

Producer Responsibility in Dutch Waste Law¹

Introduction

Producer responsibility is an important component of Dutch Waste Law. A person who markets a product has full or partial responsibility for the disposal of that product in the waste phase. Producer responsibility has been implemented for the most important waste streams by means of agreements between producers and importers, by regulation or by a combination of the two.

The background of introducing producer responsibility relates first of all to the idea that giving producers some or all of the financial and/or physical responsibility for managing their products in the waste phase will reduce environmental pressures. This is also in line with the polluter pays principle.

Producer responsibility has been introduced, either on a voluntary basis, or by regulation (or a combination of the two) for: cars, car-tyres, batteries, packaging waste, paper/cardboard, plastic film for agriculture, PVC exterior building materials, PVP piping, hazardous photographic waste and electrical and electronic equipment.

Legal Framework

The Environmental Management Act provides for the relevant framework concerning the introduction of producer responsibilities in waste law. Chapter 10 of the Act contains rules on waste and Part 10.2 covers preventive measures. Under Article 10.4 of the Act, Decrees in Council may be issued 'in the interests of preventing or limiting the creation of waste'. Article 10.4. has served as legal ground for *i.a.* the:

- 1998 Disposal of White and Brown Goods Decree
- 1995 Disposal of Batteries Decree
- 1995 Car Tyre Disposal Decree
- 2002 End-of-Life Vehicle Decree.

A relevant distinction may be made in any discussion of disposal structures. Disposal structures can be divided into voluntary, compulsory and hybrid structures.

Currently, voluntary disposal structures have been set up for paper and carton, plastic cladding elements, PVC pipes and tubes, and hazardous photographic waste. In this paper I will not discuss voluntary disposal structures in detail.

Compulsory disposal structures are those required by law. Such compulsory structures exist for, among other things, end-of-life vehicles, car tyres, batteries and white and brown goods. Below we shall consider the *Disposal of White and Brown Goods Decree* in some detail.²

Other compulsory disposal structures follow a similar pattern. For this reason the structure for white and brown goods can serve as an example. Nevertheless, we shall also briefly consider the specific features of the Disposal of Batteries Decree and the End-of-Life Vehicle Decree.

Finally, hybrid disposal structures must be mentioned. Hybrid disposal structures contain both compulsory and voluntary elements. Such hybrid structures exist for packaging waste and for agricultural thin films. Packaging waste is covered by the *Convenant Verpakkingen II*, or *Environmental Agreement on Packaging II*. Under the *Regeling verpakking en*

¹ This paper builds upon and contains quotes from Hans Vedder, *Competition Law, Environmental Policy and Producer Responsibility* (Groningen 2002).

² An unofficial translation of the text of the Decree is annexed.

verpakkingsafval, or *Packaging and Packaging Waste Regulations*, the Minister for the Environment and the market parties are given the option of concluding an environmental agreement.

Disposal of White and Brown Goods Decree

Since the 1st of June 1998 the Disposal of White and Brown Goods Decree has come into force. The central issues of the decree are the following:

- manufacturers and importers are obliged to take back free of charge and process all discarded white and brown goods (Article 5);
- manufacturers and importers shall give the Minister notification of the manner in which they will perform the taking back and processing;
- it is prohibited to incinerate or to landfill products that have been collected or taken back separately;
- when supplying a new product, suppliers shall take back as a minimum free of charge a similar product that has been discarded after use and that is tendered to them;
- the last user does not have to pay at the moment of discarding of his product;
- it will be prohibited to have in stock for commercial purposes refrigerators and freezers containing CFC's, discarded after use;
- under Article 9 of the Decree, financing the so called 'chain deficit' is the manufacturer's responsibility

Manufacturers and importers can implement their responsibility in two different ways. They can opt for an individual solution or a collective solution. In the latter case the Decree offers two possibilities: making a joint notification, or concluding an environmental agreement.

Under Article 10(1) of the Decree, a manufacturer or importer is required to notify the Minister of the Environment concerning the manner in which he plans to implement the obligations under the Decree. Articles 10(2) and (3) list a number of items that must at the very least be mentioned in the notification. These are worked out in more detail in the Explanatory Note and the Guidelines to the Decree.³ The Explanatory Note makes it clear that individual notification is not the preferred option.

Article 4 of the Decree offers the possibility of concluding an environmental agreement between the Minister of the Environment and one or more importers or manufacturers. The Explanatory Note also observes that an environmental agreement may contain agreements that are contrary to competition law. It particularly mentions Article 6 of the Competition Act and the rule laid down by Article 10 taken together with Article 81 of the EC Treaty.

Under Article 11(1) of the Decree, both individual and collective notification require the Minister of the Environment's consent.

The Guidelines open with a number of general remarks concerning the minister's consent to a notification. Paragraph 4.1 contains the so-called 'Competition Authority proviso'. Setting up a disposal scheme, whether jointly or otherwise, can entail the conclusion of agreements. Such agreements may be covered by the Competition Act. According to the Guidelines the minister will only consent to notification 'subject to the proviso that no agreements are entered into which conflict with the Competition Act.' Where manufacturers and importers conclude such agreements, they will have to submit an application for exemption to the Competition Authority.

³ Both texts are available (in English) on request: just give me an email!

Disposal of Batteries Decree

The overall design of the Disposal of Batteries Decree is very similar to the Disposal of White and Brown Goods Decree. It does, however, contain a number of rules specifically addressing product batteries. Notification of a disposal scheme may be either individual or collective, but there is no provision for concluding an environmental agreement. The explanatory note expresses a clear preference for a joint solution. Here, too, the possibility of a disposal fee is mentioned. Producer responsibility extends to historical waste, and in that respect the order contains not only a definite preference for a collective solution, but also incentives to arrive at such a solution, similar to those in the Disposal of White and Brown Goods Decree.

Part 15.10 of the Environmental Management Act⁴ provides for the possibility of declaring a disposal fee binding on an entire sector. The principal condition for this is that it should be ‘in the interest of the efficient disposal of waste’. The request for this must come from a ‘significant majority’ of the industry. The Ministry of the Environment has produced guidelines on the subject. These contain a ‘Competition Authority proviso’ under which the Minister for the Environment will only declare such a fee binding on an entire sector when it is clear that there are no competition law problems.

Given the present state of the law, problems are indeed anticipated where it is required that the disposal fee is passed on and/or invoiced separately. Inclusion of this ‘Competition Authority proviso’ is probably designed to implement the requirement contained in Article 15.36(1) of the Environmental Management Act that the Minister for Economic Affairs be consulted. There is no indication in the legislative history of these provisions as to precisely what this requirement implies.

Packaging and Packaging Waste Regulations

EC Directive 94/62 on packaging and packaging waste is implemented in national legislation in the Packaging and Packaging Waste Regulations (based on Article 21.6, subArticle of the Environmental Management Act).

The Regulations impose various obligations on individual producers and importers of packaging. The Regulations however gave the packaging supply chain the option of concluding a covenant in which the various parties (industry & government) would agree how the obligations in the Regulations would be implemented. In that case the individual obligations would not apply. The packaging supply chain took advantage of this opportunity. In force is the Packaging Covenant II. The Covenant is made of six sub-covenants and an umbrella covenant. Five of the sub-covenants deal with the recycling of five different types of materials (paper fibre, glass, metal, plastic and wood). The sixth of these sub-covenant contains agreements on prevention and recycling. The umbrella covenant specifies the main objective and regulates a number of general matters, such as monitoring and the settlement of disputes. The Covenant has been signed by industrial organisations, individual companies or groups of companies, the Ministry.

End-of Life Vehicles

In 2002 309,721 end-of-life vehicles have been processed. 88% has been processed via the system of *Auto Recycling Nederland* (ARN). Auto Recycling Nederland was established by the Dutch automobile industry with the aim of bringing about drastic reductions in the amount of waste generated by scrap cars (end-of-life vehicles).

⁴ See Annex.

Thanks to the ARN-system in 2002 85% in weight of end-of-life vehicles has been re-used. This percentage must increase, required by law, to 95% by 2007. The regulatory framework is now provided by the *2002 End-of-Life Vehicles Decree*, which is meant to implement EU-Directive 2000/53. However, the system existed already before 2002, albeit on a voluntary basis.

The recycling system is financed by a waste disposal fee. Everyone applying for a car registration for the first time in the Netherlands pays a waste disposal fee. The fee is 45 euro and has been declared generally binding for the period 1 January 2001 up to and including 31 December 2003. The waste disposal fee is collected by ARN and used to pay out waste removal premiums.

Key elements of the the Decree are:

- the requirement for the producer to take preventive measures (eco-design, use of recyclable materials); Article 3 Decree.
- the requirement for producer and importeur to set up a take-back system (Article 8 sub a) Decree);
- the requirement to set up a processing system (Article 8 sub c) Decree);
- end-of-life vehicles must be taken back free of charge (Article 8 sub b) Decree);
- 85% in weight of end-of-life vehicles re-use target (Article 9 Decree);
- 95% in weight of end-of-life vehicles re-use target by 2007 (Article 9 Decree);
- Individual or collective notification to the minister for the Environment (Articles 12 and 16 Decree).

In the Explanatory Note to the Decree it is mentioned that the Decree contains, in some aspects, more stringent measures than the Directive:

- the explicit requirement in Article 8 sub c) of setting up a processing system;
- producer responsibility is applicable immediately and by 1/1/2007, implying full financial responsibility for all cars, independent age.
- more stringent re-use targets.

Competition Law Problems

The White and Brown Goods Decree itself mentions the possibility that a collective approach to producer responsibility might conflict with the competition rules. The relevant Dutch competition rules are contained in the *Mededingingswet*, or *Competition Act* and entered into force on 1 January 1998. I will not go into any details of either Dutch or European competition law, but instead will focus on the ‘problems’ caused by competition law.

Very briefly it could be said that as far as collective disposal schemes are concerned there is only one problem in the relationship between Dutch environmental legislation and competition law. The relevant Dutch environmental legislation indicates a clear preference for a *collective* solution for the requirement of producer responsibility. However, where manufacturers and importers respond to this preference by setting up a collective scheme, their co-operation will be subject to the rules laid down in the Competition Act.

Two distinct aspects of the problem can be distinguished: a substantive and a procedural problem. The substantive problem follows from the fact that the Dutch Competition Authority (*NMa*), in its decisions on collective disposal schemes, does not take sufficient account of the positive effects referred to above. It can be deduced from the decisions of the *NMa* that the authority is not generally ill-disposed towards collective disposal schemes financed by means of a disposal fee. Though disposal fees as such are regarded as anti-competitive, agreements about setting such fees may be exempted. However, from the policy currently pursued by the

NMa, it can be implied that agreements that include the compulsory passing on of a disposal fee that is mentioned separately on the invoice will not qualify for exemption.

Earlier we saw that when the Minister for the Environment consents to a notification, he makes a so-called *NMa* proviso. In practice this means that the Minister for the Environment only approves a notification subject to the proviso that the scheme as a whole is not contrary to competition law. Therefore, a collective disposal structure requires the consent of the Minister for the Environment but will also have to be notified to the *NMa* and perhaps even to the European Commission.

Annex Environmental Management Act

TITLE 15.10 WASTE DISPOSAL SUPPLEMENTS

Article 15.35

For the purposes of the implementation of this title and the provisions based thereupon, the following definitions shall apply:

waste disposal supplement: a contribution towards the costs of collecting, storing, treating, processing, destroying or landfilling, or otherwise disposing of a substance, preparation or other product as waste;

waste disposal supplement agreement: a written agreement between those who import or market in the Netherlands a particular substance, preparation or other product, for the payment of a waste disposal supplement.

Article 15.36

1. Should it prove necessary in the interests of the efficient disposal of waste substances, Our Minister may, in response to a well-founded request and after consultation with Our Minister for Economic Affairs, declare a waste disposal supplement agreement binding on all those who import or market in the Netherlands a particular substance, preparation or other product.

2. Our Minister shall lay down rules regarding the matters which ought to be included in a waste disposal supplement agreement for which a universally binding declaration is requested, and regarding the information to be submitted with a request as referred to in subArticle 1. Such information shall in any case include anything showing that a reasonable effort was made to prevent users of that substance, preparation or other product being obliged in practice to pay a contribution for its disposal more than once.

Article 15.37

1. A request as referred to in Article 15.36 may be submitted only by individuals or organisations whose joint turnover of the substances, preparations or other products in question, in the opinion of Our Minister, means that they constitute a significant majority of those who import or market in the Netherlands those substances, preparations or other products. Concerning the question of whether those who have submitted such a request, or their organisations, do in fact constitute a significant majority, Our Minister shall in any event take into account the number of such persons or organisations in proportion to the total number of those who import or market in the Netherlands those substances, preparations or other products.

2. Our Minister shall give notification of the submission of the request in the Government Gazette (Staatscourant) and one or more national newspapers. Article 3:20 of the General Administrative Law Act shall apply *mutatis mutandis*, with the proviso that only the substance of the request shall be stated and that any person may submit their misgivings about the request in writing only.

3. Our Minister shall take a decision on the request within sixteen weeks of its submission. Should it prove impossible to take a decision until an obligation ensuing from a treaty which is binding upon the Netherlands or a decision of an international Organisation which is binding upon the Netherlands has been met, the deadline for the decision shall be postponed until such time as the procedure relating to that obligation has been completed. The applicant shall be informed of the postponement.

4. Our Minister shall publish the decision taken on the request by announcing it in the Government Gazette. The statement of the grounds on which the decision is based shall in any event indicate the consideration given to the views expressed concerning the request. Should

Our Minister's decision declare an agreement concerning a waste disposal supplement universally binding, the text of the agreement shall be placed in the Government Gazette.

5. Our Minister shall also publish the decision taken on the request by providing notification of the substance of the decision in one or more national daily newspapers, stating the place where the decision on the request may be consulted in the Government Gazette.

Article 15.38

1. Our Minister may, if requested, grant exemption from a waste disposal supplement agreement which has been declared universally binding if the applicant undertakes to ensure that the waste substance in question is disposed of in such a way that, in the opinion of Our Minister, it is at least as effective as the disposal method stipulated in the universally binding waste disposal supplement agreement in question.

2. Exemption may be granted subject to restrictions. Conditions may be attached to the exemption.

3. An exemption granted pursuant to subArticle 1 may be altered or revoked in response to a request to that effect or without such a request. Article 15.39, subArticle 2 shall apply mutatis mutandis, the interests referred to in part b being replaced by: failure to fulfil the requirement referred to in subArticle 1 of this Article.

4. With regard to the giving of a decision as referred to in subArticles 1 and 3, Article 15.37, subArticles 2 to 5 shall apply mutatis mutandis. Prior to reaching a decision, Our Minister shall inform the exemption holder of his intention to alter or revoke an exemption, except in cases where the exemption holder requests alteration or revocation.

Article 15.39

1. A decision given pursuant to Article 15.36, subArticle 1 shall be valid for a maximum period of five years, which is to be stated in the decision.

2. After consultation with Our Minister for Economic Affairs, Our Minister may revoke a decision given pursuant to Article 15.36, subArticle I if:

a. the information provided in respect of the request is found to be so incorrect or incomplete that another decision would have been taken if the correct information had been known at the time the request was assessed;

b. on the basis of hindsight or a change in circumstances, it must be assumed that the interests of the effective disposal of waste substances would be unacceptably prejudiced should the decision remain in force;

c. a treaty or decision of an international Organisation which is binding upon the Netherlands, or regulations for the implementation thereof, give cause for revocation.

3. Before withdrawing a decision given pursuant to Article 15.36, subArticle 1 on the basis of subArticle 2a, Our Minister shall give those who submitted the request for the agreement to be made universally binding the opportunity to express their views. Our Minister shall also publish the revocation of the decision in the Government Gazette.

4. Article 15.37, subArticles 2, 4 and 5 shall apply mutatis mutandis to the proposal to revoke a decision given pursuant to Article 15.36, subArticle 1 on the grounds referred to in subArticle 2b or 2c.

Article 15.40

Each individual shall be bound to comply with an agreement which applies to him and which has been declared universally binding in respect of any other individual who has a reasonable interest in compliance.

Article 15.41

If one or more of the persons responsible for importing into, or marketing in, the Netherlands a substance, preparation or other product on which a waste disposal supplement agreement has been declared universally binding considers that there are reasonable grounds to suspect that one or more other persons are failing to comply with one or more of the universally binding provisions in the agreement, such a person or persons may request Our Minister to investigate the matter, with a view to taking legal action pursuant to Article 15.40. The inspector shall institute the investigation, and report its findings to Our Minister. Our Minister shall make the report available to the person or persons who had requested it.