

COMMISSION DECISION

of 29 January 2003

confirming measures notified by Belgium pursuant to Article 6(6) of Directive 94/62/EC of the European Parliament and the Council on packaging and packaging waste

(notified under document number C(2003) 361)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(2003/82/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 94/62/EC of the European Parliament and the Council of 20 December 1994 on packaging and packaging waste ⁽¹⁾, and in particular Article 6(6) thereof,

Having consulted the Committee set up under Article 21 of Directive 94/62/EC,

Whereas:

I. PROCEDURE

1. Directive 94/62/EC

Directive 94/62/EC on packaging and packaging waste, based on Article 95 (ex Article 100a) of the Treaty, aims to harmonise national measures concerning the management of packaging and packaging waste in order to prevent any impact thereof on the environment or to reduce such impact, thus providing a high level of environmental protection, and to ensure the functioning of the internal market and to avoid obstacles to trade as well as distortions and restrictions of competition within the Community. To this end, Article 6(1) of the Directive lays down, *inter alia*, quantified targets to be achieved by Member States for recovery and recycling of packaging waste.

Article 6(1)(a) of the Directive establishes that, no later than 30 June 2001, between 50 % as a minimum and 65 % as a maximum by weight of the packaging waste will be recovered. Pursuant to Article 6(1)(b), within this general target, and within the same time limit, between 25 % as a minimum and 45 % as a maximum by weight of the totality of packaging materials contained in packaging waste will be recycled, with a minimum of 15 % by weight for each packaging material.

Article 6(6) of the Directive introduces a monitoring procedure to ensure coherence between the different strategies chosen by Member States, particularly with a view to ensure that targets

set in one Member State do not hinder compliance by other Member States with the Directive or represent distortions of the internal market.

Under that provision, the Commission is to confirm such measures after appropriate verification.

2. The measure notified

2.1. Background

In Belgium, the Federal State is competent to transpose Directive 94/62/EC as regards product-related issues (such as, for instance, Article 9 and Annex II). The fixing of targets for recovery and recycling of the packaging materials contained in the packaging waste, as laid down in Article 6 of Directive 94/62/EC, comes into the exclusive competence of the Regions.

In order to ensure a coherent and consistent transposition and implementation of Directive 94/62/EC and in particular its Article 6, the three Belgian Regions concluded a Cooperation Agreement on the prevention and management of packaging waste on 30 May 1996 (hereinafter Cooperation Agreement) ⁽²⁾.

Article 3(2) of the Cooperation Agreement of 1996 contained the following recycling and recovery targets to be achieved by the concerned economic operators, in each of the three Regions, i.e. Flanders, Wallonia and Brussels, both as regards household packaging waste and industrial packaging waste:

	Recycling	Recovery	Minimum recycling rate by weight for each packaging waste
1998	Minimum: 45 %	Minimum: 70 %	15 %
1999	Minimum: 50 %	Minimum: 80 %	15 %

⁽²⁾ It sets out the obligation for economic operators (packaging fillers and users, including importers in case the packaging was filled outside Belgium) to take-back and recycle/recover the packaging materials contained in the packaging waste put on the market (Article 6 of the Cooperation Agreement), either individually or by contracting a third party (Articles 7(1) of the Cooperation Agreement), and to achieve quantified targets for recycling and recovery (Article 3(2) of the Cooperation Agreement).

⁽¹⁾ OJ L 365, 31.12.1994, p. 10.

The Cooperation Agreement was notified by the Belgian authorities on 13 July 1996 pursuant to Article 6(6) and was confirmed by Commission decision 1999/652/EC of 15 September 1999 ⁽¹⁾.

2.2. Revision of the Cooperation Agreement

On 1 August 2001, the Belgian authorities notified to the Commission a draft revision of the Cooperation Agreement, in the context of the procedure established by Directive 83/189/EC ⁽²⁾. The aim of the notified measure is to increase the recycling and recovery targets established by Article 3 of Cooperation Agreement of 1996.

The revised Article 3 of the Cooperation Agreement would establish the following targets:

	Recycling	Recovery	Minimum recycling rate by weight for each packaging waste
2000	50 %	80 %	15 %
2001	60 %	80 %	20 %
2002	65 %	85 %	25 %
2003	70 %	90 %	30 %

Those revised targets are based on a cost-benefit analysis conducted by the Belgian authorities.

Article 3(2) states that the calculation method for the attainment of those recycling and recovery targets will be established by the Interregional Commission for Packaging (Interregionale Verpakkingscommissie) ⁽³⁾. It stipulates furthermore that the overall recovery target equals the sum of the attained recycling target, organic recycling and energy recovery and that mechanical recycling can be counted for the attainment of the recycling target. As from 1 January 2003, the Interregional Commission of Packaging will formulate new proposals for the overall recycling and recovery targets as from 2003. Those future targets will depend on the evolution of recycling and recovery capacities and the modes of selective collection.

Finally it should be noted that the revised Cooperation Agreement will not enter into force retroactively. The increased targets will only apply as from the moment of publication of the revised Cooperation Agreement in the Belgian official journal.

⁽¹⁾ OJ L 257, 2.10.1999, p. 20.

⁽²⁾ OJ L 109, 26.4.1983, p. 8. This Directive has been replaced by Directive 98/34/EC, OJ L 204, 21.7.1998, p. 37.

⁽³⁾ For 2001, the calculation method will mirror the 1996 calculation method.

3. Opinions

Article 6(6) of the Directive states that the Commission shall take a decision, after a verification of the measures in cooperation with Member States. To this end, the Commission consulted the Member States on this notification in the context of the Committee established by Article 21 of Directive 94/62/EC (Article 21 Committee).

A first exchange of views took place during the Article 21 Committee meeting of 6 February 2002. Member States were invited to send written comments to the Commission. During the Article 21 Committee meeting of 6 February 2002, the delegation from Belgium explained that in their view there was no problem with Belgium setting higher national targets for packaging recycling. In their opinion export markets were able to absorb the additional quantities of waste packaging and therefore that there would be no capacity problems which would prevent the Commission from accepting the Belgian proposal. France questioned this assumption and indicated that they may be opposed to the proposed higher national targets in Belgium. Spain and Italy also stated their general concern on the internal market effects of higher national targets.

On 29 April 2002, France submitted written comments on the Belgian notification to the Commission. The French authorities mentioned a specific concern that the increased recycling rates of the revised Cooperation Agreement may lead to capacity problems in the French glass recycling sector. Since Belgium no longer disposes of glass recycling capacity ⁽⁴⁾, it will export its glass to recycling capacities in neighbourhood-countries, including to France. In France, the recycling capacities for glass are limited. Increased exports of glass to France could create capacity problems in France. Moreover, the Belgian exported glass is cheaper than the French glass. Therefore, the French authorities expressed their concern that the Belgian measure could create distortions of the internal market and hinder France in attaining their obligations under the Directive.

On 15 May 2002, the Commission asked Belgium to clarify certain elements of its notification. In response to this request, the Commission received additional information from the Belgian authorities on 20 June 2002.

During the Article 21 Committee of 25 July 2002, the Commission presented an overview of the information provided by the Belgian authorities and the French authorities' concerns. Some other Member States, notably Italy and Spain, indicated their doubts as to whether Belgium has appropriate recycling capacities for glass. Belgium clarified they lost their recycling capacity for glass, due to competition on the internal market.

⁽⁴⁾ As indicated by the Belgian authorities in their notification, the situation for glass on the Belgian market has changed since the notification of the initial Cooperation Agreement in 1996. Indeed, the Verlipack group, which was the only Belgian group to use container glass from households with a recycling capacity of approximately 160 000 tonnes of glass per year, has disappeared from the market in 1999. The Belgian authorities argue, however, that no capacity problems in the glass sector will occur because of the existence of neighbouring recycling capacity located in other Member States.

II. ASSESSMENT

In this case, Belgium has asked for a derogation from Article 6(1)(a) and (b) of Directive 94/62/EC. Article 6(6) of the Directive allows Member States to go beyond targets set in Article 6(1)(a) and 6(1)(b) if the Member State provides to this effect appropriate capacities for recycling and recovery. The measures must be taken in the interest of a high level of environmental protection and on the condition that they avoid distortions of the internal market and do not hinder compliance by other Member States with the Directive. Nor may they constitute an arbitrary means of discrimination or a disguised restriction on trade between Member States.

Hereinafter, the Commission will assess whether the Belgian notified measure is consistent with those considerations.

(a) Appropriate capacities for recovery and recycling

This requirement is interpreted by the Commission as not imposing on Member States self-sufficiency with respect to recycling and recovery. Member States may also have recourse to capacities located in other Member States and third countries in order to fulfil their recycling and recovery targets. This, however, makes it difficult to carry out a precise quantification of available capacities, since recycling takes place in an open international market.

This criterion serves also the purpose of ensuring that measures taken in one Member State do not result in problems of compliance with the Directive for other Member States; therefore it should be seen in conjunction with the other criteria laid down in Article 6(6). In practice, compliance with this criterion is a signal for compliance with criteria (b) and (c). In particular, if targets are set exceeding those laid down in Article 6(1), it should be ensured that this is not to the detriment of collection and recycling schemes in other Member States.

Consultation of the other Member States revealed that some Member States have doubts as to whether Belgium disposes of the appropriate capacities for recovery and recycling for glass and France indicated concerns related to its own glass recycling capacities. The Belgian authorities stated that there are no capacity problems, because there are sufficient recycling capacities at the borderline areas (notably in Germany, the Netherlands and France). Moreover, in their view, a restrictive application of the criteria of Article 6(6) of Directive 94/62/EC would be contrary to the internal market, since it is because of the competition on this internal market that Belgium has lost its glass recycling capacity on its territory. Furthermore, the notified measure does not have a negative impact, because in practice, the proposed targets are already attained. In 1999, the agreed body for household waste in Belgium announced a recycling rate of 73,0 % and the agreed body for industrial waste announced a recycling rate of 77,9 %. As regards the price of Belgian glass, the Belgian authorities clarified that public tenders determine the price of Belgian glass. On the basis of

those tenders, it seems that as from 2002, exports to France will decrease and exports to the Netherlands and Germany will increase.

It should be noted that since the last notification of 1996, the situation on the Belgian market for glass has changed because the most important Belgian recycling centre has disappeared because of competition on the internal market. However, the situation for metal packaging, non ferrous metals, mechanical recycling of synthetic materials, and paper and board on the Belgian market has not changed since the 1996 notification. For those materials, Belgium has sufficient recycling capacities on its territory.

On the basis of the foregoing, the Commission concludes that since there is no obligation to recycle packaging within a country, the measure needs to be seen in the context of an overall assessment of the European and/or global market for recycled material. Therefore, unless there is a general market saturation which is due to technical and market limitations and cannot be overcome by additional financing, it should be assumed that appropriate capacities are available, independently of whether this is within or outside the concerned Member State. In general, this seems the case for the targets envisaged by Belgium. Nevertheless, there are some signs for saturation of the glass market. From the available information, it is, however, impossible to generally conclude that additional material cannot find appropriate capacities.

(b) Potential distortions of the internal market

Distortions of the internal market occur when high recycling rates are accompanied by a high degree of financing through e.g. licence fees, resulting in lower prices for secondary materials. If in another country the level of ambition is lower and less financing is provided, the domestically collected secondary materials will be more expensive than imported material. If, in addition, recycling capacities are limited, it may be difficult for those countries with low ambitions to find a market for their own collected material.

Consultation of the other Member States revealed that some Member States fear distortions of the internal market. The Belgian authorities state that a risk of internal market distortions does not exist in the light of the small size of the Belgian market and of the progressive application of the notified measure. In practice, the notified measure would not have any impact because the attained recycling targets for glass in Belgium are already much higher than the ones proposed by the notified measure (Belgium reported a recycling rate of 87,5 % of glass packaging in 2001). Glass recycling is awarded on the basis of public tenders, which determine the price for the Belgian glass. Finally, the maximum collection capacity on the Belgian market seems to be attained, and therefore it is to be expected that in the future, the amount of collected glass will not substantially increase.

The Commission finds that the fact that the small size of the Belgian market cannot be used as a reason for being treated differently than larger countries. Similarly, existing high recycling rates and unlikely further increases do not exclude that there are already distortions of the internal market. However, as glass recycling is awarded on the basis of public tenders, it can be assumed that the price is equal to the European and/or global market price for cullet. Therefore, the level of provided financing cannot be expected to be substantially different from other countries. Therefore, it is difficult to determine with a sufficient degree of certainty that the Belgian targets have or will have distorting effects on the internal market.

On the basis of the foregoing, the Commission concludes that it does not dispose of sufficient elements showing that the Belgian recycling and recovery targets would lead to potential distortions of the internal market.

(c) Non-hindrance of compliance by other Member States with the Directive

The purpose of this criterion is to assess whether a national measure hinders other Member States to comply with the targets of the Directive. As outlined in point b, this can be the case if a high degree of financing is provided in one country whereas in other countries the level of financing is lower and if recycling capacities are limited.

The assessment of the notified measures in light of this criterion should primarily be made taking into account the opinion of the Member States whose compliance with the targets of the Directive could be endangered by measures set up in other Member States. France has indicated that the notified measure could endanger this Member States' obligations under the Directive with respect to glass.

In line with the reasoning in point b, the Commission could not find sufficiently clear evidence that the measure notified by Belgium would be capable of hindering compliance of this Member State's obligations under the Directive.

(d) No arbitrary means of discrimination

The Belgian measure apply without distinction to all packaging waste, whether arising from domestic or imported products. Consultations of the other Member States have not indicated any possible arbitrary means of discrimination.

(e) No disguised restriction on trade between Member States

This concept refers to possible restrictions on imports of products from other Member States and to indirect protection of domestic production. The packaging wastes to which the Belgian measure refers are goods which fall under the scope of Articles 28 to 30 of the EC Treaty and consequently measures

taken in the field of waste management are also capable, in certain circumstances, of restricting trade or protecting domestic production. In this particular case, the content of the Belgian measure and its application do not seem to allow for the conclusion that restriction on trade are caused by the Belgian notified measure.

III. CONCLUSION

The Commission, in the light of the information provided by Belgium and of the outcome of the consultation of the Member States described in the above considerations, concludes that the measure notified by Belgium pursuant to Article 6(6) of Directive 94/62/EC should be confirmed since it has been verified that:

- appropriate capacities for recovery and recycling of the material collected under the Belgian targets are available,
- the measure does not lead to distortions of the internal market,
- the measure does not hinder compliance by other Member States with the Directive,
- the measure does not constitute an arbitrary means of discrimination,
- the measure does not constitute a disguised restriction on trade between Member States.

It should be noted, however, that signs of saturation of the market for collected cullet have been reported. Belgium is encouraged to observe the glass market with particular care and to make sure that the levels of collection in Belgium do not exceed the capacities of the glass market,

HAS DECIDED AS FOLLOWS:

Article 1

The measure notified by Belgium which exceed the maximum recovery and recycling target laid down respectively in Article 6(1)(a) and (b) of Directive 94/62/EC are hereby confirmed.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 29 January 2003.

For the Commission
Margot WALLSTRÖM
Member of the Commission