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Legislation

Contents

[1] Text with EEA relevance.

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 17 September 2001

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

(Cases COMP/34493 — DSD; COMP/37366 — Hofmann and DSD; COMP/37299 — Edelhoff and DSD; COMP/37291 — Rethmann and DSD; COMP/37288 — ARGE and five others and DSD; COMP/37287 — AWG and five others and DSD; COMP/37526 — Feldhaus and DSD; COMP/37254 — Nehlsen and DSD; COMP/37252 — Schönmackers and DSD; COMP/37250 — Altvater and DSD; COMP/37246 — DASS and DSD; COMP/37245 — Scheele and DSD; COMP/37244 — SAK and DSD; COMP/37243 — Fischer and DSD; COMP/37242 — Trienekens and DSD; COMP/37267 — Interseroh and DSD)

(notified under document number C(2001) 2672)

(Only the German text is authentic)

(Text with EEA relevance)

(2001/837/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, the First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by Regulation (EC) No 1216/1999 [2], and in particular Articles 2, 6 and 8 thereof,

Having regard to the applications for negative clearance and notifications for exemption of the agreements on which the DSD system is based which were submitted by DSD under Articles 2 and 4 of Regulation No 17 on 2 September 1992; to the supplementary applications for negative clearance and notifications for exemption of the Service Agreement submitted by the waste disposal undertakings Trienekens on 17 September 1998, Fischer on 17 September 1998, SAK on 18 September 1998, Scheele on 18 September 1998, DASS on 21 September 1998, Altvater on 21 September 1998, Schönmackers on 25 September 1998, Nehlsen on 28 September 1998, Feldhaus on 29 September 1998, Rethmann on 30 October 1998, Edelhoff on 6 November 1998, Hofmann on 4 January 1999, and by the waste disposal associations BVSE and VKS on 29 October 1999; and to the supplementary application for negative clearance and notification for exemption of the Guarantee Agreements submitted by the waste disposal service provider Interseroh on 9 October 1998,

Having regard to the decision of 25 October 1996 to initiate a proceeding in this case,

Having invited interested undertakings under Article 19(3) of Regulation No 17 to submit their observations [3],

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

Whereas:

A. **THE FACTS**

I. *INTRODUCTION*

(1) On 2 September 1992 *Der Grüne Punkt — Duales System Deutschland AG* (hereinafter called 'DSD'), in Cologne, notified a number of agreements with a view to obtaining negative clearance or a decision granting exemption from the prohibition on restrictive practices. DSD operates in Germany a countrywide system for the collection and recovery of sales packaging. The system is designed to meet the requirements of the German Packaging Ordinance. The notification concerns those

[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 148, 15.6.1999, p. 5.
[3] OJ C 100, 27.3.1997, p. 4.

agreements (the Constitution or Statutes, the Service Agreement, the Trade Mark Agreement and the Guarantee Agreements) on which the operation of the system is based.

(2) Following publication of the notification pursuant to Article 19(3) of Regulation No 17, in a notice in which the Commission announced its intention of taking a favourable view of the agreements in question under Article 81, 13 sets of observations in all were received from interested third parties ([4]).

(3) Between September 1998 and January 1999 individual notifications of the Service Agreement were received from altogether 12 waste disposal firms having such agreements with DSD. Two joint notifications of the same agreement were also received, each from a waste disposal association acting on behalf of six waste disposal firms.

(4) The waste disposal firms submitting individual notifications were Friedrich Hofmann GmbH & Co, Entsorgung Edelhoff Süd GmbH, Rethmann Entsorgungswirtschaft GmbH & Co KG, Feldhaus Recycling GmbH & Co KG, Karl Nehlsen GmbH & Co KG, Schönmackers Umweltdienste GmbH & Co KG, Jacob Altvater GmbH & Co, DASS GmbH, Erwin Scheele GmbH & Co KG, SAK Sondershäuser Entsorgungs GmbH, Fischer Rohstoff Recycling Freudenstadt GmbH, and Trienekens GmbH.

(5) On 29 October 1998 the BVSE Bundesverband Sekundärrohstoffe und Entsorgung e.V. (Federal Association for Secondary Raw Materials and Waste Disposal (BVSE)) submitted a joint notification of the Service Agreement on behalf of ARGE Duales System Storman-Lauenburg; ART Abfallberatungs- und Verwertungs GmbH; Cordier Abfallentsorgung GmbH; Rudolf Fritsche GmbH; TWR Tenner Wertstoff Recycling GmbH; and Ostthüringer Recycling- und Handels-GmbH.

(6) Likewise on 29 October 1998 the VKS Verband Kommunale Abfallwirtschaft und Stadtreinigung (Association for Local Waste Management and Refuse Collection (VKS)) submitted a joint notification of the Service Agreement on behalf of AWG — Abfallwirtschafts-Gesellschaft Donau-Wald mbH; Betrieb für das Duale System im Saarland; Entsorgung Dortmund GmbH; ESG Entsorgungswirtschaft Soest GmbH; VIVO Gesellschaft für Abfallvermeidung; and USB Umweltservice Bochum GmbH.

(7) In addition, over 200 waste disposal firms have informed the Commission of the Service Agreement through the Bundesverband der Deutschen Entsorgungswirtschaft (Federal Association of the German Waste Disposal Business (BDE)). These waste-disposal firms are listed in the index attached to this Decision.

(8) On 9 October 1998 the firm Interseroh AG notified acceptance and guarantee agreements for the waste fractions paper and board, tinplate, aluminium, and other composites.

(9) On 3 August 2000 the Commission sent a statement of objections to DSD initiating proceedings under Article 82 of the EC Treaty. On 20 April 2001 the Commission adopted Decision 2001/463/EC ([5]) in which it found that DSD was engaging in conduct incompatible with the common market by requiring, under the first sentence of Article 4(1) and the first sentence of Article 5(1) of the Trade Mark Agreement, the payment of a license fee for the total quantity of sales packaging carrying the Green Dot trade mark put into circulation in Germany even where undertakings subject to the obligations arising out of the Packaging Ordinance:

(a) either use DSD's exemption service as referred to in Article 2 of the Trade Mark agreement,

— only for partial quantities,

— or do not use the said service but put into circulation in Germany uniformly designed packaging which is also in circulation in another Member State of the European Union or of the European Economic area and which participates in a take-back system using the Green Dot trade mark;

(b) provided the obligated undertakings prove that, in respect of the quantity or partial quantity for which they do not use the exemption service, they fulfil their Packaging Ordinance obligations through competing exemption systems or through self-management solutions.

(10) This Decision is concerned with the Constitution or Statutes, the Guarantee Agreements and the Service Agreements.

II. *THE PACKAGING ORDINANCE*

(11) On 12 June 1991 the *Verordnung über die Vermeidung von Verpackungsabfällen* (Ordinance on the Avoidance of Packaging Waste, or 'Packaging Ordinance') was adopted in Germany. An amended version of the Ordinance entered into force on 28 August 1998. The Ordinance is intended to prevent or reduce the impact of packaging waste on the environment.

(12) The Packaging Ordinance is binding mainly on packaging manufacturers and distributors. A distinction is made in Section 3(1) between sales packaging, transport packaging and secondary packaging. Sales packaging is packaging which is provided as a sales unit and is used by the final consumer. 'Sales packaging' within the meaning of the Ordinance may also be packaging used by the distributive trades, restaurants and other service providers which makes possible or supports the handing over of goods to final consumers (service packaging), or non-returnable crockery or

([4]) See footnote 3.

([5]) OJ L 166, 21.6.2001, p. 1.

non-returnable cutlery. Transport packaging is packaging which facilitates the transport of goods, which protects goods in transit between the manufacturer and the distributor against damage or which is used for reasons of safety of transportation and is used by the distributor. Secondary packaging is packaging which is used as an additional layer of packaging over sales packaging and which is not needed for reasons of hygiene, preservation or protection of the goods against damage or soiling for sale to the final consumer.

(13) The terms 'manufacturer' and 'distributor' are defined in Section 3(7) and (8) of the Packaging Ordinance. A manufacturer within the meaning of the Ordinance is someone who manufactures packaging, packaging materials or products from which packaging is directly made, or who imports packaging into the territory covered by the Ordinance. A distributor within the meaning of the Ordinance is someone who puts packaging, packaging materials or products from which packaging is made, or packaged goods, into circulation, regardless of the marketing stage. A distributor within the meaning of the Ordinance may also be the mail-order trade. Pursuant to the first sentence of Section 3(10) of the Packaging Ordinance, a final consumer is the purchaser who does not sell on the goods in the form in which they are delivered to him.

(14) The rules on sales packaging, secondary packaging and transport packaging differ. As far as sales packaging is concerned, Section 6(1) of the Packaging Ordinance provides that the distributor of sales packaging is obliged to take back from final consumers, free of charge, used, empty sales packaging at, or in the immediate vicinity of, the actual point of sale and to recover it in accordance with the quantitative requirements of the Annex to the Ordinance (the so-called self-management solution). The distributor must draw the attention of the private final consumer by means of clearly visible, legible labelling to the fact that the packaging may be returned (third sentence of Section 6(1)). The distributor's take-back obligation is limited to packaging of the type, shape and size, and to packaging of those goods, which the distributor carries in his range (fourth sentence of Section 6(1)). In the case of distributors with a sales area of less than 200 square metres, the take-back obligation applies only to packaging for the brands which the distributor puts into circulation (fifth sentence of Section 6(1)). A corresponding take-back obligation is also imposed on mail-order firms, which have, for example, to provide adequate facilities within a reasonable radius of the final consumer (sixth sentence of Section 6(1)) ([6]).

([6]) See Lübeck Regional Court (Landgericht) judgment of 23 January 2001, ref. 11 0 126/00.

(15) Germany stated in answer to questions put by the Commission that the quotas which have to be met are to be met exclusively by taking back sales packaging at, or in the immediate vicinity of, the actual point of sale and that any additional collections organised near private dwellings may not count towards these quotas. The Cologne Regional Court (*Landgericht*) has held, however, that the quota need not be met only via collections at the point of sale ([7]). Pursuant to Section 6(2) of the Packaging Ordinance, the packaging taken back by the distributor pursuant to subsection 1 must in turn be taken back by its manufacturer and (previous) distributors and must be reused, or within stated quotas recycled, outside the public waste-management system.

(16) Pursuant to Section 11 of the Packaging Ordinance, manufacturers and distributors may delegate responsibility for fulfilling all take-back and recovery obligations to third parties.

(17) Pursuant to the first sentence of Section 6(3) of the Packaging Ordinance, the take-back and recovery obligation does not apply to manufacturers and distributors participating in an extensive system which throughout the distributor's sales territory guarantees the regular collection of used sales packaging from the final consumer or in the vicinity of the final consumer. The system must likewise meet certain recovery quotas. There is no legal obligation to participate in such a system once it has been set up. Firms which do not participate continue to be subject to the individual take-back obligation. The scope of a system under Section 6(3) of the Packaging Ordinance is restricted to sales packaging collected from private final consumers ([8]). Private final consumers within the meaning of the Ordinance are, according to the second sentence of Section 3(10), private households and comparable sources of waste generation, in particular restaurants, hotels, canteens, government offices, barracks, hospitals, educational establishments, charitable organisations, the offices of professional people, agricultural holdings and craft enterprises, excluding print shops and other paper-using businesses, which can have their packaging material disposed of at the rate normally associated with private households using normal household containers for paper and board and lightweight packaging with a capacity no greater than 1 100 litres for each material.

([7]) See Cologne Regional Court judgment of 13 January 2000, ref. 31 0 991/99.

([8]) See Section 6(3) and Section 3(1), point 2, and (10), and the third sentence of paragraph 1 of Annex I to the Packaging Ordinance.

(18) Pursuant to paragraph 2 of point 4 of Annex I to the Packaging Ordinance, manufacturers and distributors have to make it known that they are participating in a system pursuant to Section 6(3) of the Packaging Ordinance by marking packaging or by other suitable means (e.g. by informing customers at the point of sale or by a package leaflet). The marking of packaging with a system mark in the absence of membership of the system is not punishable by a fine under the Packaging Ordinance ([9]).

(19) Recognition as an extensive system within the meaning of Section 6(3) of the Packaging Ordinance is granted by decision of the competent authority of the *Land*. The fourth sentence of Section 6(3) of the Packaging Ordinance provides that the system must be compatible with existing collection and recovery systems as employed by the local bodies responsible for waste collection. In practice, the recognition of a system by the competent *Land* authority is dependent on a 'declaration of compatibility' being issued by the relevant body. This means that municipal and rural district authorities must endorse the agreement concluded in their territory between the system operator and the collector.

(20) In an annex to the Ordinance, the quantitative conditions for recognition are laid down. Before the Ordinance was amended, these collection and sorting quotas were defined by reference to the total amount of packaging material in the source area (i.e. the *Land*). Thus, for example, as of 1 July 1995 80 % of all packaging material had to be covered by the collection system. From the materials collected, 90 % of glass, tinplate and aluminium and 80 % of paper and board, plastics and composite packaging had to be sorted out into a quality suitable for recycling. During the period from 1993 until 30 June 1995 reduced quota requirements applied.

(21) Once the Packaging Ordinance was amended, this absolute calculation method was converted into an individual-system-based calculation method (i.e. one covering the sales packaging fed into a given system). In future, moreover, those manufacturers and distributors who do not participate in a system pursuant to Section 6(3) of the Packaging Ordinance also have to meet these quantitative requirements. Since 1 January 2000, 75 % of packaging made of glass, 70 % of packaging made of tinplate, paper and board, and 60 % of packaging made of composites must be recovered both by the operators of extensive systems within the meaning of Section 6(3) of the Ordinance as regards packaging for which manufacturers and distributors participate in their system and by manufacturers and distributors who opt for a self-management solution. At least 60 % of packaging made of plastic must be recovered, and at least 60 % of this quota must be recovered using processes whereby new, physically identical material is produced or the plastic remains available for another material use (so-called reusable material process). Packaging made of material for which no specific recovery methods are prescribed is to be recycled as far as is technically possible and economically reasonable. In the case of a self-management solution, compliance with the take-back and recovery requirements must be certified by an independent expert on the basis of verifiable documents (paragraph 1 of point 2 of Annex I). An exemption system must furnish verifiable evidence of the quantities collected and recovered. At the request of the competent authority, the evidence must be confirmed by an independent expert's report (paragraph 4 of point 3 of Annex I).

(22) Germany has indicated that a simultaneous combination of the self-management solution and participation in a Section 6(3) system is possible and that therefore participation in a Section 6(3) system with a certain quantity of a packaging product is also possible. In the interests of the consumer and of the authorities, however, a degree of transparency must be brought about as to which packaging is subject to the take-back obligation at or in the immediate vicinity of the shop and which is not. Germany has also confirmed that, pursuant to the Packaging Ordinance, the final consumer is free to decide whether to leave the packaging in the shop or return it to the shop later, or to take it to a disposal point near his home ([10]).

([9]) (Question put by the Commission:) 'Does the Packaging Ordinance allow a range of packaging to be uniformly marked despite its being partially disposed of under Section 6(3) of the Packaging Ordinance (e.g. in the circumstances provided for in the ninth sentence of Section 6(1) of the Ordinance), bearing in mind that the distributor cannot foresee which specific packaging will be disposed of in the vicinity of the shop and which will be disposed of in the vicinity of the home?'
(Answer given by Germany:) 'The marking of packaging with the system mark pursuant to paragraph 2 of point 4 of Annex I in the absence of membership of the system is not punishable by a fine under the Packaging Ordinance. It may, however, be caught by other legal provisions, such as trade mark law.'

([10]) (Question put by the Commission:) 'Is it correct to say that, pursuant to the Packaging Ordinance, the final consumer is free to decide whether to leave the packaging in the shop or to bring it back there, or to take it to a disposal point near his home?'
(Answer given by Germany:) 'The Packaging Ordinance does not contain any express provision requiring the final consumer to return the packaging. The assumption contained in the question is therefore correct.'

(23) Where the distributor and the manufacturer do not fulfil the obligations laid down in the first sentence of Section 6(1) and the first sentence of Section 6(2) of the Packaging Ordinance by taking back packaging at the point of sale, they have to ensure, pursuant to the ninth sentence of Section 6(1), read in conjunction with the fourth sentence of Section 6(2), of the Ordinance that it is taken back using a system pursuant to subsection 3. Germany has further indicated in this connection that a self-manager who has not met his recovery quota is required to participate in a Section 6(3) system with the amount of packaging that is necessary in order to meet the quota.

(24) For transport packaging and secondary packaging there are similar take-back obligations. However, there is no possibility of release from these obligations by way of participation in a system. Nor are there any take-back and quota requirements. Distributors who offer goods in secondary packaging are obliged to remove it when handing goods over to final consumers or to make available at the point of sale facilities where final consumers can return the secondary packaging free of charge. If the final consumer leaves the goods in their secondary packaging, it is treated as sales packaging for the purposes of the Packaging Ordinance.

(25) In response to questions put by the Commission, Germany declared back in 1993 that Section 6(3) of the Packaging Ordinance would no be interpreted as meaning that the establishment of only one system was possible. The Packaging Ordinance allowed the setting-up of additional disposal systems for sales packaging. It was not the legislator's intention that only one system should be created in Germany or in each *Land*.

(26) According to the explanatory memorandum to the amended version of the Packaging Ordinance, one of its basic aims is to enhance competition. This is to be achieved, *inter alia*, by henceforth putting collection, sorting and recovery services out to competitive tender and by selling packaging intended for recovery under competitive conditions. Moreover, the costs associated with the collection, sorting and recovery or disposal of each packaging material are to be published. The explanatory memorandum also states that competition between several 'dual' systems is to be facilitated. The recycling requirements are now to be expressed in terms of the volumes brought into the system, which will make it very much easier to set up competing systems. Greater competition should create the potential for cost savings among manufacturers and in the distributive trades ([11]).

III. *THE COLLECTION AND RECOVERY SYSTEM OPERATED BY DSD*

(27) DSD is the only undertaking in Germany which operates an extensive system for the collection and recovery of sales packaging within the meaning of Section 6(3) of the Packaging Ordinance. At the beginning of 1993, DSD was recognised by all competent authorities in the German *Länder*. The system has been in operation since 1992 and has been fully operational since 1993. It is called a 'dual' system as the collection and recovery of packaging is effected outside the public waste disposal system and is operated by a private undertaking.

(28) Besides DSD there are a few other undertakings which organise the collection and recovery of sales packaging. However, these undertakings are not extensive systems within the meaning of Section 6(3) of the Packaging Ordinance. They operate as a third undertaking within the meaning of Section 6(1) and (2) read in conjunction with Section 11 of the Packaging Ordinance. In other words, they fulfil directly the take-back obligations of manufacturers or distributors of sales packaging. A large number of other undertakings collect and recover transport packaging.

(29) DSD is financed by fees from undertakings belonging to the system. By this means, the undertaking acquires the right, against payment of a fee, to use the Green Dot trade mark on its sales packaging and, as an actual service, exemption from the obligation to take back such packaging.

(30) DSD's turnover was DEM 4,2 billion in 1998, DEM 3,9 million in 1999 and DEM 4,0 billion in 2000. DSD collected some 5,6 million tonnes of sales packaging in 1998. Some 17 000 firms are currently members of the system. It is estimated that a Trade Mark Agreement has been concluded for some 70 % of all sales packaging put into circulation in Germany. The following table shows the amount of packaging collected by DSD as a proportion of the total volume of packaging over the period 1995 to 1998:

([11]) See the explanatory memorandum to the amended version of the Packaging Ordinance, ref. BT-Drucksache 13/10943, pp. 19 to 22.

	1995	1996	1997	1998
Used sales packaging collected by DSD (*) (million tonnes)	5,06	5,45	5,61	5,60
Consumption of sales packaging by private final consumers (million tonnes)	6,96	6,87	6,85	6,86
Total consumption of sales packaging (million tonnes)	7,91	7,81	7,81	7,85
Percentage of total sales packaging consumption covered by DSD	63,97 %	69,78 %	71,83 %	71,34 %
Percentage of sales packaging consumption by final consumers covered by DSD	72,70 %	79,33 %	81,90 %	81,63 %

(*) All estimates of the consumption of sales packaging were prepared by GVM (Gesellschaft für Verpackungsmarktforschung Wiesbaden) (see in particular the packaging recycling statement of March 1999). Figures for the used sales packaging covered by DSD were supplied by DSD.

(31) DSD does not perform the task of collection itself but employs local (public or private) collecting companies. DSD has concluded so-called Service Agreements with those undertakings. There are 546 collection districts. Some collectors are DSD contractors for more than one district. DSD has concluded agreements with 537 collectors in all. Some of the collectors are in turn integrated into larger groups of companies. Under the Service Agreement, the collector has the exclusive task of collecting and sorting used sales packaging in a certain district. The system covers private households and certain business enterprises. The collector does not necessarily collect and sort all packaging himself, subcontractors often being used for the collection and sorting of certain materials.

(32) The system established by DSD collects used sales packaging made from all kinds of materials. The packaging is deposited either in containers placed close to private households or in plastic bags or bins which have been distributed to individual households. The receptacles used for collection are the property of the collector ([12]). Sorting the collected material is the responsibility of the collector. Usually the sorting is done by specialised undertakings. The collector takes all packaging put into the containers, regardless of whether or not it bears the Green Dot mark. Other objects put into the containers will also be recovered if they are suitable or will be sorted as waste. Together with sales packaging made of paper and board collectors usually also collect old printed matter (newspapers and magazines). This makes up the larger part (about 75 %) of the paper and board collected. The collection of printed matter is not part of the DSD system and is not paid for by DSD.

(33) Once the material has been sorted it is conveyed to a recovery plant either directly by the collector or with the help of third parties, or handed over to so-called guarantee companies. These guarantee companies have given DSD an assurance that they will recover the used packaging. The guarantee companies are organised by the industries producing the relevant packaging materials, or else are undertakings specially created for the purpose of marketing and recovering the collected materials. The quotas imposed must be recycled. Any additional volumes are to be recovered by other processes wherever technically possible and economically reasonable. If no form of recovery is available which is technically end economically reasonable, these volumes may be disposed of in a manner considered environmentally sound.

(34) The system operated by DSD does not collect all sales packaging within the meaning of the Packaging Ordinance but only that arising in private households and comparable sources of waste generation. Transport packaging is not collected. This restriction of the range of DSD's activities has been ordered by the Federal Cartel Office. The Office has objected several times to attempts by DSD to extend the range of its activities.

(35) In October 1992 DSD announced plans to start collecting sales packaging which ends up at large enterprises and industrial installations. After the Federal Cartel Office had objected that this would lead to the exclusion from the market of those collectors which are not DSD contractors, the project was abandoned. The Federal Cartel Office expressed the view in this case that the individual *Länder* decisions which obliged DSD to engage in the behaviour in question could not prevent the Office from stopping these activities. In a settlement

([12]) Confirmed by DSD in its reply of 5 July 1995 to the Commission's request for information.

of the case, it was agreed that DSD may collect from the following premises on the same pattern (in terms of intervals) as for private households: restaurants, canteens, hospitals, government offices, educational establishments, barracks, offices of liberal professions and craft enterprises, excluding printers and other paper-using enterprises, which have containers not larger than 1 100 litres for each material.

(36) In a second case the Federal Cartel Office issued a prohibition order on 24 June 1993 against a project whereby DSD extended its range of activities to sales packaging which is not sold in retail outlets and to transport packaging. The subject of the order was DSD's plan to collect, via a subsidiary, sales packaging and transport packaging made of paper and board or plastic accumulating at large commercial and industrial installations. The Federal Cartel Office saw the bundling of the demand for collection services as a restraint of competition within the meaning of Section 1 of the German Law prohibiting Restraints of Competition. DSD has not appealed against the order.

IV. *THE AGREEMENTS*

(37) This Decision is concerned with DSD's Constitution or Statutes, with the standard agreement with waste disposal firms in its original form and in the form given it by the first, second, third and fourth amendments, and with the agreements concluded with guarantee companies. The agreements have been amended several times in the course of this proceeding.

1. THE CONSTITUTION

(38) DSD was set up on 28 September 1990. In 1997 it was converted into public limited company form under the name *Der Grüne Punkt — Duales System Deutschland Aktiengesellschaft*. The preamble to the Constitution or Statutes (*Satzung*) of the company states that traders, bottlers and packers, manufacturers of packaging and suppliers of packaging material have decided to set up a privately organised take-back system in which used sales packaging is collected outside the public waste disposal system from points in the vicinity of households. This 'dual' system consists of several inseparable components: the establishment of a collection system reaching the final consumer, guarantees of acceptance and recovery and contracts for recovery, the marking of all packaging within the system with the Green Dot trade mark, and the financing of the system by means of a fee charged for the use of the Green Dot trade mark. The preamble to the Constitution originally included an undertaking on the part of traders that they would stock only packaging carrying the Green Dot. There is no such clause in the version notified.

(39) The Constitution states that the object of the company is the organisation and operation of a dual waste disposal system through measures for the avoidance of waste and especially packaging waste, the collection and sorting of secondary raw materials, and the raising of the necessary financial resources. A shareholders' resolution of 19 October 1992 replaced the term 'sales packaging' which had originally been used by the term 'packaging'.

(40) Membership of the company is open to all German and foreign undertakings. In 1998 DSD had 552 shareholders. The shareholders are firms in the distributive trades, bottlers and packers, manufacturers of packaging and suppliers of packaging material. Waste disposal firms, however, lent DSD more than DEM 700 million when DSD experienced a financial crisis in 1993, and some of this has since been converted into sleeping partners' holdings.

(41) The Constitution provides that there is to be a supervisory board composed of an equal number of representatives of the distributive trades, bottlers and packers, and manufacturers of packaging and suppliers of packaging material. The present board is made up of three representatives of each group and three representatives of waste disposal firms.

2. THE SERVICE AGREEMENT

(42) The relationship between DSD and the collectors is governed by a standard agreement, the Agreement on the Establishment and Operation of a System for the Collection and Sorting of Used Sales Packaging, known as the Service Agreement (*Leistungsvertrag*). Since it was originally notified the agreement has been amended several times, by the first, second, third and fourth amendments. With a few exceptions, Service Agreements were concluded for the first time between January 1992 and January 1993. Not all collectors have agreed to all the amendments made to the Agreement, so that in some cases the version in force is an earlier one.

(43) In January 2000 there were 537 Service Agreements between DSD and collectors, of which 502 incorporated the fourth amendment, 10 were as amended by the third amendment only, six were as amended by the second amendment, 18 were as amended by the first amendment, and one was in the form of the original Agreement.

(44) Section 1 of the Service Agreement provides that the collector has the exclusive task of setting up and operating a system of the kind defined in Section 6(3)

of the Packaging Ordinance in a designated district. Any further functions which DSD takes on as a result of changes in the Packaging Ordinance, or the amendment or enactment of other legislation, are likewise entrusted by DSD exclusively to the collector as part of the package of activities for the designated district. Point 2(1) of the third amendment, which was left intact by the fourth amendment, states that the parties agree that all sales packaging left at the collection points belonging to DSD and covered by the system is to be collected and where necessary sorted and brought for recovery only in accordance with the Agreement. Collection must take place at or in the vicinity of the final consumer's home; the collector is free to determine the detailed arrangements. The collector may act through subcontractors. However, a provision introduced by the third amendment provides that the arrangements made by collectors are to be replaced by a system of bins installed directly at households by 31 December 1999, except in the case of glass.

(45) The Service Agreement provides that the collector takes ownership and possession of the used sales packaging at the time of collection or at the time when the final consumer places it in a container used for collection. DSD never acquires ownership of the reusable materials recovered or to be recovered.

(46) For each class of material DSD undertakes to conclude agreements with suitable guarantors (guarantee companies), who will ensure recovery on a long-term basis.

(47) The Service Agreement originally provided that the collector was not entitled to market the collected materials himself. He was to pass them free of charge to guarantors designated by DSD. In comments sent to DSD the Commission objected to this 'zero interface' principle, on the ground that it infringed Article 81(1)(a) of the EC Treaty. Competition was restricted because collectors were restricted in their relations with third parties, and although they were owners of the materials were prevented from exploiting them commercially themselves. Following talks with the Commission DSD put an end to the zero interface system.

(48) The Agreement now provides that from 1 January 1996 the collector has a choice between marketing glass, paper and board, tinplate and aluminium alone (which is known as self-marketing) or together with a guarantee company (modified self-marketing), or continuing to pass the materials to a guarantee company (guarantor marketing). The collector's choice binds him until the expiry of the Service Contract. He may indicate a separate choice for separate waste fractions. But plastics and composite packaging (drinks cartons and other composite packaging) must be passed on to a guarantor.

(49) If the collector opts for self-marketing, he has the right and the obligation to recover and market the material collected in his own name and for his own account and risk. If the collector defaults, DSD is entitled to organise collection either itself or through a third party. The collector has to give DSD security, the amount of which is determined on the basis of the potential costs of recovery. DSD can make use of the security only in the event of the insolvency of the collector. If the collector opts for modified self-marketing, he is entitled to recover the materials jointly with a guarantor. The collector and the guarantor are jointly and severally liable for the performance of the duty to recover the material. If the collector opts for guarantor marketing, he must place the collected and sorted material at the disposal of a guarantor designated by DSD.

(50) Even in the event of self-marketing or modified self-marketing, the collector has to designate a guarantor to coordinate a volume flow record. The collector has to conclude an agreement with the guarantor regarding the keeping of this record, and the agreement must be approved by DSD. The collector must supply the guarantor with uniform and complete documentation showing the progress of the waste from collection to the recovery of the reusable materials. Either party may end the agreement at the end of a calendar year, following six months' notice.

(51) For collecting and sorting each packaging material the collector receives a payment, which is generally based on weight. The payment is calculated taking account of the costs of disposing of waste that has to be removed from the materials collected, and of the overall success rate, which is measured by the volume collected in relation to the number of inhabitants. The payment is adjusted by means of a price variation clause. The Service Contract originally included a clause stating that a collector who opted for self-marketing or modified self-marketing was to pay a flat-rate sum of DEM 1,25 per head of population per year to DSD, in consideration of the revenue he earned from recovery; but this clause has been removed, in fulfilment of a commitment given by DSD to the Commission (see recital 70).

(52) Following the fourth amendment, the notified Service Agreement was to run until the end of 2004 or 2007; under the third amendment, it was to run until the end of 2003 or, if an option to extend was exercised, until the end of 2005. The older variants usually provided that the Agreement could be terminated for the first time at the end of the year 2002 or 2003, and could be extended for another five years. On the basis of the fourth amendment in any event, therefore, the total duration of the Service Agreements was as a rule about 15 years.

(53) In comments made to the parties notifying the Service Agreements the Commission objected to their duration.

The collectors argued that long-term agreements were necessary primarily in order to enable them to plan and invest securely so as to be able to implement the Agreement. The investment needed was essentially in collection and transport vehicles, collection bins and containers, and sorting facilities and equipment for used sales packaging. In terms of volume, collectors had to invest particularly heavily in sorting plants using separation equipment which was very costly owing to the technology required. There are now about 400 sorting plants, most of which were built in the years 1992 to 1995. According to information supplied by the collectors and the BDE, the collectors concerned have invested or are in the process of investing some DEM 10 billion altogether over the lifetime of the Agreement. Long-term agreements, it was argued, were indispensable, especially in order to ensure secure planning and investment so that collectors could recoup this investment, which was exceptional in the industry. In the initial stages DSD was the collectors' only customer for used sales packaging collection services, and collectors could afford to undertake the necessary investment only on the basis of clear and reliable planning and amortisation.

(54) In order to establish whether such long-term exclusive agreements were indeed necessary in order to recoup the investment required, the Commission made various measurements. It conducted an industry-wide survey investigating the extent, the scale and the date of the investment carried out or still to be carried out by the collectors, especially in respect of the relatively capital-intensive sorting plants. It considered that for purposes of the enquiry the 24 collectors who sought individual exemption of their Service Agreements could be regarded as sufficiently representative of the industry, and it subjected them to a detailed individual investigation looking at the conditions for recovery of the investment. For this purpose an economic investment and profitability study was conducted into the data and forecasts submitted by these collectors regarding the investment carried out or still to be carried out and the turnovers and costs achieved or forecast during the lifetime of the agreement, account being taken of any alternative uses and residual values.

(55) The individual investigation of the collectors studied in detail led to the conclusion that an exclusive agreement running until the end of 2007 was not indispensable in order to recoup the investment actually being carried out by the collectors. The results suggested rather that if the Service Agreements were to run until the end of 2003 collectors would have sufficient time to achieve an economically satisfactory redemption of their investment. The Commission informed the applicants of this finding, and the applicants then set a termination date of 31 December 2003 for the Agreements in the event that the Commission ultimately exempted them. This change was made between August 1999 and January 2000.

(56) The Service Agreements do not tie the collectors exclusively to DSD; they leave them free to supply similar services to other customers. DSD has also given the Commission the commitment set out in recital 71.

(57) DSD initially claimed that where third parties wished to make use of the collection facilities of collectors contracted to DSD they had to have DSD's authorisation. This was the subject of a complaint lodged under Article 82 of the EC Treaty by the competing Vereinigung für Wertstoffrecycling mbH (Association for the Recycling of Reusable Materials (VfW)), and of an action brought before the Cologne Regional Court. DSD had argued that VfW could not without DSD's consent make use of collection facilities for reusable materials set up as part of the DSD system, or have them used by VfW's own collectors. The Commission indicated that Article 82 of the EC Treaty might be applicable.

(58) After the Commission put forward its view, DSD stated that it would not seek to restrict use in this way either in the particular case of VfW or in comparable cases; it has given the Commission a commitment to that effect, which is set out in recital 72.

(59) Annex 1 to the third amendment, which was left intact by the fourth amendment, lists collection points which are to be served in addition to private households. DSD states that the enumeration of these collection points is not part of the notification.

3. THE GUARANTEE AGREEMENTS

(60) The Guarantee Agreement governs the legal relations between DSD and the undertakings that accept and recover the collected sales packaging. These firms guarantee the recovery of the collected materials on a long-term basis, irrespective of market conditions at any one time. In the beginning guarantees of recovery were given for specific waste fractions by the producer industries; these guarantees in some cases tended to be theoretical. DSD subsequently concluded agreements with individual guarantors, the 'guarantee companies'. For paper and board there are three guarantee companies; and for glass, aluminium, tinplate and composite cartons there is one each.

(61) The Guarantee Agreements initially provided that DSD was to require the collectors to deliver these materials to

the guarantee companies free of charge, which was known as the 'zero interface' (*Schnittstelle Null*) principle. This clause mirrored the clause in the Service Agreements already referred to. After the Commission objected to these arrangements too, the Guarantee Agreements were either terminated or amended to match the amended provisions in the Service Agreements (see recital 47).

(62) At present there are Guarantee Agreements for the following materials, which are largely identical in substance. For paper and board, there are agreements with Interseroh AG; with VfW; with Gesellschaft für PapierRecycling (GespaRec); with Deutsche Gesellschaft für Wertstoffverwertung mbH (DGW); with Papier- und Kunststoffverwertungs GmbH (IPK); and with Recostra SA. For glass there is an agreement with Gesellschaft für Glasrecycling und Abfallvermeidung mbH (GGA). For aluminium there are agreements with Interseroh AG; with DGW; with IPK; with VfW; and with Deutsche Aluminium Verpackung Recycling GmbH (DAVR). For tinplate there are agreements with Interseroh AG; with Rasselstein Hoesch GmbH; with DGW; with IPK; with VfW; with Entsorgungs- und Beratungsgesellschaft für die deutsche Recyclingwirtschaft mbH & Co KG (GEBR); and with Thyssen Sonnenberg GmbH. For composite drinks cartons there is an agreement with Recarton GmbH. For other composite packaging there is an agreement with Interseroh AG. The Guarantee Agreements generally run until 31 December 2003.

(63) Where a collector has opted for marketing through a guarantor, the guarantee company is obliged to accept all sorted sales packaging from that collector which meets certain sorting quality requirements. In modified self-marketing, the guarantee company organises marketing and recovery jointly with the collector; the guarantee company is liable alongside the collector for proper recovery.

(64) The guarantee company is obliged to supply evidence of the recovery of the materials, and to draw up a volume flow record every year. The guarantee company must draw up such records even for collectors who market their own materials. It may charge for this service.

(65) To ensure that the process of notification between collectors and guarantee companies is neutral in competition terms, DSD has given the commitments in recitals 73 and 75.

(66) The Guarantee Agreements contain no exclusivity clauses. DSD is free to conclude agreements with several guarantee companies for the same waste fraction. DSD has stated that it is generally prepared to conclude a guarantee agreement with any undertaking that meets the relevant requirements. DSD has given a commitment to that effect, which is set out in recital 74.

(67) DSD did not notify an agreement regarding the recovery of plastic packaging concluded with Deutsche Gesellschaft für Kunststoffrecycling GmbH (DKR) because DKR is a company associated with DSD. DSD holds 49,6 % of the shares, while the remaining 50,4 % is owned by a number of chemicals manufacturers acting through a holding company.

(68) The agreements setting up guarantee companies are outside the scope of this Decision.

V. *COMMITMENTS GIVEN BY DSD*

(69) DSD has submitted a number of commitments to the Commission in connection with the agreements which are the subject of this proceeding.

(a) ***The Service Agreement***

(70) DSD undertakes no later than 30 September 1997 to amend the clauses in contracts with collectors on the marketing of sorted materials (second sentence of point 3.4.5 of the third amendment of the Service Agreement) so that collectors who take full advantage of the marketing right are not treated more favourably than collectors who exercise this possibility only in respect of a part of the materials available for marketing.

(71) DSD will not oblige collectors to work exclusively for DSD. DSD further undertakes to refrain from obliging collectors to use containers or other facilities for the collection of used sales packaging exclusively for the performance of the Service Agreement. This will not apply where the use of the collection containers or other facilities by third parties is incompatible with the permission given by the public authorities, or where the Packaging Ordinance or other legislation determines otherwise, or where for other reasons it would be unreasonable to permit them to be used (for example in the case of dangerous substances or contaminants). The use of collection containers and other facilities by third parties may be allowed for when settling accounts with the collector.

(72) DSD is prepared to refrain from seeking to restrict use in the manner referred to in the judgment of the Cologne Regional Court of 18 March 1997 in particular case of VfW and in comparable cases. DSD may however pursue claims for information and settlement against collectors in a contractual relationship with DSD.

(b) ***The Guarantee Agreements***

(73) Knowledge acquired by DSD in preparing the records of deliveries for recycling required by the Packaging Ordinance may not be used for purposes of market information. Where necessary, records are to be rendered anonymous in an appropriate fashion. For sorted materials in the glass, tinplate, aluminium and paper and board fractions DSD may not ask for further evidence of delivery for recycling than proof of delivery to an undertaking authorised by national law to recover or to trade in these materials within the European Community or the EEA, unless there is reasonable doubt of proper compliance with the requirements of the Packaging Ordinance.

(74) DSD is in principle prepared to accept anyone who satisfies the relevant requirements as a guarantor for a waste fraction.

(75) DSD is in principle prepared to render references to undertakings in volume flow records anonymous, provided this is accepted by the *Länder* in their capacity as exempting authorities.

VI. *OBSERVATIONS SUBMITTED BY THIRD PARTIES*

(76) Following the publication of a notice under Article 19(3) of Regulation No 17 and Article 3 of Protocol No 21 to the EEA Agreement, the Commission received observations from 13 interested parties. The observations were concerned mainly with the Service Agreement and the Trade Mark Agreement. The Trade Mark Agreement is outside the scope of this Decision.

(77) On the Service Agreement, it was submitted that in practice, and contrary to the commitment referred to in recital 71, DSD did not allow third parties unimpeded access to the collection facilities of the parties to the Service Agreement. This led the Commission to explain its understanding of this commitment to DSD once again, where upon DSD gave a supplementary commitment (see recital 72). Some observations concerned the planned duration of the Service Agreements; these strengthened the Commission in its view that the doubts it had already expressed to DSD regarding the indispensability of the planned duration of the Agreements ought to be renewed, and led to an adjustment to the duration of the Agreements. Some observations also suggested that when the Service Agreements expired fresh agreements should be awarded by competitive tender. As has been explained, the amended Packaging Ordinance makes provision for this. Other observations argued that the 'zero interface' in the Service Agreements should be removed for plastics and plastic composites too.

(78) The Commission has carefully considered the observations submitted to it by interested parties, and has addressed them in this Decision wherever necessary and appropriate.

B. **LEGAL ASSESSMENT**

I. *ARTICLE 81(1) OF THE EC TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT*

(79) All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited as incompatible with the common market.

1. AGREEMENTS BETWEEN UNDERTAKINGS

(80) DSD has operated under its Constitution (known in German as the *Gesellschaftsvertrag*, and from 1997, when DSD became a public limited company, as the *Satzung*). The preamble to the present Constitution states that traders, bottlers and packers, and manufacturers of packaging and suppliers of packaging material have decided to set up an organisation to act as a vehicle for the establishment of a dual collection system. According to the Constitution membership of the company is open to any domestic or foreign undertaking. DSD's Constitution is therefore an agreement between undertakings.

(81) With a view to the provision of services, DSD itself concludes Service Agreements with collectors and Guarantee Agreements with guarantee companies. The Service Agreement which DSD concludes with collectors and the Guarantee Agreement which DSD concludes with guarantee companies are likewise agreements between undertakings.

2. RESTRICTION OF COMPETITION

2.1. ***Relevant markets***

(82) In what follows the markets relevant to an assessment of the agreements which are the subject of this proceeding are defined both in terms of the service involved and in terms of geographic area.

2.1.1. **The relevant product market**

(83) The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of their characteristics, their prices and their intended use.

(84) The object of DSD is to organise and operate what is termed a dual private take-back system for used packaging. The agreements on which the DSD system is based produce economic effects at various levels at which value added is created. It will be shown here that for the assessment of the Constitution, the Service Agreement and the Guarantee Agreement under Article 81(1) there are separate and independent relevant markets.

2.1.1.1. *The market in the organisation of the take-back and recovery of household packaging waste*

(85) The Commission considered the definition of the relevant market in the organisation of the take-back and recovery of used sales packaging collected from private final consumers in Decision 2001/463/EC. For purposes of this Decision, therefore, it will be sufficient to refer to the discussion there.

(86) Nor need any final ruling be given here as to which of the two conceivable market definitions contained in that Decision should be applied. As will be explained below, the agreements under consideration do not restrict competition within the meaning of Article 81(1) of the Treaty in any event, regardless of which market definition is applied. It is not necessary to decide the precise definition of the market in the organisation of the take-back and recovery of used sales packaging collected from private final consumers (hereinafter referred to as 'household packaging waste') in Germany.

2.1.1.2. *The market in the collection and sorting of household packaging waste*

(87) In the case of the collectors who collect, transport and sort used sales packaging on behalf of DSD, the relevant market is the market in the collection and sorting of household packaging waste. For the present at any rate this forms one market. Collecting sales packaging and sorting it according to its use are two different activities, and the infrastructure needed is different too. They have to be classed together, however, mainly because the market is shaped by the demand exerted by DSD, and because DSD has in the past purchased both services together. Demand on this market originates with exemption systems and with the manufacturers and distributors bound by the Packaging Ordinance and the firms responsible for organisation under Section 11 of the Packaging Ordinance. If Germany's view prevails (see recital 15), self-management arrangements will exert demand only on the margin of this market, particularly in respect of collection points deemed equivalent to private households, or in the case of delivery to the final consumer.

(88) The market in the collection and sorting of household packaging waste is a market separate from the collection from households of items other than sales packaging, that is to say essentially the traditional household and residual waste collection, and likewise separate from collection from non-household-related sources in industry and large commercial enterprises.

Distinction from household and residual waste

(89) With the enactment of the Packaging Ordinance the collection of used sales packaging from households (including small businesses which were comparable in terms of the logistics of collection) was separated from the traditional household refuse collection, and responsibility for the organisation of this sales packaging collection was taken away from the public waste management system. Collecting firms now had the opportunity to collect and sort used packaging for their own account; until then they had done so only as agents of public authorities and under their supervision.

(90) Household and residual waste continued to be collected under the responsibility of the local authorities who had an obligation to remove it. The market in the collection and sorting of household packaging waste is distinguished from that market by a substantially broader service profile. Unlike the traditional household and residual waste collection, this operation itself adds value, through the sorting of sales packaging into different materials in accordance with specific instructions and the delivery of the sorted materials for further recycling. A collector who takes on the task of sorting used packaging usually has to undertake extensive investment in order to set up proper sorting facilities. The investment is demand-specific, and cannot rapidly be used for other types of collection. Collection services for sales packaging and collection services for the remaining household and residual waste are not functional substitutes in the short term.

Distinction from collection from industry and large commercial enterprises

(91) The market in the collection and sorting of household packaging waste is distinguished from collection from

non-household collection points in industry and large commercial enterprises especially by the different logistical requirements of collection, with regard to such things as the number of collection points that have to be cleared, the average volume to be collected from each point, the containers required, or the intensity of the collection schedule.

(92) In industry and large commercial enterprises the number of collection points is relatively limited, and they can be cleared separately by different collectors, because the volume to be collected is fairly large. In the case of final consumers, on the other hand, waste has to be collected direct from all households in the local authority's area, apart from a few cases where it may be brought by the public to a single collection centre. Collection from final consumers therefore displays clear network effects, i.e. effects of both scale and scope.

(93) These specific supply conditions have the consequence that for logistical reasons collection points at households, if they are to be served at optimum cost, have usually to be served by only a limited number of collectors. A further and decisive factor is that as a rule only one container can be placed at each collection point for each type of material (such as glass, paper or lightweight packaging), for reasons of space and the established habits of final consumers. The specific supply conditions are also the main reason why there is usually only one household refuse or reusable materials collection from households, which is carried out by just one collector.

(94) But this does not apply to non-household collections from industry and large commercial enterprises. Here firms conclude individual waste-disposal contracts with collectors. From their point of view it is of no great importance whether what has to be collected is sales packaging, other materials or waste. Indeed there is some tendency among big companies to look for comprehensive waste disposal arrangements for the whole company, which may very well be operating in several places. Even before the Packaging Ordinance entered into force, therefore, waste collection from large commercial and industrial firms was already organised on competitive lines, and unlike collection from households it presents no special logistical difficulties. In addition, the sales packaging to be collected from final consumers differs greatly from that which accumulates in industry and large commercial enterprises in terms of the materials, reusable or otherwise, which it contains. Tinplate, aluminium and plastic composites are collected almost entirely from private households, where they usually appear in the lightweight packaging fraction and have to be sorted subsequently. Sorting takes place in relatively capital-intensive sorting plants using technical facilities which are not needed for the sorting of packaging from industry and large commercial enterprises.

(95) Thus collection services for household packaging waste and for sales packaging which accumulates in industry and large commercial enterprises are not functional substitutes either.

Conclusion

(96) The Commission is satisfied that the collection services which DSD obtains from collectors constitute a market in the collection and sorting of household packaging waste. This market is separate from traditional household and residual waste disposal and from collection from commercial and industrial firms. There is no need to settle here whether the relevant market could be further differentiated by individual material fractions, such as glass or paper and board, or into its component value-adding functions, such as collection itself, transport and sorting, as this would not change the assessment under Article 81(1).

2.1.1.3. *Markets in recovery services and secondary raw materials*

(97) DSD plays a role on the markets in recovery services and secondary raw materials with respect to glass, paper and board, tinplate, aluminium, plastics, and composite drinks cartons and other composite packaging; it does so by organising the delivery of reusable materials covered by the system for recovery by guarantee companies, in accordance with the requirements of the Packaging Ordinance, on a long-term basis independently of the market conditions of the moment. The guarantee companies give DSD the assurance that the reusable materials prepared by the collectors will be recovered in accordance with the Packaging Ordinance.

(98) The Commission takes the view that the secondary raw materials which are prepared for recovery in the DSD system divide into separate markets in the separate reusable fractions, some of which, such as those in glass or paper, existed before the Packaging Ordinance was enacted and DSD was set up.

(99) However, the definition of the relevant product markets in recovery services and secondary raw materials need not be settled here, because even if a narrower market

definition is accepted the assessment of the agreements on any of these markets would not change the overall assessment for competition purposes under Article 81(1) (see below). In particular, there is no need to settle whether the mere organisation of the guarantee of recovery of a specific material by a guarantee company is a product market separate from the downstream recovery of that material, or from the offer for sale of secondary raw materials.

2.1.2. **Relevant geographic market**

(100) The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

(101) The objective supply and demand conditions on the relevant markets covered by the DSD system continue to exhibit considerable variations between Member States. This is due not least to the fact that this is a sector which used to be, and in some areas still is, to a large extent regulated and organised by the State.

(102) Although the waste-management sector is becoming increasingly internationalised, it is still the case that supply and demand continue to be organised at national level, in particular as regards waste-management services for used sales packaging. One major factor is that the legal provisions that regulate the disposal of packaging are still very different from one country to another. This is true not only of the statutory requirements governing extensive take-back and exemption systems and the collection, sorting and recovery quotas to be met, but also of the commercial freedom of action which private undertakings enjoy, e.g. regarding the collection and sorting of sales packaging under their own responsibility. This is one of the reasons why the take-back and exemption system operated by DSD is restricted to Germany, and the Service Agreements needed to put the system into practice have been concluded entirely on a domestic basis.

(103) It must be assumed, therefore, that the objective supply and demand conditions on the relevant markets in this case differ on a continuing basis from those in other parts of the common market. Consequently, when the Community competition rules have to be to applied to these two product markets within the DSD system, namely the market in the organisation of the take-back and recovery of household packaging waste and the market in the collection and sorting of household packaging waste, the relevant geographic market is that of the Federal Republic of Germany. As far as the markets in recovery services and secondary raw materials are concerned, however, it will not be necessary to define the geographic market.

2.2. ***Restriction of competition by DSD's Constitution on the market in the organisation of the take-back and recovery of household packaging waste***

(104) At the present time DSD is the only undertaking on the market in the organisation of the take-back and recovery of household packaging waste in Germany to offer an extensive system that provides exemption from the obligation to take back and recover sales packaging. DSD is thus the vehicle through which the shareholders and other undertakings who conclude Trade Mark Agreements with DSD secure exemption from their take-back and recovery obligation.

(105) The setting up of the company along the lines laid down in DSD's Constitution was therefore a vital condition if participation in an extensive system was to be offered as a means of securing exemption from a company's take-back and recovery obligation; a business that wishes to secure such exemption can join the system by concluding a bilateral contract, namely a Trade Mark Agreement, with DSD.

(106) DSD's Constitution contains no exclusivity clauses. The shareholders are free to enter into contracts with organisations competing with DSD, or with firms providing services to DSD. In the original version of the preamble to the Constitution traders undertook to stock only packaging that carried the Green Dot trade mark; but this obligation is no longer present in the version notified.

(107) Thus the Constitution does not occasion any appreciable restriction of competition within the meaning of Article 81(1) on the market in the organisation of the take-back and recovery of household packaging waste. This is why the question of the precise definition of the market need not be settled. Nor is it necessary to consider whether these agreements affect trade between Member States.

Conclusion

(108) The Commission concludes that the setting-up of DSD in accordance with its Constitution does not constitute a restriction of competition within the meaning of Article 81(1). This does not mean that market activities arising out of the operation of such a system can never be caught by Article 81.

2.3. *Restriction of competition on the market in recovery services and secondary raw materials*

(109) DSD plays a role on the markets in recovery services and secondary raw materials with respect to glass, paper and board, tinplate, aluminium, plastics, and composite drinks cartons and other composite packaging, by organising the recycling of reusable materials from the sales packaging covered by the system, which is necessary in order to obtain exemption by the responsible *Land* authorities. Rules on this aspect are to be found in both the Service Agreement and the Guarantee Agreement.

2.3.1. **Restriction of competition by the Service Contract**

(110) As explained in recital 47, DSD has abolished the system of the 'zero interface'. There is consequently no longer any appreciable restriction of competition on the relevant market in respect of the glass, paper and board, tinplate and aluminium fractions. For the present, in view of the special circumstances that obtain when an exemption system of this kind is being set up for the first time, the Commission is prepared to allow the clause requiring collectors to commit themselves to one or other form of marketing of the materials collected until the termination of the Service Agreement. The Commission takes the view, however, that after the current Service Agreements expire on 31 December 2003 markets in recovery services and secondary raw materials will be sufficiently well established, and that under future agreements it should be possible to opt for a form of marketing of materials for a substantially shorter time.

(111) For plastics and composite packaging containing plastics (composite drinks cartons and other composite packing), the Service Agreement continues to prevent the collector from marketing the sorted materials himself. These materials must be passed on to a guarantee company. Whether or not this exception is admissible is a question that has to be determined in the specific circumstances that obtain where a functioning market is being established in the recovery of plastics from household packaging waste.

(112) Until the enactment of the Packaging Ordinance and the setting up of DSD, plastic and composite packaging accumulating in households, unlike other materials such as glass or paper, was not collected and recovered separately; it was collected along with the ordinary household waste (see recital 89). The Packaging Ordinance, on grounds of environmental policy, launched the collection and recovery of plastic and composite packaging, thereby introducing a new area for business activity.

(113) But the plastic sales packaging and the composite packaging containing plastics which are collected and sorted in the DSD system has a market price which is invariably negative, so that at present these materials can be recovered in accordance with the Packaging Ordinance only against payment by DSD. In the past, indeed, this negative market price has at times meant that plastics intended for recovery have been steered into cheaper disposal channels that were not in accordance with the Packaging Ordinance, and as a result DSD has had to take corrective and monitoring measures. One of those measures is the maintenance for the time being of the zero interface for plastics and composite packaging.

(114) In view of the exceptional circumstances and conditions surrounding the establishment of a new, functioning market in the recovery of sorted plastic and composite packaging, the Commission is satisfied that the temporary maintenance of the zero interface for plastics for the lifetime of the Service Agreements, that is to say until 2003, is not a restriction of competition. This assessment is rendered easier by the fact that in accordance with the amended Packaging Ordinance DSD is to put the contracts for the recovery of plastics out to competitive tender.

(115) The Service Contract originally included a clause stating that a collector who opted for self-marketing or modified self-marketing was to pay a flat-rate sum of DEM 1,25 per head of population per year to DSD, in consideration of the revenue he earned from recovery; but this clause has been removed, in fulfilment of a commitment given by DSD to the Commission (see recital 70).

(116) The Commission therefore concludes that the relevant provisions of the Service Agreement do not lead to any appreciable restriction of competition on the markets in recovery services and secondary raw materials downstream from the collection and sorting of used sales packaging, and consequently are not caught by Article 81(1).

2.3.2. **Restriction of competition by the Guarantee Agreements**

(117) As explained in recital 61, the acceptance and guarantee agreements for the various materials originally included arrangements which corresponded to those in the Service Agreements imposing a requirement to surrender the prepared materials. These arrangements have been deleted or amended.

(118) The Guarantee Agreements running until the end of 2003 contain no exclusivity clauses. DSD is therefore free to conclude agreements with more than one

guarantee company. DSD has given the Commission a commitment that it will accept any would-be guarantor who satisfies the necessary conditions (see recital 74). The Commission accordingly concludes that any undertaking that objectively meets the requirements for guarantors and requests guarantee company status from DSD will be admitted as a guarantee company within a reasonable time.

(119) Concern had been expressed that the process of notification between collectors and guarantee companies might not be neutral in competition terms, and DSD has sought to dispel any doubt by giving a commitment that any knowledge it acquires in preparing the records of deliveries for recycling required by the Packaging Ordinance will not be used for purposes of market information; where necessary, records are to be rendered anonymous in an appropriate fashion (see recital 73). DSD has also agreed to render references to undertakings in volume flow records anonymous, provided this is accepted by the *Länder* in their capacity as exempting authorities (see recital 75).

(120) The Commission therefore concludes that the relevant provisions of the guarantee agreements do not appreciably restrict competition on the relevant product market in recovery services and secondary raw materials, and consequently are not caught by Article 81(1).

2.4. ***Restriction of competition by the Service Agreement on the market in the collection and sorting of household packaging waste***

(121) The Packaging Ordinance lays down requirements for the extensive take-back and exemption systems referred to in Section 6(3); for the practical implementation of these requirements DSD has concluded a standard Service Agreement with collectors. Section 1 of the Service Agreement provides that the collector takes sole responsibility for setting up and operating a system of the kind defined in Section 6(3) of the Packaging Ordinance in a designated district (see recital 44). In what follows this exclusivity clause will be examined to establish whether or not it is compatible with Article 81(1) of the EC Treaty.

(a) *The collector enjoys exclusivity*

(122) DSD undertakes to purchase collection and sorting services exclusively from one collector in the designated area in the lifetime of the Agreement; given DSD's commanding market position as a purchaser (see recital 30), this means that other providers of collection and sorting services for household packaging waste are to a great extent prevented from offering their services.

(123) By entrusting these services to just one collector in a designated area, DSD is restricting its own freedom of action with regard to the purchase of collection services for used sales packaging. The restriction has the effect that competing providers of collection and sorting services for household packaging waste are unable to offer their services to the leading purchaser of such services, so that competition between collectors is appreciably restricted in the designated area. The restriction is reinforced by the fact that even where though it would theoretically be possible to collect different reusable materials separately and independently of one another (essentially glass, paper and board, and light packaging), DSD with very few exceptions refrains from entrusting them to different contractors.

(124) The result is that DSD undertakes for the entire lifetime of the agreement to purchase collection and sorting services of this kind exclusively from the appointed collector in the designated area in question. This restricts competition on the market in the collection and sorting of household packaging waste, since during the lifetime of the agreement no other collector can conclude a Service Agreement with DSD, so that the excluded collectors are deprived of the possibility of doing business with the leading purchaser. This is so even though the excluded collectors may operate as subcontractors to a DSD collector for the collection or sorting of specific reusable materials or waste fractions.

Appreciable restriction

(125) The exclusive agreement between DSD and the collectors will be caught by Article 81(1) of the EC Treaty only if it affects competition appreciably. Whether or not the restriction is appreciable will be determined primarily by the position of the parties to the agreement on the relevant market and by the duration of the exclusive obligation.

(126) DSD has concluded standard Service Agreements including the exclusivity clause described in recital 44 for more than 500 designated areas, and has thus set up a network for the collection and sorting of household packaging waste which covers the whole of Germany. DSD consequently has a network of similar agreements covering the whole of the relevant geographic market.

(127) DSD is at present the only undertaking in Germany with an extensive take-back system for household packaging waste, and is therefore the purchaser of

reference for such collection services throughout the country and in any particular designated area. In the years 1996 to 1998 the obligation to take back and recover was discharged by joining the DSD system in respect of about 70 % of the sales packaging put into circulation in Germany (see recital 30). On the market under consideration here, that is to say the market in the collection and sorting of household packaging waste, DSD accounts for at least 80 % of demand. DSD is the sole reference purchaser of collection services of this kind, while the supply side is characterised by a large number of suppliers, some of them operating only on a regional basis.

(128) On the supply side, as explained in recital 93, it has also to be borne in mind that primarily for reasons of spatial organisation and collection logistics it is unlikely at present that an additional collection system for private final consumers will be set up alongside that already established by DSD, which might otherwise give the excluded collectors an alternative customer for their services. Given the infrastructure bottleneck at the point of collection from households, it is surely more realistic to suppose that a potentially competing exemption system or self-management arrangement would cooperate with those collectors who already provided collection services for DSD under a Service Agreement. There are only a few particular collection points deemed equivalent to private households, such as hospitals or canteens, which subject to certain conditions relating to collection logistics and types of packaging might conceivably be able to entrust the work to other collectors, which would involve installing additional containers for the purpose. But the scope which may remain for collectors to do business in this way is still of comparatively limited economic importance on the relevant market. It is unlikely, therefore, that any appreciable new opportunities for excluded collectors will arise during the lifetime of the Agreement in the designated area.

(129) In an assessment of the effect of these exclusivity obligations on competition, a decisive factor is their duration. The exclusivity clause described is contained in the successive versions of the standard Service Agreements, which now run until the end of 2003.

(130) Most of the agreements were first concluded in 1992: the exclusivity arrangement is an unusually long-lasting one. Its effect is to exclude other service providers who were not selected as service contractors in the first round of Service Contracts from offering their services at central level, and consequently affects their capacity to offer their services at all in the long term.

Effect on trade between Member States

(131) DSD has concluded Service Agreements with an exclusivity clause for more than 500 designated areas, and in this way has set up a countrywide disposal network for the collection and sorting of household packaging waste. For the duration of the Agreements access to the market is rendered difficult for collectors, especially those from other Member States of the European Economic Area, on a long-term basis. The exclusivity clauses have a strong adverse effect on foreign collectors' scope for establishing themselves on the relevant market. The exclusivity clause in the Service Agreements may therefore appreciably affect trade between Member States.

Finding

(132) Consideration of the exclusivity clause in the Service Agreement has shown, therefore, that access to the relevant market by domestic and foreign collectors is greatly obstructed; this goes a considerable way towards partitioning off a substantial part of the common market. Article 81(1) of the EC Treaty is therefore applicable to the exclusivity clause in the Service Agreement.

(b) *Access to the collectors' facilities*

(133) As already explained in recital 93, the infrastructure for collection in the vicinity of households forms a bottleneck, so that it is especially important in terms of competition law that competitors with DSD should have free and unimpeded access to these facilities, and indeed following publication of a notice under Article 19(3) of Regulation No 17, objections were put forward regarding this aspect on competition grounds; in what follows, therefore, the Service Agreement is examined in this light. There would be a restriction of competition caught by Article 81(1) especially if the Service Agreement was so designed that it excluded competitors with DSD from access to the collection infrastructure.

(134) The Service Agreements do not confer any exclusivity on DSD, so that collectors are free to offer their services to competitors with DSD. In the commitment set out in recital 71, DSD has confirmed that no exclusivity

obligation in DSD's favour will be imposed. In the same commitment DSD has also undertaken not to ask collectors to use containers or other facilities for the collection and sorting of used sales packaging exclusively for the performance of their Service Agreement with DSD.

(135) Point 2.1 of the third amending agreement, left intact by the fourth amending agreement, likewise confers no exclusivity on DSD. It refers only to the sales packaging to be allocated to the DSD system. This is the packaging covered by the DSD system, rather than all sales packaging which might be covered by an exemption system in accordance with Section 6(3) of the Packaging Ordinance.

(136) Originally, as has been explained in recital 57, DSD had claimed that joint use of DSD collectors' collection facilities by third parties should be possible only if DSD had authorised it. The Commission told DSD that conduct aimed at ensuring that third parties could make joint use of containers and other collection facilities belonging to collectors contracted to DSD only if DSD had authorised such joint use might be interpreted as obstruction of competitors constituting abuse of a dominant position within the meaning of Article 82 of the EC Treaty.

(137) After the Commission stated this view, DSD withdrew its claim that third parties ought to be entitled to make joint use of DSD collectors' collection or other facilities only with DSD's permission, and gave a commitment to that effect, which is set out in recital 72.

(138) There would also be a difficulty if DSD were to demand payment for such use directly from third parties, or to claim that it ought to have a say in the negotiation by collectors and third parties of an appropriate payment for the joint use of collection containers. But DSD, and other parties with agreements with the collectors, are free in their own dealings with the collectors to seek to ensure that no services demonstrably provided for third parties are charged to DSD, and where appropriate to negotiate an appropriate reduction in payment with the collectors.

(139) It does not, therefore, follow from the Service agreement that competitors with DSD are denied access to the collection infrastructure, so that there is no restriction of competition here within the meaning of Article 81(1).

(c) *Conclusion*

(140) Consideration of the exclusivity clause in the Service Agreement has shown, therefore, that access to the relevant market by domestic and foreign collectors is greatly obstructed; this goes a considerable way towards partitioning off a substantial part of the common market. Article 81(1) of the EC Treaty is therefore applicable to the exclusivity clause in the Service Agreement.

II. *ARTICLE 81(3) OF THE EC TREATY AND ARTICLE 53(3) OF THE EEA AGREEMENT*

(141) As the exclusivity clause in the Service Agreements between DSD and collectors is caught by Article 81(1) of the EC Treaty, it has now to be established whether it satisfies the tests of Article 81(3).

1. IMPROVING THE PRODUCTION OR DISTRIBUTION OF GOODS OR PROMOTING TECHNICAL OR ECONOMIC PROGRESS

(142) Any positive effects brought about by the exclusivity clause in the Service Agreements, which is caught by Article 81(1), must be weighed against the restrictive effects of the agreements.

(143) DSD is currently the only extensive take-back and exemption system for used sales packaging; according to its objects, it seeks to give effect to national and Community environmental policy with regard to the prevention, recycling and recovery of waste packaging. The Service Agreement is therefore intended to implement the objectives of the German Packaging Ordinance and of Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste ([13]). This legislation is aimed at preventing or reducing the impact of waste packaging on the environment, thus providing a high level of environmental protection.

(144) The Service Agreements concluded by DSD and the collectors provide for practical steps to implement these environmental objectives in the collection and sorting of used sales packaging collected from households and equivalent collection points. Such agreements are essential if DSD is to meet the targets and obligations it has assumed in connection with the operation of the system. To this end the Service Agreements require the establishment of logistical arrangements for collection and sorting which involve substantial investment (see recital 53). Regular collection from private final consumers of used sales packaging differentiated into specified reusable materials, and subsequent sorting or preparation for full recovery, gives direct practical effect to environmental objectives.

(145) The exclusivity clause in the Service Agreements between DSD and collectors makes it possible for the

([13]) OJ L 365, 31.12.1994, p. 5.

parties to plan the provision of services on a long-term basis and to organise it reliably. The necessary investment can be carried out and recouped over an economically reasonable period (see recital 54). There are positive network effects in the collection of household packaging waste, and substantial scale and scope advantages can be achieved, so that to entrust collection to a single collector for the duration of the agreement produces gains in efficiency. At the same time DSD, the purchaser of the service, is given the assurance that its requirements can be met on a regular and reliable basis, in a sensitive area which was previously organised under public law.

(146) It can be accepted, therefore, that the exclusivity clause in the Service Agreements contributes to improving the production of goods and to promoting technical or economic progress.

2. BENEFIT TO CONSUMERS

(147) The Service Agreements have the effect of guaranteeing extensive collection from private final consumers of sales packaging within the DSD system, differentiated into reusable materials. This is in line with the methods of waste collection that final consumers are already familiar with, and can therefore be regarded as especially consumer-friendly.

(148) As a result of the scale and scope advantages achievable, many of the manufacturers and distributors who are under an obligation to take back and recover packaging can be expected to make cost savings if they discharge their obligation by taking part in an extensive system, rather than seeking to meet their obligation individually. It can be accepted that the cost savings made over the lifetime of the agreement will be passed on to consumers, and also that consumers will likewise benefit as a result of the improvement in environmental quality sought, essentially the reduction in the volume of packaging ([14]).

(149) The Commission accordingly concludes that the Service Agreements do comprise advantages for consumers, and that consumers are allowed a faire share of the resulting benefit.

3. THE RESTRICTION IS INDISPENSABLE

(150) The Commission has studied the exclusivity clause in the Service Agreements, which run until the end of 2003, and has come to the conclusion that until that time the clause is indispensable.

(151) The assessment of whether or not the exclusivity clause is indispensable has to consider the economic and legal framework in which the agreement was concluded. In order to set up the system, substantial investment was needed in the establishment of logistical arrangements for the collection and of used sales packaging which had not existed in the same form hitherto. This investment had to be carried out by the collectors contracted to DSD under Service Agreements.

(152) On grounds of management and efficiency, and especially in order to ensure that the collection service vital to the success of the system as a whole would be provided on a regular and reliable basis, the system operator DSD decided to entrust collection to only one firm in each of the approximately 500 designated areas for the lifetime of the Agreement. The relatively short time allowed for implementation by the drafters of the Ordinance and the need to reach an understanding with the local authorities also militated in favour of selective agreements with collectors.

(153) But a decisive consideration for the assessment of the indispensability of the exclusivity clause is the fact that the investment required by the Service Agreement has to be planned and carried out in security. Collectors have to invest in collection vehicles, bins and containers, and sorting facilities.

(154) As explained in recital 52, most of the Service Agreements initially notified were to run until the end of 2005 or 2007. It was argued that long-term contracts were indispensable in order to pay off the investments carried out under the Service Agreement or still to be carried out before its expiry, especially in the logistics of collection and sorting.

(155) On the basis of comprehensive calculations of investment and profitability, the Commission has studied the question whether the Service Agreements had to run for so long in order to recoup the planned volume of investment, and has concluded that an exclusive agreement running up to the end of 2005 or 2007 was not indispensable (see recital 55). The results of this investigation suggested rather that if the Service Agreements were to run until the end of 2003 collectors would have sufficient time to achieve an

([14]) According to information supplied by the German Federal Government, the volume of household packaging waste in Germany fell from 7,6 million tonnes in 1991 to 6,7 million tonnes in 1997. See the explanatory memorandum to the Packaging Ordinance.

economically satisfactory redemption of their investment, so that a longer lifetime was not indispensable. The parties then stated that they would be prepared to set a termination date of 31 December 2003 for the Agreements.

(156) The Commission accepts, therefore, that without an exclusivity clause running until 2003 it would not have been possible to set up a countrywide system of collection, and especially sorting, at least on the desired scale, in the same time and with the same assurance of a reliable collection service, and DSD would consequently have been unable to establish the required extensive take-back and exemption system. In view of the special circumstances surrounding the implementation of the objectives of the Packaging Ordinance, involving the setting up for the first time of an extensive take-back and exemption system, the Commission concludes that an exclusivity clause running up to the end of 2003 is indeed indispensable. Any Service Agreements between DSD and collectors with a lifetime running beyond 31 December 2003 do not satisfy the tests laid down in Article 81(3) of the EC Treaty for exemption from the ban on restrictive practices.

(157) The Commission takes the view, however, that from that time onward the DSD system will have to be regarded as fully established, and that conditions in waste management as a whole and in the collection and sorting of used sales packaging will be such that long-term exclusivity obligations will no longer be indispensable. For future service agreements, therefore, the Commission considers that a lifetime of up to three years, but not more, will generally be reasonable and economically justified.

4. COMPETITION IS NOT ELIMINATED

(158) Regardless of DSD's position on the relevant markets, the exclusivity clause in the Service Agreements is not likely to eliminate competition on the market in the collection and sorting of household packaging waste.

(159) In the first place, collectors excluded by DSD remain free to offer their services to firms wishing to manage their own waste. Such arrangements are possible at least in respect of certain combinations of sales packaging and collection points on the margins of the market (see recital 87).

(160) Ultimately, however, the assessment of the question whether competition can be eliminated turns on the conditions of supply on the market in question. As explained in recitals 92 and 93, the supply side of the market in the collection and sorting of household packaging waste is characterised by marked network effects, that is to say effects of scale and scope, which means that it is economically advantageous to entrust the task to one collector in each designated area, at least within any one exemption system. In addition, there are considerations of spatial economics, collection logistics and traditions of waste collection established among consumers which make it economically difficult in many cases to duplicate the arrangements for collection from households.

(161) The conditions of supply specific to the relevant market also explain why the amended Packaging Ordinance requires operators of dual exemption and take-back systems to award collection services by competitive tender (see recital 26). The Ordinance here takes account of the fact that supply-side competition on this market is governed by special factors, and that tendering will ensure that there is competition at least to secure designated areas.

(162) Because of the special conditions of supply on the relevant market, the containers used for collecting used sales packaging from households often form a bottleneck in terms of competition. Realistically it is to be expected that competing exemption schemes and some self-management arrangements will often work together with the collector currently carrying out collection for DSD. Free and unimpeded access to the collection infrastructure set up by collectors contracted to DSD under a Service Agreement is therefore a vital condition of more intense demand-side competition for collection and sorting services for household packaging waste, and more intense competition on the upstream market in the organisation of the take-back and recovery of household packaging waste.

(163) As explained in recital 56, the Service Agreements do not tie the collector exclusively to DSD. Collectors are free to offer their services to others. DSD has also given the Commission the commitments set out in recitals 71 and 72, in which it agrees to refrain from requiring collectors to use containers or other facilities for the collection of used sales packaging solely for purposes of the Service Agreement. Nor will DSD seek to restrain third parties from using DSD collectors' collection facilities.

Obligations attached

(164) Although DSD has already given commitments regarding the joint use of collection facilities by competitors, the Commission considers it necessary to attach obligations to this Decision in view of the vital importance of unimpeded access to the collection infrastructure for competition on a market characterised by special supply conditions and in view of the qualifications contained in the commitment set out in recital 71. The aim is to ensure that the anticipated effects on competition do in fact take place and that the tests for exemption in Article 81(3) are accordingly satisfied.

(165) DSD considers that the obligations that the Commission proposes to attach to the Decision go well beyond the commitments that DSD and the Commission had previously agreed; that they are not compatible with the German Packaging Ordinance, at least as a general rule; and that at least in some cases they are unreasonable on other grounds.

— *Incompatible with the Packaging Ordinance*

(166) DSD argues that the Packaging Ordinance does not allow self-managers to collect in the vicinity of the final consumer. The Commission therefore cannot seek to make it possible for them to do so by requiring DSD to allow joint use.

(167) It is a matter of debate in Germany whether self-managers must reach their quotas entirely through collection at the point of sale (see recital 15). It is not disputed, however, that even self-managers must collect packaging from the vicinity of the final consumer if the goods are delivered to the final consumer's address, as is the case for example with mail order or deliveries by small traders (see recital 14). In any event, the Packaging Ordinance does not require DSD to impose prohibitions on the collectors contracted to it in order to enforce public-law rules on self-management arrangements, and compliance with the obligation attached to this Decision will not in any way compel DSD to infringe the Packaging Ordinance.

(168) DSD argues that joint use of receptacles by competing systems would not be compatible with the principle of responsibility for one's own product introduced when the Packaging Ordinance was amended. Systems must fulfil the recovery quotas for the packaging taking part in them. It would not ordinarily be possible simply to allocate packaging to one or other system while complying with the polluter-pays principle.

(169) The Commission does not see that any provision of the Packaging Ordinance prevents the joint use of receptacles. No such interpretation follows either from the court judgments cited by DSD ([15]) or from the observations submitted by Germany ([16]). It is true that since the amendment of the Packaging Ordinance, systems must meet their recovery quotas only in respect of the packaging taking part in them, rather than in respect of the total volume of certain packaging materials (see recital 21). But the purpose of this provision, and one of the main objectives of the amendment, is to promote competition, not just by requiring that collection services be put out to tender, but also by improving the scope for competition between different collection systems ([17]).

(170) Volumes of packaging can be allocated to different systems on a polluter-pays basis if they are shared by means of quotas. DSD and the collectors already do this for paper and board, where newspapers and periodicals are also collected in the receptacles belonging to collectors contracted to DSD (see recital 32).

(171) It should be added that when the Packaging Ordinance is being interpreted account must be taken of the importance of the joint use of collection infrastructure for the emergence of competition (recital 164). This is not only because the promotion of greater competition is one of the main objectives of the amendment to the Packaging Ordinance, but also because any interpretation of the Packaging Ordinance must have regard to the European competition rules.

— *Unreasonable*

(172) In DSD's view, joint use would be unreasonable on other grounds too, in some cases at least. It would make it more difficult to draw up volume flow records; DSD collectors' employees would be endangered by

([15]) The Higher Administrative Court (*Verwaltungsgerichtshof*) of Hesse, in a judgment delivered on 20 August 1998, ref. 8 TG 3140/98, p. 23, held that a collection scheme set up in a specific area which used its own receptacles to collect DSD system packaging did not satisfy the requirements for an exemption system.

([16]) DSD quotes a statement in Germany's observations to the effect that if packaging can be bought in there will be no incentive to retrieve waste from the packaging one places on the market oneself; but this relates only to the question whether self-managers are entitled to collect or buy in packaging from the vicinity of the final customer, and does not concern the question of the joint use of receptacles by competing systems.

([17]) See footnotes 11 and 15: the explanatory memorandum to the amendment of the Packaging Ordinance, and Higher Administrative Court of Hesse, *loc. cit.*

packaging which had held dangerous substances; DSD would be disadvantaged at the settlement stage; and quite proper requests for information could not be met.

(173) Volume flow records are based on evidence of the volumes of packaging recovered (see recital 21). It is not necessary to show that these volumes consist of packaging actually taking part in the system. Allocation by quotas, therefore, would not make volume flow records any more difficult to prepare.

(174) A DSD collector would decide what use should be made of the receptacles belonging to him, and would conclude any agreements necessary for the purpose, and would consequently be in a position to take whatever steps were needed to prevent any danger to his employees.

(175) The obligations attached to this Decision do not prevent DSD from reducing its payments to a collector where the collector allows his collection containers to be used by third parties. Nor do they prevent DSD from requiring information on this point. The second obligation is intended not to prevent a demand for information, but rather to ensure that when the volume flow record is being drawn up the volumes collected for competitors are properly credited to them.

Interim finding

(176) On the basis of the commitments given by DSD and the obligations attached to this Decision the Commission is satisfied that free and unimpeded access to the collection infrastructure is possible without restriction. There is therefore realistic scope for market entry by competing take-back and exemption systems and by self-management arrangements, and as a result demand competition is possible without restriction. The Commission is also satisfied that access to the infrastructure will not be impeded by any other provisions in the Service Agreement or by other accompanying or implementing provisions having the same effect.

(177) This protected market access for competing service providers will allow an intensification of competition on the relevant market in the collection and sorting of household packaging waste and on the upstream market in the organisation of the take-back and recovery of household packaging waste.

(178) On these facts, and in view of the obligations attached to this Decision, the Commission finds that competition on the relevant market is not eliminated. In view of the guaranteed market access for competing service providers, it can be expected that there will in future be an intensification of competition for collection services for household packaging waste.

Conclusion

(179) The exclusivity clauses in the Service Agreements concluded by DSD with collectors satisfy the tests for the application of Article 81(3) on condition that the Service Agreements provide for termination on 31 December 2003.

C. RETROSPECTIVE EFFECT, DURATION OF EXEMPTION; OBLIGATIONS

(180) The Commission notes that the Service Agreement has qualified for exemption under Article 81(3) since 1 January 1996.

(181) Article 8(1) of Regulation No 17 states that exempting decisions are to be issued for a specified period, and that conditions and obligations may be attached thereto. Under Article 6 of the Regulation, the date from which such a decision takes effect is not to be earlier than the date of notification, or the date on which the notification is brought into conformity with the conditions for the application of Article 81(1) and (3). The exemption should therefore run from 1 January 1996 until 31 December 2003, in order to give DSD and the collectors a sufficient measure of legal certainty under the EC competition rules.

(182) In order to guarantee third parties access to the collection facilities of DSD's partners in the Service Agreement, and to prevent the elimination of competition on the relevant markets, an obligation should be imposed on DSD requiring it not to impede collectors wishing to conclude and apply agreements with organisations competing with DSD for the joint use of containers or other facilities for the collection and sorting of used sales packaging. Where there is joint use of collection facilities, competitors with DSD should be able to make unrestricted use of packaging collected for them, and in order to ensure that this is so the further obligation should be imposed on DSD that it must not require of collectors that they inform DSD of volumes of packaging not collected for the DSD system. These obligations are indispensable in order to prevent the elimination of competition on the relevant markets, and constitute a clarification of the commitments given by DSD which helps to increase legal certainty. The commitments apply for the duration of the exemption. If the parties commit a breach of these obligations, Article 8(3)(b) of Regulation No 17 empowers the Commission to revoke the Decision.

(183) If before the end of the period of exemption it should prove, perhaps from a decision of a German court of last resort, that contrary to the Commission's view the joint use by third parties of the collection infrastructures of Service Contract collectors is not compatible with German law, and in particular with the Packaging Ordinance, there would then have been a major change in the facts basic to the making of this Decision, and the Commission would reconsider the requirements for the applicability of Article 81(3) to the Service Agreement, and would if necessary revoke the declaration of exemption.

(184) This Decision is without prejudice to the application of Article 82 of the EC Treaty.

(185) This Decision is likewise without prejudice to any pending or future Commission proceedings in respect of the German Packaging Ordinance,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession and of the commitments given by DSD, the Commission finds that there are no grounds under Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement for action on its part in respect of the Constitution of DSD or the Guarantee Agreements.

Article 2

Acting under Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, the Commission declares Article 81(1) and Article 53(1) of the EEA Agreement inapplicable to individual Service Agreements containing an exclusivity clause running no further than the end of 2003.

This exemption shall run from 1 January 1996 to 31 December 2003.

Article 3

The following obligations are attached to the declaration of exemption in Article 2:

(a) DSD shall not impede collectors wishing to conclude and apply agreements with organisations competing with DSD for the joint use of containers or other facilities for the collection and sorting of used sales packaging.

(b) Where collectors conclude agreements with competitors with DSD providing for the joint use of containers or other facilities for the collection and sorting of used sales packaging, DSD may not require that they inform DSD of volumes of packaging not collected for the DSD system.

Article 4

This Decision is addressed to the following undertakings:

Der Grüne Punkt — Duales System Deutschland AG
Frankfurter Straße 720–726
D-51145 Köln

ART Abfallberatungs- und Verwertungs GmbH
Am Moselkai 1
D-54293 Trier

Jakob Altvater GmbH & Co.
Postfach 4330
D-70781 Filderstadt

AWG Abfallwirtschafts GmbH Donau-Wald
Eginger Straße 37
D-94532 Außernzell

BVSE Bundesverband Sekundärrohstoffe und Entsorgung e.V.
Hohe Straße 73
D-53119 Bonn

Cordier Abfallentsorgung GmbH
Stücks 8
D-66871 Konken

DASS GmbH
Hultschiner Damm 335
D-12623 Berlin

Betrieb für das Duale System im Saarland
Untertürkheimerstraße 21
D-66117 Saarbrücken

ARGE Duales System Stormarn/Lauenburg
Vor dem Bockholt
D-23883 Grambeck

Edelhoff Entsorgung Süd GmbH
Am Ententeich 11
D-36251 Bad Hersfeld

Entsorgung Dortmund GmbH
Sunderweg 98
D-44147 Dortmund

ESG Entsorgungswirtschaft Soest GmbH
Aldegrewerwall 24
D-59494 Soest

Feldhaus Recycling GmbH & Co. KG
Eckernförder Landstraße 300
D-24941 Flensburg

Fischer Rohstoff Recycling Freudenstadt GmbH
Robert-Bürkle-Straße 10
D-72250 Freudenstadt

Rudolf Fritsche GmbH
Steinbühlstraße 5
D-91301 Forchheim

Friedrich Hofmann GmbH & Co.
Kirchenstraße 22
D-91186 Büchenbach

Interseroh AG
Stollwerckstraße 9a
D-51149 Köln

Karl Nehlsen GmbH & Co. KG
Furtstraße 14–16
D-28759 Bremen

Ostthüringer Recycling und HandelsGmbH
Auenstraße 55
D-07490 Gera-Langenberg

Rethmann Entsorgungswirtschaft GmbH & Co. KG
Dieselstraße 3
D-44805 Bochum

SAK Sondershäuser Entsorgungs GmbH
Schachtstraße 5
D-99706 Sondershausen

Erwin Scheele GmbH & Co. KG
Agathastraße 63
D-57368 Lennestadt

Schönmackers Umweltdienste GmbH & Co. KG
Laar 1
D-47652 Weeze

Trienekens GmbH
Greefsallee 1–5
D-41747 Viersen

TWR Tenner Wertstoff Recycling GmbH
Straupitzstraße 11
D-03172 Guben

USB Umweltservice Bochum GmbH
Postfach 102465
D-44724 Bochum

VIVO Gesellschaft für Abfallvermeidung GmbH
Lochham 56
D-83627 Warngau

VKS Verband Kommunale Abfallwirtschaft und Stadtreinigung e. V.
Postfach 510620
D-50942 Köln

Done at Brussels, 17 September 2001.

For the Commission
Mario MONTI
Member of the Commission

ANNEX

Index of firms having 'notified' the Service Agreement

Abfallbeseitigung H. Cohrs GmbH	29614 Soltau
Abfallwirtschaft Meißen GmbH	01665 Gröbern
Abfallwirtschaft Werder GmbH	14542 Werder
ALTROH GmbH & Co. KG	23566 Lübeck
ARGE Magnitz/Bergler	95643 Tirschenreuth
ARGE Alb-Donau-Kreis Recycling	89584 Ehingen
ARGE Fischer/Rethmann	80999 München
ARGE Mabeg/Bornhorst/Ostendorf	27572 Bremerhaven
ARGE Abfallwirtschaft Delmenhorst	27755 Delmenhorst
ARGE Abfallwirtschaft Kreis Nordfriesland	25853 Ahrenshöft
ARGE Bergler Schmid & Zweck	92729 Weiherhammer
ARGE DS Ennepe-Ruhr-Kreis	58454 Witten-Stockum
ARGE DSD Hoch-Taunus-Kreis	65205 Wiesbaden
ARGE DSD Rheingau-Taunus	65329 Hohenstein
ARGE DSD — Verpackungen Hochtaunuskreis	65205 Wiesbaden
ARGE DSD im Kreis Düren	52457 Aldenhoven
ARGE DSD Kreis Warendorf	59320 Ennigerloh
ARGE DSD Rhein-Sieg-Kreis	53721 Siegburg
ARGE Duales System Ahrweiler	53489 Sinzig
ARGE Duales System Dresden Land	01159 Dresden
ARGE Duales System Hoyerswerda	02977 Hoyerswerda
ARGE Duales System Landkreis Cuxhaven	28759 Bremen
ARGE Duales System Landkreis Mainz — Bingen	67678 Mehlingen
ARGE Duales System Landkreis München	85572 Neubiberg
ARGE Duales System Landkreis Rottweil	78655 Dunningen
ARGE Duales System Löbau, Bautzen, Zittau	02708 Löbau
ARGE Duales System Stadt Herne	45127 Essen
ARGE Duales System Mühldorf	88339 Bad Waldsee
ARGE Elsen-Wagner-Schönmackers	53945 Blankenheim
ARGE Hochsauerlandkreis	59909 Bestwig-Velmede
ARGE Kreis Mettmann GbR	42489 Wülfrath
ARGE LK Annaberg	09456 Annaberg-Buchholz
ARGE LK Döbeln	04720 Döbeln
ARGE Mildena GmbH	39624 Kalbe
ARGE Schwarzwald-Baar	78112 St. Georgen
ARGE Steinburg/Itzehoe	25524 Itzehoe
ARGE Wertstofferfassung Ernst+Hofmann	91710 Gunzenhausen
ARGE Wertstofferfassung Landkreis Eichstätt	85053 Ingolstadt
ARGE Wertstofferfassung Stadt Ingolstadt	85053 Ingolstadt
ARGE ZUG-Garbot-Seidel	08056 Zwickau
ARGE DSD-Verpackungen Main-Taunus-Kreis	65719 Hofheim (Am Taunus)
ASM GmbH & Co. KG	22525 Hamburg
AVW	79761 Waldshut-Tiengen
AWG	37671 Höxter
AWU AbfallwirtschaftsUnion	06901 Rackith

AWU AbfallwirtschaftsUnion Kyritz GmbH	16866 Kyritz
AWU AbfallwirtschaftsUnion Neuruppin GmbH	16816 Neuruppin
AWU AbfallwirtschaftsUnion Torgau GmbH	04880 Dommitzsch
AWU AbfallwirtschaftsUnion Wriezen GmbH	16269 Wriezen
AWU AbfallwirtschaftsUnion Wurzen GmbH	04808 Burkartshain
AWU AbfallwirtschaftsUnion Oranienburg GmbH	16727 Velten
Bausch GmbH	88212 Ravensburg
Bauschutt Container Abfuhr Werkstoffrecycling	29664 Waldrode
Bautrans Umweltservice GmbH	76189 Karlsruhe
Becker GmbH	98544 Zella-Mehlis
Becker Umweltdienste GmbH	19322 Wittenberge
Beekmann, R & J	26629 Großefehn
Bickmeier Städtereinigung GmbH	39517 Tangerhütte
Bogenschütz Alois	72415 Grosselfingen
Böhm Indupa GmbH & Co. KG	12357 Berlin
Böhme GmbH	95111 Rehau
Böhme Vogtlandentsorgung GmbH & Co. KG	08248 Klingenthal
Braun & Trienekens GmbH	52078 Aachen
Braun Entsorgung GmbH	85077 Manching
Brewitzer Container	92660 Neustadt
Breyer GmbH	66271 Kleinblittersdorf
Brunner GmbH	92099 Grafenwörth
BWS Bergische Wertstoff-Sammel-GmbH	51766 Engelskirchen
CED-Entsorgungsdienst	09114 Chemnitz
Chr. Schmid GmbH & Co.	73230 Kirchheim
DEKS GmbH	45143 Essen
DELME Transport- u. Entsorgungsgesellschaft	15526 Alt-Golm
Delpa GmbH & Co. KG	27751 Delmenhorst
Dienstleistung & Recycling	06847 Dessau
Ehgartner Entsorgung GmbH	82538 Geretsried
Entsorgungsbetrieb Alfred Kropf	95707 Thiersheim
Entsorgungsgesellschaft Bergische Region	42279 Wuppertal
Entsorgungswirtschaft Sonneberg GmbH	96515 Sonneberg
ESR GmbH	55232 Alzey
ETG GmbH	73037 Göppingen
Fischer Recycling München GmbH	81677 München
Fischer Rohstoff Recycling GmbH	79108 Freiburg
Frassur GmbH	04910 Elsterwerda
Frey Entsorgung GmbH	55471 Wüschheim
Friedrich Herz GmbH	91555 Feuchtwangen
Georg Simon GmbH	96342 Stockheim
GES Gesellschaft zur Entsorgung	63150 Heusenstamm
Ges. z. Erfassung u. Aufbereitung GmbH	32440 Porta Westfalica
Gesellschaft für Abfall und Recycling mbH	28816 Stuhr
Gesellschaft für saubere Umwelt	18196 Karelsdorf
GEV GmbH	39101 Magdeburg
GFR Gesellschaft für Rohstoffrecycling mbH	90768 Fürth/Bayern
Gölz Transporte	73230 Kirchheim
Görlitz GmbH	02814 Görlitz

Greifswald Entsorgung GmbH	17489 Greifswald
Gröberner Deponiebetrieb	01665 Niederau/OT Gröbern
Gröger GmbH	89301 Günzburg
Hans Novak	86603 Donauwörth
Haselberger GmbH	85604 Pöring
HAW Havelländische Abfallwirtschaftsgesellschaft	14712 Rathenow
Heinz GmbH & Co. KG	85368 Moosburg/Isar
Hiemenz GmbH	64720 Michelstadt
Hippe	01324 Dresden
Hoffmann Wolfgang	83043 Bad Aibling
Hofmann KG	68519 Viernheim
Horst Moldenauer GmbH	22869 Schenefeld
Inast GmbH	74803 Mosbach
Jakob Becker GmbH	67678 Mehlingen
Jan Heitmann	25335 Elmshorn
Johann Dumps	83457 Bayerisch Gmain
Johannes Fehr GmbH & Co. KG	34253 Lohfelden
Karl Bickmeier GmbH	39517 Tangerhütte
Karl Nehlsen GmbH & Co. KG	28759 Bremen
KCD Container-Dienst GmbH	55559 Bretzenheim
Keske Entsorgung GmbH	38112 Braunschweig
Knittel GmbH	89269 Vöhringen
Kommunal- und Industrieentsorgung	06928 Schweinitz
Kommunalentsorgung Borna GmbH	04552 Borna
Kraus Container	92670 Windischeschenbach
Landkreis Entsorgung GmbH	08340 Schwarzenberg
Lober GmbH & Co. KG	92431 Neunburg vom Wald
LSR GmbH	37351 Dingelstädt
Ludwig Dorr	87439 Kempten
Lüneburger Rohstoffverwertung GmbH & Co. KG	21357 Bardowick
MABEG GmbH & Co. KG	44849 Herne
MABEG-Nord Gesellschaft für Entsorgungswirtschaft	27572 Bremerhaven
Mannert GmbH	66388 Gersthofen
Matthias Palzkill GmbH & Co. KG	54634 Bitburg
Meier Entsorgung GmbH	79189 Bad Krozingen
Meindl Entsorgungsservice GmbH	93138 Lappersdorf/Hainsacker
MERB–Mittelbadische EntsorgungsGmbH	77855 Achern
Merseburger Entsorgung GmbH	06217 Merseburg
MetallverwertungsGmbH	79288 Gottenheim
Meyer GmbH	26131 Oldenburg
Müllabfuhr Containerdienst	66994 Dahn
Müllbetriebe Varel GmbH	26316 Varel
Mülltrans Krupp GmbH & Co. KG	67105 Schifferstadt
Nehlsen & Wassermann Entsorgungs GmbH	17039 Hellfeld/Neubrandenburg
Nehlsen Entsorgungs GmbH	18209 Bad Doberan
Nehlsen Entsorgungs GmbH	18311 Ribnitz-Damgarten
Nehlsen Entsorgungs GmbH	18573 Samtens/Rg.
Oberreiter KG	84513 Töging
Orbit GmbH	89416 Lauingen

Papyrus Wertstoff Service GmbH	83435 Bad Reichenhall
Peter Edenharder GmbH	92318 Neumarkt
Peter Fink GmbH	85221 Dachau
Peter Schad GmbH & Co. KG	36124 Eichenzell
Pfahler GmbH	91550 Dinkelsbühl
Pflelderer GmbH & Co. KG	70327 Stuttgart
Plauen GmbH	08525 Plauen
Radeberger Stadtentsorgung	01454 Radeberg
RAG Sortier GmbH	79730 Murg
RAZ Rohstoff-Aufbereitung GmbH & Co. KG	14823 Niemegk
Recycling GmbH	13407 Berlin
REG GmbH	78658 Zimmern
REMO Recycling GmbH	04736 Waldheim
Rfels Recycling GmbH	38644 Goslar
Rhenus AG & Co. KG	44147 Dortmund
RHK GmbH & Co.	24145 Kul
RIA Umwelt GmbH	04420 Bienitz
Rohstoff-Recycling Rostock GmbH & Co. KG	18059 Rostock
ROPA EntsorgungsGmbH & Co.	81245 München
ROPA EntsorgungsGmbH & Co.	70197 Stuttgart
RPS Altvater GmbH & Co. KG	67158 Ellerstadt
RTB Umwelt GmbH	16928 Falkenhagen
RTB Umwelt GmbH	15306 Seelow
RTS Umwelt	01259 Dresden
Rudolf Seiler	66587 Merchweiler
RZM GmbH	39126 Magdeburg
RZS Recycling Zentrum GmbH	21684 Stade
SAK Entsorgungs- und Recycling GmbH	99706 Sondershausen
Samme, Kruse & Pape GmbH & Co.	22113 Hamburg
Saso Velbert GmbH	42551 Velbert
Sauter+Weh GmbH	58074 Meckenbeuren
Schader EntsorgungsGmbH	64625 Bensheim
Scherrible GmbH & Co.	73730 Esslingen
Schmid & Zweck GmbH	92224 Amberg
Schneemann Recycling GmbH	37115 Duderstadt
Schönmackers Umweltdienste GmbH & Co. KG	41836 Hückelhoven
Schönmackers Umweltdienste GmbH & Co. KG	47906 Kempen
Schönmackers Umweltdienste GmbH & Co. KG	50171 Kerpen
Schönmackers Umweltdienste GmbH & Co. KG	41464 Neuss
Schönmackers Umweltdienste GmbH & Co. KG	57074 Siegen
Schönmackers Umweltdienste GmbH & Co. KG	08228 Rodewisch
SEE Stadt Eisenach Entsorgung GmbH	99817 Eisenach
Seebauer Abfallentsorgung	93648 Vohenstrauß
SERO Leipzig GmbH	04179 Leipzig
SERO Recycling GmbH	19018 Schwerin
SERO-Handel Dresden GmbH	01159 Dresden
S-plus Umweltservice GmbH	71332 Waiblingen
Stäblein GmbH	97659 Schönau
Stadtentsorgung Huth GmbH	06791 Zschornewitz

Städtereinigung Nord GmbH & Co. KG	24837 Schleswig
Steiger GmbH	85376 Hetzenhausen
STEP Stadtentsorgung Potsdam GmbH	14478 Potsdam
Stralsunder EntsorgungsGmbH	18435 Stralsund
Stratmann EntsorgungsGmbH	01109 Dresden
Theo Kleiner Recycling GmbH	66953 Pirmasens
TK Umweltdienste Bonn GmbH & Co. KG	53121 Bonn
Tönsmeier Entsorgung	32457 Porta Westfalica
Tönsmeier Entsorgungsdienste GmbH	06333 Welfesholz
TUE Entsorgung GmbH	99086 Erfurt
TVG – Transport- und Verwertungsgesellschaft	64319 Pfungstadt
UMTECH GmbH	06653 Weißenfels
Umweltdienst Sömmerda GmbH	99610 Sömmerda
Umweltdienste GmbH	21737 Wischhafen
Unstrut-Hainich GmbH	99991 Höngeda/Mühlhausen
USEG Verpackung-Recycling GmbH	76275 Ettlingen
UWE Entsorgung GmbH	04425 Taucha
Veno GmbH	96472 Rödental
Wagner Entsorgung GmbH	96317 Kronach
Werner GmbH & Co.	63773 Goldbach
Wertstoffentsorgung Konstanz GmbH	78459 Konstanz
Wertstoffgesellschaft Konstanz Firma Danner	78315 Radolfzell
Wertstoffrecycling KG	86368 Gersthofen
WeVo Städtereinigung Oschersleben	39387 Oschersleben
WGV Recycling GmbH	82547 Eurasburg
Willi Hipp Systementsorgung	88045 Friedrichshafen
Wilm GmbH	84405 Dorfen
Wittko KG GmbH & Co.	24539 Neumünster
WMD Schreiber GmbH	25524 Itzehoe
WMD Schreiber Städtereinigung GmbH & Co.	59494 Soest
Wolf GmbH	63654 Büdingen
Wolfener Recycling GmbH	06766 Wolfen
WRZ Hörger GmbH & Co. KG	89567 Sontheim
WSA GmbH & Co.	73257 Köngen
Zeitzer EntsorgungsGmbH	06712 Zeitz

COMMISSION RECOMMENDATION

of 7 November 2001

on the results of the risk evaluation and the risk reduction strategies for the substances: acrylaldehyde; dimethyl sulphate; nonylphenol phenol, 4–nonyl-, branched; *tert*-butyl methyl ether

(notified under document number C(2001) 3380)

(Text with EEA relevance)

(2001/838/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 793/93 of 23 March 1993 on the evaluation and control of the risks of existing substances ([1]) and in particular Article 11(2) thereof,

Whereas:

(1) Article 10 of the Regulation (EEC) No 793/93 established the procedure to be followed for the risk evaluation of the substances on the priority lists at the level of the Member States designated as rapporteur.

(2) Commission Regulation (EC) No 1488/94 ([2]) outlines the principles for the assessment of risks to man and the environment of existing substances in accordance with Regulation (EEC) No 793/93.

(3) The Member State rapporteur after evaluating the risk of a given priority substance to man and the environment should suggest where appropriate a strategy for limiting the risk, including control measures and/or surveillance programmes.

(4) Article 11 of Regulation (EEC) No 793/93 foresees that the results of the risk evaluation and the recommended strategy for limiting risks in respect to substances on the priority lists should be adopted at Community level in accordance with the procedure laid down in Article 15 and shall be published by the Commission.

(5) Article 1 of Regulation (EEC) No 793/93 provides that that Regulation should apply without prejudice to Community legislation on the protection of consumers and on safety and protection of health of workers at work, in particular Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work ([3]).

(6) A first priority list identifying substances requiring attention has been adopted by Commission Regulation (EC) No 1179/94 ([4]); this priority list provides, among other substances, for the evaluation of the following:

— acrylaldehyde.

(7) A second priority list identifying substances requiring attention has been adopted by Commission Regulation (EC) No 2268/95 ([5]). This second priority list provides, among other substances, for the evaluation of the following:

— dimethyl sulphate,

— nonylphenol,

— phenol, 4-nonyl-, branched.

(8) A third priority list identifying substances requiring attention has been adopted by Commission Regulation (EC) No 143/97 ([6]). This third priority list provides, among other substances, for the evaluation of the following:

— *tert*-butyl methyl ether.

(9) The rapporteur Member States have completed all the risk evaluation activities with regard to man and the environment for the above five substances ([7]) and, where appropriate, have suggested strategies for limiting the risks.

(10) The results of the risk evaluation of the five substances and the recommended risk reduction strategies for the five substances should be adopted at the Community level.

([1]) OJ L 84, 5.4.1993, p. 1.
([2]) OJ L 161, 29.6.1994, p. 3.
([3]) OJ L 183, 29.6.1989, p. 1.
([4]) OJ L 131, 26.5.1994, p. 3.
([5]) OJ L 231, 28.9.1995, p. 18.
([6]) OJ L 25, 28.1.1997, p. 13.
([7]) The comprehensive risk assessment reports as forwarded to the Commission by the Member States rapporteur are publicly available. Short summaries are also available. Both can be found on the internet site of the European Chemicals Bureau, Institute for Health and Consumer Protection of the Joint Research Centre in Ispra, Italy (http://ecb.ei.jrc.it/existing-chemicals/).

(11) In accordance with Article 11(3) of Regulation (EEC) No 793/93, the Commission will consider the results of the risk evaluation and the recommended strategy for limiting the risks, when proposing Community measures in the framework of Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations ([8]) and in the framework of Directive 89/391/EEC as well as in the framework of other relevant existing Community instruments.

(12) The Scientific Committee on Toxicity, Ecotoxicity and the Environment (CSTEE) has been consulted and has issued an opinion with respect to the risk assessment reports referred to in this recommendation.

(13) The measures provided for in this recommendation are in accordance with the opinion of the Committee set up pursuant to Article 15 of Regulation (EEC) No 793/93,

HEREBY RECOMMENDS:

1. All sectors importing, producing, transporting, storing, formulating into a preparation or other processing, using, disposing or recovering the following substances:

   — acrylaldehyde
   CAS No 107-02-8
   EINECS No 203-453-4

   — dimethyl sulphate
   CAS No 77-78-1
   EINECS No 201-058-1

   — nonylphenol
   CAS No 25154-52-3
   EINECS No 246-672-0

   — phenol, 4-nonyl-, branched
   CAS No 84852-15-3
   EINECS No 284-325-5

   — *tert*-butyl methyl ether
   CAS No 1634-04-4
   EINECS No 216-653-1

   should take into account the results of the risk evaluation as summarized in Section I (human health/environment) of Parts 1, 2, 3, 4 and 5 of the Annex to this recommendation and include them, where appropriate, in the safety data sheets ([9]). These results were formulated in the light of the opinions delivered by the Scientific Committee on Toxicity, Ecotoxicity and the Environment (CSTEE) ([10]).

2. The risk reduction strategies described in Section II (strategy for limiting risks) of Parts 1, 2, 3, 4, 5 of the Annex to this recommendation should be implemented.

Done at Brussels, 7 November 2001.

For the Commission
Margot WALLSTRÖM
Member of the Commission

([8]) OJ L 262, 27.9.1976, p. 201.

([9]) In accordance with the provisions of Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ 196, 1.8.1967, p. 1), Commission Directive 91/155/EEC of 5 March 1991 defining and laying down the detailed arrangements for the system of specific information relating to dangerous preparations in implementation of Article 10 of Directive 88/379/EEC (OJ L 76, 22.3.1991, p. 35), Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work (14th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC, OJ L 131, 5.5.1998, p. 11 and Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ L 200, 30.7.1999, p. 1).

([10]) The risk assessment reports were peer-reviewed by the CSTEE and its opinions were expressed at the 13th plenary meeting (Brussels, 4 February 2000), 15th plenary meeting (Brussels, 19 June 2000), 22nd plenary meeting (Brussels, 6 and 7 March 2001) and 23rd plenary meeting (Brussels, 24 April 2001). The CSTEE opinions can be found on the internet site:
(http://europa.eu.int/comm/food/fs/sc/sct/outcome_en.html).

ANNEX

PART 1

CAS No 107-02-8 Einecs No 203-453-4

Molecular formula:	C_3H_4O
Einecs Name:	Acrylaldehyde
Rapporteur:	The Netherlands
Classification ([1]):	F; R11 T+; R26 T; R24/25 C: R34 N: R50

The risk assessment is based on current practices related to the life-cycle of the substance produced in or imported into the European Community as described in the risk assessment forwarded to the Commission by the Member State Rapporteur.

The risk assessment has, based on the available information, determined that in the European Community the substance is only used as an intermediate for the manufacturing of a number of different substances (e.g. animal feed additives, biocides, pesticides, leather tanning agents, fragrances). Outside the European Community the substance is also used as an effective broad-spectrum biocide, tissue fixative, in etherification of food starch and production of colloidal metals. It was not possible to obtain information on the use of the total volume of substance produced in or imported into the European Community, therefore, some uses may exist which are not covered by this risk assessment.

The risk assessment has identified other sources of exposure of the substance to man and the environment in particular releases of the substance from industrial combustion processes, automobile exhaust gases and tobacco smoke, which do not result from the life-cycle of the substance produced in or imported into the European Community. The assessment of the risks arising from these exposures is not part of this risk assessment. The risk assessment forwarded to the Commission by the Member State Rapporteur does however provide information that could be used to assess these risks.

I. **RISK ASSESSMENT**

A. *HUMAN HEALTH*

The conclusions of the assessment of the risks to

WORKERS

are

1. that there is a need for specific measures to limit the risks. This conclusion is reached because of concerns for eye, nose and respiratory tract irritation as a consequence of single and repeated inhalation exposure arising from the production and processing of the substance;

   and:

2. that, in addition to the conclusion given above, the risk assessment shows that there are uncertainties with regard to the possible genotoxic and carcinogenic effects of the substance locally at the exposure site after long-term exposure by inhalation to non-cytotoxic concentrations. However, at this moment no validated genotoxicity test exists to investigate this, and the relatively low exposure levels do not justify the request for a carcinogenicity study by inhalation.

The conclusion of the assessment of the risks to

([1]) The classification of the substance is established by Commission Directive 2001/59/EC of 6 August 2001 adapting to technical progress or the 28th time Council Directive 67/548 on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ L 225, 21.8.2001, p. 1).

CONSUMERS

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

— the risk assessment shows that risks are not expected. Risk reduction measures already being applied are considered sufficient

The conclusion is reached, because the risk assessment shows that the substance is not used in products available for consumers.

The conclusion of the assessment of the risks to

HUMANS EXPOSED VIA THE ENVIRONMENT

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

— the risk assessment shows that risks are not expected. Risk reduction measures already being applied are considered sufficient.

The conclusion of the assessment of the risks to

HUMAN HEALTH (physico-chemical properties)

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

— the risk assessment shows that risks are not expected. Risk reduction measures already being applied are considered sufficient.

B. *ENVIRONMENT*

The conclusion of the assessment of the risks to the

ATMOSPHERE, AQUATIC ECOSYSTEM and TERRESTRIAL ECOSYSTEM

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied.

This conclusion is reached because:

— the risk assessment shows that risks related to the environment spheres mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

The conclusion of the assessment of the risks for

MICRO-ORGANISMS IN THE SEWAGE TREATMENT PLANT,

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied.

This conclusion is reached because:

— the risk assessment shows that risks related to the environmental spheres mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

II. **STRATEGY FOR LIMITING RISKS**

For WORKERS

The legislation for workers' protection currently in force at Community level is generally considered to give an adequate framework to limit the risks of the substance to the extent needed.

Within this framework it is recommended to develop at Community level occupational exposure limit values for the substance to subirritating levels. Until such time as occupational exposure limit values for the substance have been adopted at Community level, exposure in the workplace should be reduced as low as technically feasible because of possible local carcinogenic effects.

PART 2

CAS No 77-78-1 Einecs No 201-058-1

Molecular formula:	$C_2H_6O_4S$
Einecs Name:	Dimethyl sulphate
IUPAC Name:	Dimethyl sulfate
Rapporteur:	The Netherlands
Classification ([2]):	Carc. Cat.2; R45 Muta. Cat.2; R40 T+; R26 T; R25 C; R34 R43

The risk assessment is based on current practices related to the life-cycle of the substance produced in or imported into the European Community as described in the comprehensive risk assessment forwarded to the Commission by the Member State Rapporteur.

The risk assessment has, based on the available information, determined that in the European Community the substance is mainly used as an intermediate and methylating agent in production of many organic chemicals (dyes, perfumes, pharmaceuticals). Other uses reported are as a sulphating agent in the manufacturing of various products (e.g. dyes, fabric softeners). It was not possible to obtain information on the use of the total volume of substance produced in or imported into the European Community, therefore, some uses may exist which are not covered by this risk assessment.

The risk assessment has identified other sources of exposure of this substance to man and the environment. In particular releases of the substance from combustion of sulphur containing fossil fuels and formation in the atmosphere as a reaction product of sulphur dioxide and organic compounds, which does not result from the life-cycle of the substance produced in or imported into the European Community. The assessment of the risks arising from these exposures is not part of this risk assessment. The risk assessment forwarded to the Commission by the Member State Rapporteur does however provide information which could be used to assess these risks.

This substance has not been tested for all aspects of reproductive toxicity and consequently the risk assessment does not evaluate in full the risks to any population of this endpoint. This test has not been required, as the substance has been identified as a non-threshold carcinogen.

I. **RISK ASSESSMENT**

A. *HUMAN HEALTH*

The conclusions of the assessment of the risks for

WORKERS

are that there is a need for specific measures to limit the risks. This conclusion is reached because of:

— concerns for risks for respiratory tract irritation, mutagenicity and carcinogenicity as a consequence of inhalation exposure arising from production, processing and use of the substance,

— concerns for the pregnant population for adverse health effects as a consequence of repeated inhalation exposure arising from the use of the substance as an intermediate.

([2]) The classification of the substance is established by Commission Directive 2000/32/EC of 19 May 2000 adapting to technical progress for the 26th time Council Directive 67/548 on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ L 136, 8.6.2000, p. 1).

The conclusion of the assessment of the risks for

CONSUMERS and HUMANS EXPOSED VIA THE ENVIRONMENT

is that the risk assessment shows that risks cannot be excluded at any exposure, as the substance is identified as a non-threshold carcinogen. However the risks covered by this risk assessment are not of a magnitude, that immediate action is deemed necessary. Risk reduction measures already being applied are considered sufficient to impose pressure in reducing and controlling exposure to the substance.

The conclusion of the assessment of the risks to

HUMAN HEALTH (physico-chemical properties)

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

— the risk assessment shows that risks are not expected. Risk reduction measures already being applied are considered sufficient.

B. *ENVIRONMENT*

The conclusion of the assessment of the risks to the

ATMOSPHERE, AQUATIC ECOSYSTEM and TERRESTRIAL ECOSYSTEM

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

— the risk assessment shows that risks related to the environmental spheres mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

The conclusion of the assessment of the risks for

MICRO-ORGANISMS IN THE SEWAGE TREATMENT PLANT

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

— the risk assessment shows that risks related to the environmental spheres mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

II. **STRATEGY FOR LIMITING RISKS**

For WORKERS:

The legislation for workers' protection currently in force at Community level is generally considered to give an adequate framework to limit the risks of the substance to the extent needed.

Within this framework it is recommended:

— to develop at Community level occupational exposure limit values for the substance.

PART 3

CAS No 25154-52-3 Einecs No 246-672-0

Molecular formula:	$C_{15}H_{24}O$
Einecs Name:	Nonylphenol
Rapporteur:	United Kingdom
Classification ([3]):	Xn; R22, C; R34 N: R50-53

([3]) The classification of the substance is established by Commission Directive 2001/59/EC of 26 August 2001 adapting to technical progress for the 28th time Council Directive 67/548/CEE on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ L 225, 21.8.2001, p. 1).

The risk assessment is based on current practices related to the life-cycle of the substance produced in or imported into the European Community as described in the comprehensive risk assessment forwarded to the Commission by the Member State Rapporteur.

The risk assessment has, based on the available information, determined that in the European Community the substance is mainly used as an intermediate in the production of nonylphenol ethoxylates (e.g. in detergents and paints) and in the production of resins, plastics and stabilisers in the polymer industry. Other uses include the manufacture of phenolic oximes for use outside the EU in the metal extraction industry and in some speciality paints.

I. **RISK ASSESSMENT**

A. *HUMAN HEALTH*

The conclusion of the assessment of the risks to

WORKERS, CONSUMERS and HUMANS EXPOSED VIA THE ENVIRONMENT

is that there is a need for further information and/or testing. This conclusion is reached because there is a need for better information to adequately characterise the risks for human health.

This conclusion is reached while evaluation of the available data submitted in accordance with the relevant provisions of Regulation (EEC) No 793/93 is underway ([4]).

B. *ENVIRONMENT*

The conclusion of the assessment of the risks to the

ATMOSPHERE

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

— the risk assessment shows that risks related to the environmental spheres mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

The conclusions of the assessment of the risks to the

AQUATIC ECOSYSTEM and TERRESTRIAL ECOSYSTEM are:

1. that there is need for further information and/or testing. This conclusion is reached because of:

   — concerns for effects on the aquatic spheres including sediment.

   The information and/or test requirements are:

   — further toxicity testing on sediment organisms.

   However, the implementation of the strategy for limiting risks for the environment in Section II Part 3 of the Annex will eliminate the need for further information requirements.

   and

2. that there is a need for specific measures to limit the risks. This conclusion is reached because of:

   — concerns for effects on local and regional aquatic environmental spheres including sediment as a consequence of exposure arising from nonylphenol production ([5]), production of phenolic oximes, phenol/formaldehyde resins ([6]), epoxy resins ([7]) and other plastic stabilisers, nonylphenol ethoxylate production, formulation and use,

([4]) The need for further information and/or testing applies to one scenario only. The full conclusions of the human health risk assessment will be published in a subsequent Commission recommendation.

([5]) For these uses risks to the aquatic environment only occur because of the contribution of background concentrations to local levels. The same applies to the use of nonylphenol ethoxylates in agricultural pesticide formulations, small scale photographic processes and domestic and industrial emulsion paints.

([6]) For these uses risks to the aquatic environment only occur because of the contribution of background concentrations to local levels. The same applies to the use of nonylphenol ethoxylates in agricultural pesticide formulations, small scale photographic processes and domestic and industrial emulsion paints.

([7]) For these uses risks to the aquatic environment only occur because of the contribution of background concentrations to local levels. The same applies to the use of nonylphenol ethoxylates in agricultural pesticide formulations, small scale photographic processes and domestic and industrial emulsion paints.

— concerns for effects for terrestrial spheres as a consequence of exposure arising from the production, formulation and uses of nonylphenol ethoxylates in veterinary medicines, captive use by the chemical industry, electrical engineering, industrial and institutional cleaning, in leather processing, metal extraction, in the photographic, pulp and paper, polymer and textile industry, in paint manufacture and in civil and mechanical engineering,

— concerns for effects on secondary poisoning to fish and earthworm predators as a consequence of exposure arising from nonylphenol ethoxylate production and formulation, and the use of nonylphenol ethoxylates in industrial and institutional cleaning, the electrical engineering industry, the paints, lacquers and varnish industry, civil engineering, leather processing, metal extraction, the pulp, paper and board industry, and in textile processing.

The conclusion of the assessment of the risks for

MICRO-ORGANISMS IN THE SEWAGE TREATMENT PLANT

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

— the risk assessment shows that risks related to the environmental spheres mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

II. **STRATEGY FOR LIMITING RISKS**

For the ENVIRONMENT:

Marketing and use restrictions should be considered at Community level to protect the environment from the use of nonylphenol/nonylphenol ethoxylates (NP/NPEs) in particular in:

— industrial, institutional and domestic cleaning,

— textiles processing,

— leather processing,

— agriculture (biocidal products, in particular use in teat dips),

— metal working,

— pulp and paper industry,

— cosmetics including shampoos and other personal care products.

Further work is necessary to establish those uses for which derogations can be justified.

In addition to the above, and recognising development of new Community procedures, additional measures for nonylphenol and nonylphenol ethoxylates should be considered including pollution prevention measures ([8]) at Community level, as appropriate, for the following sectors:

— production of nonylphenol and nonylphenol ethoxylates;

— use of nonylphenol ethoxylates in the synthesis of other chemicals (captive use);

([8]) Work currently underway at Community level in the framework of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ L 257, 10.10.1996, p. 26) in developing BAT Reference Documents (BREFs) that cover various chemical processes may be particularly significant in this respect. Further information on the matter can be obtained consulting the European IPPC Bureau website: http://eippcb.jrc.es.

— use of nonylphenol ethoxylates in emulsion polymerisation in particular use in acrylic esters used for specialist coatings, adhesives and fibre bonding;

— production of phenol/formaldehyde resins using nonylphenol;

— production of other plastic stabilisers using nonylphenol.

The results achieved through marketing and use restrictions and pollution control measures should be monitored and if necessary additional measures should be considered. In particular, consideration should be given to other Community instruments ([9]) to ensure control of environmental concentrations of nonylphenol and nonylphenol ethoxylates via the objectives as set-out in those instruments. These measures should be applied to the above sectors and those listed below:

— formulation (in sectors where nonylphenol/nonylphenol etoxylates use will continue);

— civil and mechanical engineering including the manufacture of wall construction materials, road surface materials and also in the cleaning of metals;

— additives in lubricating oil and in the blending of fuel additive packages;

— electronics/electrical engineering in particular use in fluxes in the manufacture of painted circuit boards, in dyes to identify cracks in printed circuit boards and as a component of chemical baths used in the etching of circuit boards;

— the photographic industry (small and large scale) in particular use in products intended for home use by amateur photographers, for photo developers who develop film for amateur photographers, some professional products and also use in x-ray film;

— production of phenolic oximes/epoxy resins;

— the preparation of paint resin and also as a paint mixture stabiliser.

The need for further marketing and use restrictions should be considered at Community level if the measures taken in these sectors are shown to be inadequate.

For possible use in biocides as an active substance, within the legislative framework currently in force at Community level for biocidal products, it is recommended that due consideration be taken of the results of the risk assessment.

For use in pesticides as an active substance, within the legislative framework currently in force at Community level for plant protection products ([10]), national authorities when granting authorisation decisions and in particular in cases where significant environmental impact is already experienced at local level should take into due consideration the results of the risk assessment. In such cases encouragement should be given to the development and use of alternatives to nonylphenol and nonylphenol ethoxylates.

For the use as an adjuvant/co-formulant ([11]) in pesticide and biocidal products national authorities when granting authorisation decisions and in particular in cases where significant environmental impact is already experienced at local level should take into due consideration the results of the risk assessment. Encouragement should be given to the development and use of alternatives to nonylphenol and nonylphenol ethoxylates and the adoption of other measures aimed at modifying consumer behaviour.

Furthermore, information should be disseminated to all interested parties in the Community to ensure protection of the environment.

([9]) Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1) introduces provisions for pollution reduction measures at Community level. Based on the list of priority substances in Annex X of the Directive, the Commission will propose quality standards and emission controls, including emission limit values two years after adoption of the list. For certain 'priority hazardous substances' amongst the priority substances, the emission controls shall aim at the cessation or phase-out of discharges, emissions and losses within 20 years. Nonylphenols are included as a 'priority hazardous substance' in the first list of priority substances which has been proposed by the Commission in February 2000 (COM (2000) 47 final (OJ C 177 E, 27.6.2000, p. 74) as amended by COM (2001) 17 final of 16 January 2001). The first list of priority substances including nonylphenols was adopted on 11 June 2001 by the Council thus allowing the measures under Directive 2000/60/EC to be used as an additional instrument to reduce risks to or via the aquatic environment.

([10]) In the framework of Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ L 230, 19.8.1991) it is foreseen that nonylphenol and nonylphenol ethoxylates as active substances in pesticides will be withdrawn from the market as from July 2003.

([11]) For the time being this use is not subject to Community evaluation in the framework of 91/414/EEC.

For the possible uses of nonylphenol and nonylphenol ethoxylates in veterinary medicinal products, within the legislative framework currently in force at Community level for veterinary medicinal products, it is recommended to holders of marketing authorisations for products containing the substances that they should substitute them with less harmful alternatives.

For the use of sludge containing nonylphenol and nonylphenol ethoxylates, within the legislative framework currently in force at Community level for sludge management, it is recommended that consideration be given to the development of provisions on concentration limit values for nonylphenol and nonylphenol ethoxylates when sludge is spread on land.

The measures identified to protect the environment will also reduce human exposure.

PART 4

CAS No 84852-15-3 Einecs No 284-325-5

Molecular formula:	$C_{15}H_{24}O$
Einecs Name:	Phenol, 4–nonyl-, branched
IUPAC Name:	4–nonylphenol, branched
Rapporteur:	United Kingdom
Classification ([12]):	Xn; R22, C; R34 N; R50-53

The risk assessment is based on current practices related to the life-cycle of the substance produced in or imported into the European Community as described in the risk assessment forwarded to the Commission by the Member State Rapporteur.

The risk assessment has, based on the available information, determined that in the European Community the substance is mainly used as an intermediate in the production of nonylphenol ethoxylates e.g. in detergents and paints and in the production of resins, plastics and stabilisers in the polymer industry. Other uses include the manufacture of phenolic oximes for use outside the EU in the metal extraction industry and in some specialty paints.

I. **RISK ASSESSMENT**

A. *HUMAN HEALTH*

The conclusion of the assessment of the risks to

WORKERS, CONSUMERS, HUMANS EXPOSED VIA THE ENVIRONMENT

is that there is a need for further information and/or testing. This conclusion is reached because there is a need for better information to adequately characterise the risks for human health.

This conclusion is reached while evaluation of the available data submitted in accordance with the relevant provisions of Regulation (EEC) No 793/93 is underway ([13]).

B. *ENVIRONMENT*

The conclusion of the assessment of the risks to the

ATMOSPHERE

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

([12]) The classification of the substance is established by Commission Directive 2001/59/EC of 6 August 2001 adapting to technical progress for the 28th time Council Directive 67/548 on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ L 225, 21.8.2001, p. 1).

([13]) The need for further information and/or testing applies to one scenario only. The full conclusions of the human health risk assessment will be published in a subsequent Commission recommendation.

— the risk assessment shows that risks related to the environmental spheres mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

The conclusions of the assessment of the risks to the

AQUATIC ECOSYSTEM and TERRESTRIAL ECOSYSTEM are:

1. that there is need for further information and/or testing. This conclusion is reached because of:

   — concerns for effects on the aquatic spheres including sediment.

   The information and/or test requirements are:

   — further toxicity testing on sediment organisms.

   However, the implementation of the strategy for limiting risks for the environment in Section II Part 4 of the Annex will eliminate the need for further information requirements;

   and

2. that there is a need for specific measures to limit the risks. This conclusion is reached because of:

   — concerns for effects on local and regional aquatic environmental spheres including sediment as a consequence of exposure arising from nonylphenol production ([14]), production of phenolic oximes ([15]), phenol/formaldehyde resins, epoxy resins ([16]) and other plastic stabilisers, nonylphenol ethoxylate production, formulation and use,

   — concerns for effects for terrestrial spheres as a consequence of exposure arising from the production, formulation and uses of nonylphenol ethoxylates in veterinary medicines, captive use by the chemical industry, electrical engineering, industrial and institutional cleaning, in leather processing, metal extraction, in the photographic, pulp and paper, polymer and textile industry, in paint manufacture and in civil and mechanical engineering,

   — concerns for effects on secondary poisoning to fish and earthworm predators as a consequence of exposure arising from nonylphenol ethoxylate production and formulation, and the use of nonylphenol ethoxylates in industrial and institutional cleaning, the electrical engineering industry, the paints, lacquers and varnish industry, civil engineering, leather processing, metal extraction, the pulp, paper and board industry, and in textile processing.

The conclusion of the assessment of the risks for

MICRO-ORGANISMS IN THE SEWAGE TREATMENT PLANT

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

— the risk assessment shows that risks related to the environmental spheres mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

II. **STRATEGY FOR LIMITING RISKS**

for the ENVIRONMENT:

Marketing and use restrictions should be considered at Community level to protect the environment from the use of nonylphenol/nonylphenol ethoxylates (NP/NPEs) in particular in:

— industrial, institutional and domestic cleaning,

— textiles processing,

([14]) For these uses risks to the aquatic environment only occur because of the contribution of background concentrations to local levels. The same applies to the use of nonylphenol ethoxylates in agricultural pesticide formulations, small scale photographic processes and domestic and industrial emulsion paints.

([15]) For these uses risks to the aquatic environment only occur because of the contribution of background concentrations to local levels. The same applies to the use of nonylphenol ethoxylates in agricultural pesticide formulations, small scale photographic processes and domestic and industrial emulsion paints.

([16]) For these uses risks to the aquatic environment only occur because of the contribution of background concentrations to local levels. The same applies to the use of nonylphenol ethoxylates in agricultural pesticide formulations, small scale photographic processes and domestic and industrial emulsion paints.

— leather processing,

— agriculture (biocidal products, in particular use in teat dips),

— metal working,

— pulp and paper industry,

— cosmetics including shampoos and other personal care products.

Further work is necessary to establish those uses for which derogations can be justified.

In addition to the above, and recognising development of new Community procedures, additional measures for nonylphenol and nonylphenol ethoxylates should be considered including pollution prevention measures ([17]) at Community level, as appropriate, for the following sectors:

— production of nonylphenol and nonylphenol ethoxylates;

— use of nonylphenol ethoxylates in the synthesis of other chemicals (captive use);

— use of nonylphenol ethoxylates in emulsion polymerisation in particular use in acrylic esters used for specialist coatings, adhesives and fibre bonding;

— production of phenol/formaldehyde resins using nonylphenol;

— production of other plastic stabilisers using nonylphenol.

The results achieved through marketing and use restrictions and pollution control measures should be monitored and if necessary additional measures should be considered. In particular, consideration should be given to other Community instruments ([18]) to ensure control of environmental concentrations of nonylphenol and nonylphenol ethoxylates via the objectives as set-out in those instruments. These measures should be applied to the above sectors and those listed below:

— formulation (in sectors where nonylphenol/nonylphenol etoxylates use will continue);

— civil and mechanical engineering including the manufacture of wall construction materials, road surface materials and also in the cleaning of metals;

— additives in lubricating oil and in the blending of fuel additive packages;

— electronics/electrical engineering in particular use in fluxes in the manufacture of painted circuit boards, in dyes to identify cracks in printed circuit boards and as a component of chemical baths used in the etching of circuit boards;

— the photographic industry (small and large scale) in particular use in products intended for home use by amateur photographers, for photo developers who develop film for amateur photographers, some professional products and also use in X-ray film;

— production of phenolic oximes/epoxy resins;

— the preparation of paint resin and also as a paint mixture stabiliser.

The need for further marketing and use restrictions should be considered at Community level if the measures taken in these sectors are shown to be inadequate.

([17]) Work currently underway at Community level in the framework of Directive 96/61/EC in developing BAT Reference Documents (BREFs) that cover various chemical processes may be particularly significant in this respect. Further information on the matter can be obtained consulting the European IPPC Bureau website: http://eippcb.jrc.es

([18]) Directive 2000/60/EC introduces provisions for pollution reduction measures at Community level. Based on the list of priority substances in Annex X of the Directive, the Commission will propose quality standards and emission controls, including emission limit values two years after adoption of the list. For certain 'priority hazardous substances' amongst the priority substances, the emission controls shall aim at the cessation or phase-out of discharges, emissions and losses within 20 years. Nonylphenols are included as a 'priority hazardous substance' in the first list of priority substances which has been proposed by the Commission in February 2000 (COM (2000) 47 final, OJ C 177 E, 27.6.2000, p. 74; as amended by COM (2001) 17 final of 16 January 2001). The first list of priority substances including nonylphenols was adopted on 11 June 2001 by the Council thus allowing the measures under Directive 2000/60/EC to be used as an additional instrument to reduce risks to or via the aquatic environment.

For possible uses in biocides as an active substance, within the legislative framework currently in force at Community level for biocidal products, it is recommended that due consideration be taken of the results of the risk assessment.

For use in pesticides as an active substance, within the legislative framework currently in force at Community level for plant protection products ([19]), national authorities when granting authorisation decisions and in particular in cases where significant environmental impact is already experienced at local level should take into due consideration the results of the risk assessment. In such cases encouragement should be given to the development and use of alternatives to nonylphenol and nonylphenol ethoxylates.

For the use as an adjuvant/co-formulant ([20]) in pesticide and biocidal products national authorities when granting authorisation decisions and in particular in cases where significant environmental impact is already experienced at local level should take into due consideration the results of the risk assessment. Encouragement should be given to the development and use of alternatives to nonylphenol and nonylphenol ethoxylates and the adoption of other measures aimed at modifying consumer behaviour.

Furthermore, information should be disseminated to all interested parties in the Community to ensure protection of the environment.

For the possible use of nonylphenol and nonylphenol ethoxylates in veterinary medicinal products, within the legislative framework currently in force at Community level for veterinary medicinal products, it is recommended to holders of marketing authorisations for products containing the substances that they should substitute them with less harmful alternatives.

For the use of sludge containing nonylphenol and nonylphenol ethoxylates, within the legislative framework currently in force at Community level for sludge management, it is recommended that consideration be given to the development of provisions on concentration limit values for nonylphenol and nonylphenol ethoxylates when sludge is spread on land.

The measures identified to protect the environment will also reduce human exposure.

PART 5

CAS No 1634-04-4 Einecs No 216-653-1

Molecular formula:	$C_5H_{12}O$
Einecs Name:	*tert*-butyl methyl ether
Rapporteur:	Finland
Classifcation:	not yet classified

The risk assessment is based on current practices related to the life-cycle of this substance produced in or imported into the European Community as described in the Comprehensive Risk Assessment forwarded to the Commission by the Member State Rapporteur.

The risk assessment has, based on the available information, determined that in the European Community the substance is mainly used as a fuel-additive in petrol. Other uses are in chemical and pharmaceutical industry and laboratories.

I. **RISK ASSESSMENT**

A. *HUMAN HEALTH*

The conclusion of the assessment of the risks to

WORKERS

is that there is a need for specific measures to limit the risks. This conclusion is reached because of:

— concerns for repeated dose local skin effects as a consequence of exposure arising from maintenance operations and automotive repair.

([19]) In the framework of Directive 91/414/EEC it is foreseen that nonylphenol and nonylphenol ethoxylates as active substances in pesticides will be withdrawn from the market as from July 2003.

([20]) For the time being this use is not subject to Community evaluation in the framework of Directive 91/414/EEC.

The conclusion of the assessment of the risks to

CONSUMERS

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

— the risk assessment shows that risks are not expected. Risk reduction measures already being applied are considered sufficient.

The conclusion of the assessment of the risks to

HUMANS EXPOSED VIA THE ENVIRONMENT

is that there is a need for specific measures to limit the risks. This conclusion is reached because of:

— concerns for the potability of drinking water in respect of taste and odour as a consequence of exposure arising from leaking underground storage tanks and spillage from overfilling of the storage tanks.

The conclusion of the assessment of the risks to

HUMAN HEALTH (physico-chemical properties)

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

— the risk assessment shows that risks are not expected. Risk reduction measures already being applied are considered sufficient.

B. *ENVIRONMENT*

The conclusion of the assessment of the risks to the

AQUATIC ECOSYSTEM are:

1. there is a need for further information and/or testing. This conclusion is reached because:

   — there is a need for better information to adequately characterise the risks to the aquatic eco-system regarding the emission of the substance to surface water.

   The information and/or test requirements are:

   — a tiered testing strategy for the investigation of the avoidance behaviour of fish and possibly wildlife related to water contaminated with the substance;

   and

2. there is a need for specific measures to limit the risks. The conclusion is reached because of:

   — concerns for the aquatic eco-system as a consequence of exposure arising from releases to surface water from terminal site storage tank bottom waters.

The conclusion of the assessment of the risks to

GROUNDWATER

is that there is a need for specific measures to limit the risks. The conclusion is reached because of:

— concerns for the potability of groundwater in respect of taste and odour as a consequence of exposure arising from leaking underground storage tanks and spillage from overfilling of the storage tanks.

The conclusion of the assessment of the risks to

ATMOSPHERE and TERRESTRIAL ECOSYSTEM

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

— the risk assessment shows that risks are not expected. Risk reduction measures already being applied are considered sufficient.

The conclusion of the assessment of the risks to

MICRO-ORGANISMS IN THE SEWAGE TREATMENT PLANT

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

— the risk assessment shows that risks are not expected. Risk reduction measures already being applied are considered sufficient.

II. **STRATEGY FOR LIMITING RISKS**

For WORKERS:

The legislation for workers' protection currently in force at Community level is generally considered to give an adequate framework to limit the risks of the substance to the extent needed.

Furthermore, and without prejudice to Community legislation in force in the area ([21]), it is recommended to investigate how to improve the design of fuel filter position in cars and fuel pumps so to facilitate maintenance and repair work while aiming at minimum skin exposure to petrol. It is therefore suggested to pursue discussions with relevant organisations of industry branches in this respect.

For HUMANS EXPOSED VIA THE ENVIRONMENT:

It is considered that measures, presented below, aiming at protection of groundwater will contribute to preventing the contamination of drinking water.

For the ENVIRONMENT:

The prevention of all anthropogenic inputs, including MTBE, to groundwater is a key objective of current Community legislation ([22]). It is recommended therefore that monitoring programmes be undertaken, where appropriate, in order to permit the early detection of groundwater contaminated by MTBE.

It is further recommended that the best available techniques be widely applied for the construction and operation of petrol underground storage and distribution facilities at service stations. In this regard Member States should consider mandatory requirements especially for all service stations in groundwater recharge areas. Furthermore, it is recommended that harmonised technical standards for the construction and operation of the storage tanks be developed at a European level by the European Committee for Standardisation (CEN). Potential past release sites, located on critical areas, should be investigated and, where necessary, remediated.

Furthermore, exchange of information on these programmes and their results should be promoted.

It is also recommended that MTBE containing bottom waters of above-ground storage tanks be controlled by plant permits ([23]) or national rules.

To facilitate the permitting (as well as any fixing of national rules) these issues are included in the ongoing work to develop guidance on 'Best Available Techniques' (BAT) ([24]).

It is recommended that Member States carefully monitor the implementation of BAT in this respect and report any important developments in BAT to the Commission in the framework of the exchange of information on BAT.

([21]) Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles (OJ L 76, 6.4.1970, p. 1).

([22]) Directive 2000/60/EC.

([23]) Plant permits issued under Directive 96/61/EC.

([24]) Work currently underway at Community level in the framework of Directive 96/61/EC in developing BAT Reference Documents (BREFs) that cover MTBE production and handling, including design and management of storage modes.

COMMISSION DECISION

of 8 November 2001

laying down a questionnaire to be used for annual reporting on ambient air quality assessment under Council Directives 96/62/EC and 1999/30/EC

(notified under document number C(2001) 3405)

(Text with EEA relevance)

(2001/839/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management [1], and in particular Article 11 thereof,

Whereas:

(1) Directive 96/62/EC establishes the framework for assessment and management of ambient air quality.

(2) Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air [2] lays down limit values to be met on a certain target date.

(3) Regular reporting by Member States is an integral element of that legislation.

(4) A number of items set out in Article 11 of Directive 96/62/EC, in conjunction with Annexes I, II, III, IV and V to Directive 1999/30/EC, in Article 3, Article 5 and Article 9(6) of Directive 1999/30/EC must be reported on an annual basis.

(5) According to Directive 1999/30/EC, provisions on reporting under Council Directive 80/779/EEC on air quality limit values and guide values for sulphur dioxide and suspended particulates [3], Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air [4] and Council Directive 85/203/EEC of 7 March 1982 on air quality standards for nitrogen dioxide [5] are repealed with effect from 19 July 2001, although the limit values under these Directives remain in force until 2005 for Directives 80/779/EEC and 82/884/EEC, and 2010 for Directive 85/203/EEC and reporting on exceedences of these limit values continues according to Article 9(6) of Directive 1999/30/EC.

(6) In order to ensure that the required information is supplied in the correct format, Member States should be required to submit it on the basis of a standardised questionnaire.

(7) The measures provided for in this Decision are in accordance with the opinion of the Committee instituted by Article 12(2) of Directive 96/62/EC,

HAS ADOPTED THIS DECISION:

Article 1

Member States shall use the questionnaire set out in the Annex as a basis for forwarding the information to be provided on an annual basis under Article 11 of Directive 96/62/EC, in conjunction with Annexes I, II, III, IV and V, and Articles 3, 5 and 9(6) of Directive 1999/30/EC.

Article 2

This Decision is addressed to the Member States.

Done at Brussels, 8 November 2001.

For the Commission
Margot WALLSTRÖM
Member of the Commission

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[1] OJ L 296, 21.11.1996, p. 55.
[2] OJ L 163, 29.6.1999, p. 41.
[3] OJ L 229, 30.8.1980, p. 30.
[4] OJ L 378, 31.12.1982, p. 15.
[5] OJ L 87, 27.3.1985, p. 1.

ANNEX

REPORTING QUESTIONNAIRE

on Council Directive 96/62/EC on ambient air quality assessment and management and Council Directive 1999/30/EC relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air

MEMBER STATE: . . . . . .

CONTACT ADDRESS: . . . . . .

REFERENCE YEAR: . . . . . .

COMPILATION DATE: . . . . . .

The following forms distinguish between items that are legally required to report and items that are voluntary to report for the Member State. Voluntary items are printed in italic.

Many of the forms below contain and indefinite number of rows or columns to be filled in. In the form description, the number of empty rows or columns to be filled in is then limited to three and a dashed borderline indicates that the form should be extended as needed.

In addition to the forms, which are to be filled in by the Member State, some tables are also provided. The tables provide information such as fixed codes that are not to be changed by the Member State.

LIST OF FORMS

Form 1	Contact body and address
Form 2	Delimitation of zones and agglomerations
Form 3	Stations used for assessment and measuring methods
Form 4	Methods used to sample and measure PM_{10} and $PM_{2,5}$: optional additional codes to be defined by the Member State
Form 5	List of zones and agglomerations where levels exceed or do not exceed limit values or limit values plus margin of tolerance
Form 6	List of zones and agglomerations where levels exceed or do not exceed upper assessment thresholds or lower assessment thresholds, including information on the application of supplementary assessment methods
Form 7	Individual exceedences of limit values and limit values plus the margin of tolerance
Form 8	Reasons for individual exceedences: optional additional codes to be defined by the Member State
Form 9	Monitoring data on 10 minutes mean SO_2 levels
Form 10	Monitoring data on 24hr mean $PM_{2,5}$ levels
Form 11	Tabular results of and methods used for supplementary assessment
Form 12	List of references to supplementary assessment methods referred to in Form 11
Form 13	Exceedence of limit values for SO_2 due to natural sources
Form 14	Natural SO_2 sources: optional additional codes to be defined by Member State
Form 15	Exceedence of limit values of PM_{10} due to natural events
Form 16	Exceedence of limit values of PM_{10} due to winter sanding
Form 17	Consultations on transboundary pollution
Form 18	Exceedences of limit values laid down in Directives 80/779/EEC, 82/884/EEC and 85/203/EEC
Form 19	Reasons for exceedences of limit values laid down in Directives 80/779/EEC, 82/884/EEC and 85/203/EEC: optional additional codes to be defined by the Member State

LIST OF TABLES

Form 1: Contact body and address

Name of the contact body	
Postal address	
Name of the contact person	
Telephone of the contact person	
Fax of contact person	
E-mail address of contact person	
Comments for clarification if needed	

Note to Form 1:

The Member State is asked to fill in the contact body, and if possible, the contact person at national level, that the Commission may approach on details regarding this questionnaire if needed.

Form 2: Delimitation of zones and agglomerations (96/62/EC Articles 5 and 11(1)(b))

	Zones		
Full zone name			
Zone code			
Pollutant(s), possibly separate protection targets, to which the zone applies			
Type (ag/nonag)			
Area (km^2)			
Population			
Border coordinate pairs			
Border coordinate pairs			
Border coordinate pairs			

Notes to Form 2:

(1) The Member State should give not only the zone name, but also a unique zone code.

(2) The Member State should indicate the pollutant(s) to which the zone applies using the codes: 'S' for SO_2, 'N' for NO_2/NO_x, 'P' for PM_{10} and 'L' for lead, separated by a semicolon, or 'A' if the zone applies to all these pollutants. If zones have been separately defined for health, ecosystem and vegetation protection, the Member State should use the following codes: 'SH' for SO_2 health protection, 'SE' for SO_2 ecosystem protection, 'NH' for NO_2 health protection and 'NV' for NO_x vegetation protection.

(3) It should be indicated whether the zone is an agglomeration (code: 'ag') or not (code: 'nonag').

(4) Optionally, the Member States may add the area and population size of the zone for further processing of the data at European level.

(5) For further processing, the Member State is requested to fill in the zone borders in a standard format (polygons, using the geographical coordinates according to ISO 6709: geographical longitude and latitude). The Member State is requested to provide separately a map of the zones (as an electronic file or on paper) to facilitate the correct interpretation of the zone data. The Member State must provide at least either the zone borders in Form 2 or a map.

Form 3: Stations used for assessment and measuring methods (1999/30/EC Annex IX)

Station-code	Local station-code	Zone code(s)	Use for Directive				Use for Directive/Measuring method code for PM_{10} and $PM_{2,5}$		Correction factor or equation used		Function of station
			SO_2	NO_2	NO_x	Lead	PM_{10}	$PM_{2,5}$	PM_{10}	$PM_{2,5}$	

Notes to Form 3:

(1) In Form 3 and other forms in this questionnaire, 'station code' refers to the code that is already in use for the exchange of data under the Exchange of Information Decision 97/101/EC. 'Local station code' is the code used within the Member State or region.

(2) The Member State is requested to identify in the third column the zone(s) in which the station is located. If more than one zone is concerned, the codes should be separated by a semicolon.

(3) The Member State is requested to use the columns headed by 'SO_2', 'NO_2', 'NO_x' and 'Lead' for indicating whether the measurement is used for assessment under Directive 1999/30/EC, ticking with '+' if used and leaving the cell empty if not used. It should be noted that ticking NO_x implies that the station is sited at a location where the limit value for vegetation applies. If the station is in the immediate vicinity of specific sources of lead as referred to in Annex IV to Directive 1999/30/EC, the Member State is requested to tick with 'SS' instead of '+'.

(4) The Member State should use the columns headed by 'PM_{10}' and '$PM_{2,5}$' for indicating whether the measurement is used for assessment under Directive 1999/30/EC and indicate at the same time which measurement method is used. If the measurement is used for assessment under the Directive, the Member State fills in the measuring method code (see Note 5); if the measurement is not used for assessment under the Directive, the cell is left empty. For $PM_{2,5}$ levels formal assessment under Article 6 of Directive 96/62/EC is not required.

(5) The measurement method code for PM_{10} and $PM_{2,5}$ can be indicated by one of the standard codes provided by this questionnaire (see Table 1) or a code defined by the Member State that refers to a separate list of methods described by the Member State (see Form 4). The description defined by the Member State may also be a reference to a separate document added to the questionnaire. If the measurement method has been changed during the year, the Member State is requested to fill in both method codes: first the method that was used for the longest time in the year, followed by the other one, separated by a semicolon.

(6) When the measurement method for PM_{10} or $PM_{2,5}$ is not the reference method, respectively the provisional reference method, set out in Directive 1999/30/EC, Annex IX, the Member State is requested to fill in the correction factor by which the measured concentrations have been multiplied to obtain the concentrations reported in this questionnaire or to fill in the corresponding correction equation. If a correction equation has been applied, a free format can be used in which the measured concentration should be denoted by 'CM' and the reported concentration by 'CR', preferably using the format CR = f(CM). If the results of the method have been demonstrated to be equivalent without the application of a correction, the Member State is requested to indicate this by entering the value 'l' of the correction factor or equation.

(7) 'Function of station' indicates whether the station is sited at a location where (a) the limit values for health, the SO_2 limit value for ecosystems and the NO_x limit value for vegetation apply (code 'HEV'), (b) only the limit values for health and the SO_2 limit value for ecosystems apply (code 'HE'), (c) only the limit value for health and the NO_x limit value for vegetation apply (code 'HV') or (d) only the limit values for health apply (code 'H').

Table 1: Methods used to sample and measure PM_{10} and $PM_{2,5}$: standard codes

Method code	Description
M1	Beta-absorption
M2	Gravimetry
M3	Oscillating microbalance

Form 4: Methods used to sample and measure PM_{10} and $PM_{2,5}$: optional additional codes to be defined by the Member State (1999/30/EC Annex IX)

Method code	Description

Form 5: List of zones and agglomerations where levels exceed or do not exceed limit values (LV) or limit values plus margin of tolerance (LV + MOT) (96/62/EC Articles 8, 9 and 11 and 1999/30/EC Annexes I, II, III and IV)

— Form 5a: List of zones in relation to limit value exceedences for SO_2

Zone code	LV for health (1hr mean)			LV for health (24hr mean)		LV for ecosystems (annual mean)		LV for ecosystems (winter mean)	
	> LV + MOT	≤ LV + MOT; > LV	≤ LV	> LV	≤ LV	> LV	≤ LV	> LV	≤ LV

— Form 5b: List of zones in relation to limit value exceedences for NO_2/NO_x

Zone code	LV for health (1hr mean)			LV for health (annual mean)			LV for vegetation	
	> LV + MOT	≤ LV + MOT; > LV	≤ LV	> LV + MOT	≤ LV + MOT; > LV	≤ LV	> LV	≤ LV

— Form 5c: List of zones in relation to limit value exceedences for PM_{10}

Zone code	LV (24hr mean) Stage 1			LV (annual mean) Stage 1			LV (24hr mean) Stage 2			LV (annual mean) Stage 2		
	> LV + MOT	≤ LV + MOT; > LV	≤ LV	> LV + MOT	≤ LV + MOT; > LV	≤ LV	> LV + MOT	≤ LV + MOT; > LV	≤ LV	> LV + MOT	≤ LV + MOT; > LV	≤ LV

— Form 5d: List of zones in relation to limit value exceedences for lead

Zone code	LV			
	> LV + MOT	≤ LV + MOT; > LV	≤ LV	SS

Notes to Form 5:

(1) The column headings have the following meaning:

> LV + MOT: above the limit value plus the margin of tolerance;

≤ LV + MOT; > LV: below or equal to the limit value plus the margin of tolerance but above the limit value;

≤ LV: below or equal to the limit value;

> LV: above the limit value;

SS: due to specific sources, see Note 7.

(2) '> LV + MOT' should be read as '> LV' when the margin of tolerance has decreased to 0 %. In that case the column headed by '≤ LV + MOT; > LV' should not be used.

(3) If the column heading describes the status of the zone, tick with '+'.

(4) If exceedence has been concluded from model calculations, tick with 'm' instead of '+'.

(5) For thresholds for ecosystems and vegetation, tick only when exceedence occurred in areas where these limit values apply.

(6) The winter mean is defined as the period from 1 October of the year preceding the reference year to 31 March of the reference year.

(7) If the exceedence status indicated in Form 5 is solely due to exceedence in an area in the immediate vicinity of specific sources designated according to Annex IV to Directive 1999/30/EC, the Member State is requested to indicate this by ticking column 'SS' by '+'.

Form 6: List of zones and agglomerations where levels exceed or do not exceed upper assessment thresholds (UAT) or lower assessment thresholds (LAT), including information on the application of supplementary assessment methods (96/62/EC Article 6 and 1999/30/EC Article 7(3) and Annex V)

— Form 6a: List of zones in relation to threshold exceedences and supplementary assessment for SO_2

Zone code	UAT and LAT related to health LV (24hr mean)			UAT and LAT related to ecosystems LV (winter mean)			SA
	> UAT	≤ UAT; > LAT	≤ LAT	>UAT	≤ UAT; > LAT	≤ LAT	

— Form 6b: List of zones in relation to threshold exceedences and supplementary assessment for NO_2/NO_x

Zone code	UAT and LAT related to health LV (1hr mean)			UAT and LAT related to health LV (annual mean)			UAT and LAT related to vegetation LV			SA
	> UAT	≤ UAT; > LAT	≤ LAT	> UAT	≤ UAT; > LAT	≤ LAT	> UAT	≤ UAT; > LAT	≤ LAT	

— Form 6c: List of zones in relation to threshold exceedences and supplementary assessment for PM_{10}

Zone code	UAT and LAT (24hr mean)			UAT and LAT (annual mean)			SA
	> UAT	≤ UAT; > LAT	≤ LAT	>UAT	≤ UAT; > LAT	≤ LAT	

— Form 6d: List of zones in relation to threshold exceedences and supplementary assessment for lead

Zone code	UAT and LAT			SA
	> UAT	≤ UAT; >LAT	≤ LAT	

Notes to Form 6:

(1) The column headings have the following meaning:

> UAT: above the upper assessment threshold;

≤ UAT; > LAT: below or equal to upper assessment threshold, but above the lower assessment threshold;

≤ LAT: below or equal to the lower assessment threshold;

SA: supplementary assessment, see Note 6.

(2) If the column heading describes the status of the zone, tick with '+'.

(3) If exceedence has been concluded from model calculations, tick with 'm' instead of '+'.

(4) For thresholds for ecosystems, tick only when exceedence occurred in areas where the limit values for ecosystems apply.

(5) Exceedence of UAT and LAT is judged on the basis of the reference year and the preceding four years in accordance with the specification in Annex V(II) to Directive 1999/30/EC.

(6) The Member State is requested to indicate in the column 'SA' whether information from fixed measuring stations has been supplemented by information from other sources as referred to in Article 7(3) of Directive 1999/30/EC.

Form 7: Individual exceedences of limit values and limit values plus margin of tolerance (MOT) (96/62/EC Article 11(1)(a)(i) and (ii) and 1999/30/EC Annexes I, II, IV and V)

— Form 7a: Exceedence of SO_2 limit value plus MOT for health (1hr mean)

Zone code	Station code	Date	Hour	Level ($\mu g/m^3$)	Reason code(s)

— Form 7b: Exceedence of SO_2 limit value for health (24hr mean)

Zone code	Station code	Date	Level ($\mu g/m^3$)	Reason code(s)

— Form 7c: Exceedence of SO_2 limit value for ecosystems (annual mean)

Zone code	Station code	Level ($\mu g/m^3$)	Reason code(s)

— Form 7d: Exceedence of SO_2 limit value for ecosystems (winter mean)

Zone code	Station code	Level ($\mu g/m^3$)	Reason code(s)

— Form 7e: Exceedence of NO_2 limit value plus MOT for health (1hr mean)

Zone code	Station code	Date	Hour	Level ($\mu g/m^3$)	Reason code(s)

— Form 7f: Exceedence of NO_2 limit value plus MOT for health (annual mean)

Zone code	Station code	Level ($\mu g/m^3$)	Reason code(s)

— Form 7g: Exceedence of NO_x limit value for vegetation

Zone code	Station code	Level ($\mu g/m^3$)	Reason code(s)

— Form 7h: Exceedence of PM_{10} limit value plus MOT (stage 1, 24hr mean)

Zone code	Station code	Date	Level ($\mu g/m^3$)	Reason code(s)

— Form 7i: Exceedence of PM_{10} limit value plus MOT (stage 1, annual mean)

Zone code	Station code	Level ($\mu g/m^3$)	Reason code(s)

— Form 7j: Exceedence of lead limit value plus MOT

Zone code	Station code	Level ($\mu g/m^3$)	Reason code(s)

Note to Form 7:

(1) Identifying the station by filling in the station code is not mandatory, but highly recommended.

(2) The phrase 'limit value plus MOT' should be read as 'limit value' when the margin of tolerance has decreased to 0 %.

(3) The date should be indicated as 'dd/mm/yy' and the hour as '1' for the hour between 00:00h and 01:00h etc.

(4) All exceedences of the limit value plus the margin of tolerance at a station are reported if the total number of exceedences is above the allowed number. If the total number of exceedences at a station is lower than or equal to the allowed number, no exceedences are reported.

(5) The reason of exceedence can be indicated by one or several standard codes provided by this questionnaire (see Table 2) or a code defined by the Member State that refers to a separate list of reasons described by the Member State (Form 8). If more than one reason is indicated, the codes should be separated by a semicolon. The description given by the Member State could also be a reference to a separate document added to the questionnaire.

Table 2: Reasons for individual exceedences: standard codes

Reason code	Description
S1	Heavily trafficked urban centre
S2	Proximity to a major road
S3	Local industry including power production
S4	Quarrying or mining activities
S5	Domestic heating
S6	Accidental emission from industrial source
S7	Accidental emission from non-industrial source
S8	Natural source(s) or natural event(s)
S9	Winter sanding of roads
S10	Transport of air pollution originating from sources outside the Member State

Form 8: Reasons for individual exceedences: optional additional codes to be defined by the Member State (96/62/EC Article 11(1)(a)(i) and (ii) and 1999/30/EC Annexes I, II, IV and V)

Reason code	Description

Form 9: Monitoring data on 10 minutes mean SO_2 levels (1999/30/EC Article 3(3))

Station code	The number of concentrations averaged over 10 minutes which have exceeded 500 µg/m³	The number of days within the calendar year on which such exceedences occurred	The number of the days referred to in the previous column, on which hourly concentrations of sulphur dioxide simultaneously exceeded 350 µg/m³	The maximum concentration averaged over 10 minutes recorded (µg/m³)	Date on which the maximum concentration occurred (dd/mm/yy)

Note to Form 9:

Where it is not practicable for a Member State to record data on concentrations of sulphur dioxide averaged over 10 minutes this form does not have to be completed.

Form 10: Monitoring data on 24hr mean $PM_{2,5}$ levels (1999/30/EC Article 5(2))

Station code	Arithmetic mean ($\mu g/m^3$)	Median ($\mu g/m^3$)	98 percentile ($\mu g/m^3$)	Maximum concentration ($\mu g/m^3$)

Form 11: Tabular results of and methods used for supplementary assessment (1999/30/EC Article 7(3) and Annex VIII(II))

— Form 11a: Results of and methods used for supplementary assessment for SO_2

Zone code	Above LV for health (1hr mean)				Above LV for health (24hr mean)				Above LV for ecosystems (annual mean)				Above LV for ecosystems (winter mean)			
	Area		Population exposed		Area		Population exposed		Area		Ecosystem area exposed		Area		Ecosystem area exposed	
	km^2	Method	Number	Method	km^2	Method	Number	Method	km^2	Method	km^2	Method	km^2	Method	km^2	Method

— Form 11b: Results of and methods used for supplementary assessment for NO_2/NO_x

Zone code	Above LV for health (1hr mean)						Above LV for health (annual mean)						Above LV for vegetation			
	Area		Road length		Population exposed		Area		Road length		Population exposed		Area		Vegetation area exposed	
	km^2	Method	km	Method	Number	Method	km^2	Method	km	Method	Number	Method	km^2	Method	km^2	Method

— Form 11c.1: Results of and methods used for supplementary assessment for PM_{10} (Stage 1)

Zone code	Above LV (24hr mean)						Above LV (annual mean)					
	Area		Road length		Population exposed		Area		Road length		Population exposed	
	km^2	Method	km	Method	Number	Method	km^2	Method	km	Method	Number	Method

— **Form 11c.2: Results of and methods used for supplementary assessment for PM_{10} (Stage 2)**

Zone code	Above LV (24hr mean)						Above LV (annual mean)					
	Area		Road length		Population exposed		Area		Road length		Population exposed	
	km^2	Method	km	Method	Number	Method	km^2	Method	km	Method	Number	Method

— Form 11d: Results of and methods used for supplementary assessment for lead

Zone code	Above LV					
	Area		Road length		Population exposed	
	km^2	Method	km	Method	Number	Method

Notes to Form 11:

(1) 'Method' is a code defined by the Member State that refers to a separate list of references (Form 12) on publications or reports in which the supplementary method is documented. Form 12 is part of the report to the Commission; the publications or reports referred to are not to be sent to the Commission.

(2) Form 11 can be complemented by maps showing concentration distributions. It is recommended that the Member State, if possible, compiles maps showing concentration distributions within each zone and agglomeration. It is recommended to provide concentration iso-lines of the parameters in which the limit values are expressed (see Table 3) using iso-lines at intervals of 10 % of the limit value.

Table 3: Statistical parameters to be used in concentration maps

Pollutant	Parameter
SO_2	99,7 percentile of 1h mean
SO_2	99,2 percentile of 24h mean
SO_2	Annual mean
SO_2	Winter mean
NO_2	99,8 percentile of 1h mean
NO_2/NO_x	Annual mean
PM_{10} and $PM_{2,5}$	90,0 percentile of 24h mean
PM_{10} and $PM_{2,5}$	Annual mean
PM_{10} and $PM_{2,5}$	98,1 percentile of 24h mean
Lead	Annual mean

Form 12: List of references to supplementary assessment methods referred to in Form 11 (1999/30/EC Article 7(3) and Annex VIII(II))

Method	Full reference

Form 13: Exceedence of limit values of SO_2 due to natural sources (1999/30/EC Article 3(4))

— Form 13a: SO_2 limit value for health (1hr mean)

Zone	Station code	Number of exceedences measured	Natural source code(s)	Estimated number of exceedences after subtraction of natural contribution	Reference to justification

— Form 13b: SO_2 limit value for health (24hr mean)

Zone	Station code	Number of exceedences measured	Natural source code(s)	Estimated number of exceedences after subtraction of natural contribution	Reference to justification

— Form 13c: SO_2 limit value for ecosystems (annual mean)

Zone	Station code	Annual mean concentration	Natural source code(s)	Estimated annual mean concentration after subtraction of natural contribution	Reference to justification

— Form 13d: SO_2 limit value for ecosystems (winter mean)

Zone	Station code	winter mean concentration	Natural source code(s)	Estimated annual mean concentration after subtraction of natural contribution	Reference to justification

Note to Form 13:

The natural source can be indicated by one or several standard codes provided by this questionnaire (see Table 4) or a code defined by the Member State that refers to a separate list of natural sources described by the Member State (Form 14).

Table 4: Natural SO_2 sources: standard codes

Natural source code	Description
A1	Volcanism inside the Member State
A2	Volcanism outside the Member State
B	Coastal wetlands
C1	Natural fires inside the Member State
C2	Natural fires outside the Member State

Form 14: Natural SO_2 sources: optional additional codes to be defined by Member State (1999/30/EC Article 3(4))

Natural source code	Description

Form 15: Exceedence of limit values of PM_{10} due to natural events (1999/30/EC Article 5(4))

— Form 15a: Contribution of natural events to exceedence of the PM_{10} limit value (stage 1, 24hr mean)

Zone	Station code	Number of exceedences measured	Natural event code(s)	Estimated number of exceedences after subtraction of natural contribution	Reference to justification

— Form 15b: Contribution of natural events to exceedence of the PM_{10} limit value (stage 1, annual mean)

Zone	Station code	Annual mean	Natural event code(s)	Estimated number of exceedences after subtraction of natural contribution	Reference to justification

Note to Form 15:

The natural event can be indicated by one or several standard codes provided by this questionnaire (see Table 5).

Table 5: Natural events causing limit value exceedences for PM_{10}: standard codes

Natural event code	Description
A1	Volcanic eruption inside the Member State
A2	Volcanic eruption outside the Member State
B1	Seismic activity inside the Member State
B2	Seismic activity outside the Member State
C1	Geothermal activity inside the Member State
C2	Geothermal activity outside the Member State
D1	Wild-land fire inside the Member State
D2	Wild-land fire outside the Member State
E1	High wind event inside the Member State
E2	High wind event outside the Member State
F1	Atmospheric resuspension inside the Member State
F2	Atmospheric resuspension outside the Member State
G1	Transport of natural particles from dry regions inside the Member State
G2	Transport of natural particles from dry regions outside the Member State

Form 16: Exceedence of limit values of PM_{10} due to winter sanding (1999/30/EC Article 5(5))

— Form 16a: Contribution of winter sanding to exceedence of the PM_{10} limit value (stage 1, 24hr mean)

Zone	Station code	Number of exceedences measured	Estimated number of exceedences after subtraction of winter sanding contribution	Reference to justification

— Form 16b: Contribution of winter sanding to exceedence of the PM_{10} limit value (stage 1, annual mean)

Zone	Station code	Annual mean	Estimated annual mean concentration after subtraction of winter sanding contribution	Reference to justification

Form 17: Consultations on transboundary pollution (96/62/EC Article 8(6))

— Form 17a: General

Has the Member State consulted other Member States on significant air pollution originating in other Member States or conducted such consultations with non-EU countries? Please tick with '+' if yes or '–' if no:	(+ or –)

— Form 17b: Specification per country

If yes, please:	EU Member States															Non-EU countries		
	AT	BE	DE	DK	ES	FI	FR	GR	IE	IT	LU	NL	PT	SE	UK			
— tick the MS or country concerned																		
— tick if the agenda(s) of the consultations has/have been added to this report																		
— tick if the minutes of the consultations have been added to this report																		

Notes to Form 17b:

(1) Tick only if yes, using '+'.

(2) The Member State may indicate consultations with non-EU countries using the following country codes: Bosnia & Herzegovina: BA; Croatia: HR; Cyprus: CY; Czech Republic: CZ; Estonia: EE; Former Yugoslav Republic of Macedonia: MK; Hungary: HU; Iceland: IS; Latvia: LV; Liechtenstein: LI; Lithuania: LT; Malta: MT; Norway: NO; Poland: PL; Romania: RO; Slovakia: SK; Slovenia: SI; Switzerland: CH.

Form 18: Exceedences of limit values laid down in Directives 80/779/EEC, 82/884/EEC and 85/203/EEC to be reported under 1999/30/EC Article 9(6)

Pollutant	Limit value exceeded	Monitoring method used	Station code	Measured value ($\mu g/m^3$)	Reason code(s)	Measures taken

Notes to Form 18:

(1) The numerical value of the limit value exceeded should be indicated in the second column.

(2) For SO_2 and suspended particulates it should be indicated whether the black-smoke or the gravimetric method was used.

(3) Identifying the station is not mandatory, but highly recommended.

(4) The reason for exceedence can be indicated by one or several standard codes provided by this questionnaire (see Table 5) or a code defined by the Member State that refers to a separate list of reasons described by the Member State (Form 19). If more than one reason is indicated, the codes should be separated by a semicolon. The description given by the Member State could also be a reference to a separate document added to the questionnaire.

Form 19: Reasons for exceedences of limit values laid down in Directives 80/779/EEC, 82/884/EEC and 85/203/EEC: optional additional codes to be defined by the Member State (1999/30/EC Article 9(6))

Reason code	Description