covered by the individual system accounts for most of the producer's packaging, the producer must normally limit affixing of the Green Dot mark to not more than the quantity covered by the Eco-Emballages system, except where it does not consider this to be adequate and rational. In that eventuality, and as long as it can demonstrate that the individual system achieves recycling and recovery results equivalent to those required by the French authorities of French collective systems and it is able to provide, at Eco-Emballages' request and not systematically, a statement from its auditors attesting to the quantity of packaging covered by the individual system, the producer may affix the Green Dot mark to all its household packaging.
 - (k) Where the producer is authorised in France to have an individual system for all its packaging and the same types of packaging belong to a collective collection and recovery system using the Green Dot mark in another Member State of the European Economic Area, and as long as it can demonstrate that the individual system achieves recycling and recovery results equivalent to those required by the French authorities of French collective systems, Eco-Emballages will offer the producer a contract allowing it to distribute packaging bearing the Green Dot mark in French territory. It must nevertheless affix to the packaging, in the vicinity of the Green Dot mark, an indication enabling the French consumer to understand clearly that the packaging has not contributed to a French collective system. If the parties cannot agree on the nature of the indication within a period of three months, an expert is to be appointed by the magistrate presiding over the French commercial court with territorial jurisdiction, at the request of the earliest petitioner, under the emergency expertise procedure.
 - (l) The clause concerning interest on arrears for late membership has been supplemented with the clarification that such interest is due with effect from 31 December 1993 or from the date the activity subject to the Decree begins, where that is later, if the products in question have not been either covered by another recovery system or the subject of proceedings for non-compliance with the Decree.
- (62) The new version of the producer contract (recital 61, points (a), (b) and (c) has been in force since 21 June 2000. As regards the new version of the long-term programme contract with local authorities (points (d) and (e)), Eco-Emballages has informed the Commission that it was approved by the Association of French Mayors on 12 July 2000, that the amendments to existing contracts had been sent to the local authorities concerned and that new contracts subsequently signed also contained those provisions. The amendment referred to in point (f) above was confirmed by Eco-Emballages in a letter to the Commission dated 7 July 2000. The undertaking outlined in point (g) derives from the interpretation given by Eco-Emballages to the contract it concluded with Pro Europe on 4 December 1998. The amendment described in point (h) has been in force since 16 February 2001. Lastly, the undertakings referred to in points (i), (j), (k) and (l) were given on 14 March 2001.

H. COMMENTS BY INTERESTED THIRD PARTIES

- (63) No formal complaint has been lodged against the notified system.

- (64) Following publication of the notice pursuant to Article 19(3) of Regulation No 17, the Commission received comments from two corporate interested third parties. Those comments related, in particular, to the terms under which sublicences are granted for use of the Green Dot mark by a competing system, the scope of producer contracts, the price scales for producers' contributions, and Eco-Emballages request that the exemption decision applied for be issued with retroactive effect.
- (65) After examining the comments in detail, the Commission considers that it has no grounds for departing from its provisionally favourable position, for the reasons set out below.
- (66) First, as already mentioned, examination of the terms on which sublicences are granted has led to an amendment whereby Eco-Emballages can no longer require a sublicensee to provide it with a list of its members.
- (67) The Commission does not comment in this Decision on the question of the existence of a principal licence for each country and of sublicences, which is being examined separately. It should therefore be stressed that this Decision does not comprise any assessment, either favourable or unfavourable, of the licensing principles established by Pro Europe.
- (68) Second, the Commission accepts that the price scales for producers' contributions are calculated having due regard for the 'polluter pays' principle. The independent study mentioned at recital 10 has made it possible to identify a cost per material according to the different methods of collection (bottle banks, etc. for use by the public, door-to-door collection) and types of collection area (rural, semi-urban, urban or other). A weighted average calculated in this manner constitutes the basis for the contribution per material (under the Decree, the local authorities are reimbursed any additional cost they incur as a result of sorting the waste). It would be disproportionate to require a more detailed differentiation, i.e., within the same material. Plastic is the only material that can be divided into different types, and consumers are unlikely to distinguish between them. When a packaged product is placed on the market, the abovementioned two calculation parameters are in any case not known. Furthermore, since the price scale is composed of a flat-rate amount per package, designed to combat the proliferation of small packages, and a weight-based contribution determined in this manner for each material, producers are encouraged to reduce packaging at source: the less they package their products, the less they contribute financially to the system.
- (69) Third, the approval by the authorities of identical price scales for systems serving the same purpose is the result of a measure taken by the State and does not constitute a restrictive practice⁽¹⁾. This situation has arisen from the authorities' desire to ensure the sustainability of the selective collection and recovery of household packaging on the French market. According to the French authorities, scales of support for local authorities that differ between approved firms might result in higher prices. The introduction of a single scale of support for local authorities would help to limit that trend, which could encourage an increase in spending. The French authorities have also explained that the costs of selective collection and sorting of household packaging waste are periodically analysed, in particular by Ademe (the Agency for the Environment and Management of Energy), and such analyses are taken into account when price scales are established. As long as the additional cost of selective collection and sorting, for which local authorities are to be compensated, is determined at national level for each type of collection and not for each local authority, it would, according to the French authorities, be difficult for the authorities to establish the price scales in any other way. Lastly, the authorities consult the Advisory Committee composed of all the partners involved, including consumers, before setting the price scales in accordance with public-interest criteria.
- I. ARTICLE 81(1) OF THE EC TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT**
- (a) Agreements between undertakings which may affect trade between Member States
- (70) The agreements between Eco-Emballages and producers and between Eco-Emballages and sectoral undertakings are agreements between undertakings since all these natural or legal persons carry on an economic activity. On the question whether the agreements concluded with local authorities are agreements between undertakings within the meaning of Article 81 of the EC Treaty, a distinction must be drawn between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market⁽²⁾. By entering into contracts with Eco-Emballages with a view to both receiving financial support in return for establishing a household waste selective collection service and proof that the waste is

⁽¹⁾ See, for example, in this connection the judgment of the Court of Justice of the European Communities in Case C-38/97 *Autotrasporti Librandi* [1998] ECR I-5955, paragraph 37.

⁽²⁾ See, for example, in this connection the judgments of the Court of Justice in Cases 118/85 *Commission v Italy* [1985] ECR I-2599, paragraph 7, and C-343/95 *Diego Call & Figli* [1997] ECR I-1547, paragraph 16.

recovered, and also selling sorted household packaging to take-back firms which provide them with proof of recovery, the local authorities are carrying on an economic activity of an industrial and commercial nature within the meaning of the above. The fact that they do so under their statutory obligation to dispose of household waste is insufficient to enable them to be regarded as acting in the role of an official authority. In accordance with Article 86(2) of the EC Treaty, the agreements in question are therefore subject to the Community rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular task of household waste disposal assigned to the municipalities and local authorities in the public interest.

- (71) Since a number of members are from other EU Member States, the producer contract is therefore liable to have effects on trade between Member States. The other agreements are aimed at redistributing the producers' contributions to local authorities, so that the latter collect the packaging and pass it on to the take-back firms for recovery. Any changes to the support for local authorities thus have repercussions on the producers' contributions. The system consequently operates as a whole and all the contracts therefore have appreciable actual or potential effects on trade between Member States.

(b) Articles of association

- (72) Eco-Emballages' articles of association do not contain any exclusive clause restricting the shareholders' freedom of action on the relevant markets and therefore do not contravene Article 81 of the EC Treaty.

(c) Duration and scope of the producer contracts

- (73) Now that all producers have the right to terminate their contract each year, the Commission takes the view that, in terms of the duration of contracts, producers' freedom of choice and action is not unduly restricted

and, furthermore, a competing system can enter the membership market, which is not foreclosed.

- (74) Likewise, since it has been expressly confirmed ⁽¹⁾ that a producer can opt to join the system in respect of certain types of material only and in respect of some or all of the packaging composed of each material, the Commission takes the same view as in recital 73 with regard to the scope of contracts.
- (75) The clause concerning interest on arrears for late payment of contributions applied to producers joining after 31 December 1993 does not create any barrier to entry to the membership market for competing systems, nor does it constitute a manifest abuse.

(d) Duration and scope of local authority contracts

- (76) Since it has been expressly confirmed ⁽²⁾ that local authorities have the right to terminate their contract at any time, the Commission takes the view that, in terms of the duration of contracts, local authorities' freedom of choice and action is not unduly restricted and, furthermore, a competing system can enter the selective collection market, which is not foreclosed.
- (77) Likewise, since it has been expressly confirmed ⁽³⁾ that a local authority can enter into a contract with Eco-Emballages in respect of one or more materials and with another body for the others, the Commission takes the same view as in recital 76 with regard to the scope of contracts.
- (78) The obligation on the local authority to enter into a contract with Eco-Emballages in respect of the entire sorted tonnage of a particular material does not constitute in the case in point a restriction of competition within the meaning of Article 81(1) of the EC Treaty because, as the local authority can terminate its contract whenever it wishes, this clause does not create any exclusive right that appreciably affects the competitive situation on the selective collection market.

(e) Duration of sectoral contracts

- (79) These contracts run for six years, and Eco-Emballages concludes only one sectoral contract for each material. Eco-Emballages is under the obligation to present to local authorities that opt for the take-back guarantee, for each material, the sectoral undertaking concerned as the designated take-back firm. This exclusivity is unilateral, and the contract does not prevent sectoral undertakings from working with any other systems. For two of the five materials (aluminium and steel) there is, according

⁽¹⁾ According to Eco-Emballages, this was already the case before the clause in question was amended.

⁽²⁾ According to Eco-Emballages, a local authority, as a legal person governed by public law, could in any event terminate its contracts at any time, as confirmed by well established case-law in France.

⁽³⁾ According to Eco-Emballages, which backed up its claim with an example of a contract, this was already the case before the clause in question was amended.

to the information available, in any case only one manufacturer on the French market and there is therefore no choice of sectoral undertaking. If the local authority does not opt for the take-back guarantee, it has a free choice of take-back firm, and any take-back firm can thus gain access to the market in the recovery of materials collected by the local authorities.

- (80) Since Eco-Emballages cannot itself provide local authorities with a take-back guarantee, it needs for that purpose a sectoral contract for each material covering the duration of its obligations. The Commission takes the view, on the basis of the information available, that access to the recovery market is not appreciably restricted by the sectoral contracts, as the take-back guarantee is optional for local authorities and the Eco-Emballages' system concerns only slightly more than one third of packaging waste on the French market (5,4 million tonnes of household packaging waste out of a total of 13 million tonnes of packaging waste in 1997). Glass is the only material most of which is handled by the Eco-Emballages or the Adelphe system, and since the sectoral undertaking is a trade association which introduced the system that was subsequently taken over by the collective systems, the Eco-Emballages system does not have appreciable effects on the recovery market. In these particular circumstances on the French market, the Commission takes the view that these contracts do not constitute a restriction of competition in breach of Article 81(1) of the EC Treaty.

(f) Involvement in contracts on the recovery market

- (81) The notified agreements contain provisions relating to the minimum take-back price paid by the take-back firm to the local authority, and consequently a relationship in which Eco-Emballages is not involved. The minimum take-back price is set in the local authority and sectoral contracts for a period of six years. Nevertheless, it is no more than a floor price and the price actually paid depends on the state of the market, provided that it is always either zero or positive. Eco-Emballages takes part in this price-setting process because the system is based on the sharing of costs between producers, local authorities and sectoral undertakings and it acts as the interface between those parties. Neither could it guarantee the payment of that price to the local authorities if it was not involved in setting it. Eco-Emballages' involvement in the terms on which the sectoral undertakings purchase waste collected by the local authorities is designed to avoid the latter having to run the risks of market fluctuations and to pay to have their packaging waste recycled, something which would be liable to deter them from joining the system. The existence of the minimum price enables local authorities to join the

system and have their sorted waste recycled. The price actually paid may always exceed the minimum price laid down. Eco-Emballages's profit is only indirect. For the above reasons, the existence and the results of its involvement do not contravene Article 81(1) of the EC Treaty.

(g) Use of the Green Dot mark

- (82) Provided that Eco-Emballages fulfils its undertaking to allow other collective systems to use the Green Dot mark in their system, in return for payment of a share of the amounts claimed by Pro Europe, the contract granting it the principal licence in France does not create an unjustifiable exclusive right and is not incompatible with Article 81(1) of the EC Treaty.
- (83) As regards the producers' right and obligation to affix the Green Dot mark to packaging, in its Decision on DSD, in a proceeding pursuant to Article 82 of the EC Treaty concerning the German market, the Commission found against the practice whereby the fee payable was linked not to the use of the service releasing the producer from its packaging take-back and recovery obligations but simply to the use of the Green Dot mark on packaging. In view of the undertakings given with regard to use of the Green Dot mark by producers taking part at the same time or entirely in an individual system or another collective system, the terms binding producers do not create any exclusive right for the benefit of Eco-Emballages and to the detriment of its actual and potential competitors. Furthermore, the problems which prompted the Commission to find that DSD had abused its dominant position do not currently arise on the French market,
- (84) Lastly, it should be recalled that, if a product bearing the Green Dot is exported and if proper proof is provided, no contribution can be claimed by Eco-Emballages for the use of the Green Dot on the packaging. Similarly, if a product bearing the Green Dot is handled in France by a competing system, no contribution is payable to Eco-Emballages.
- (85) Under these circumstances, the contracts and clauses applied by Eco-Emballages for the use of the Green Dot are not in breach of Article 81(1) of the EC Treaty.

(h) Conclusion

- (86) To sum up, in view of the arguments set out above and provided that the undertakings given are carried out, the establishment and operation of the Eco-Emballages system in accordance with the texts and contracts hitherto in force are not caught by Article 81(1) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, and in particular in view of the undertakings listed in recital 61 of this Decision, the Commission has no grounds for action under Article 81(1) of the EC Treaty or Article 53(1) of the EEA Agreement in respect of the notified agreements concerning a system of selective collection and recovery of household packaging waste established by Eco-Emballages SA, as they currently stand.

Article 2

This Decision is addressed to:

Eco-Emballages SA
44 avenue Georges Pompidou
F-92302 Levallois-Perret Cedex.

Done at Brussels, 15 June 2001.

For the Commission

Mario MONTI

Member of the Commission
