JUDGMENT OF THE GENERAL COURT (Second Chamber)

22 March 2011 *

In Case T-419/03,

Altstoff Recycling Austria AG, formerly Altstoff Recycling Austria AG and ARGEV Verpackungsverwertungs-Gesellschaft mbH, established in Vienna, represented by H. Wollmann, lawyer,

applicant,

v

European Commission, represented initially by W. Mölls, then by W. Mölls and H. Gading, and finally by W. Mölls and R. Sauer, acting as Agents,

defendant,

* Language of the case: German.

supported by

EVA Erfassen und Verwerten von Altstoffen GmbH, established in Vienna, represented by A. Reidlinger and I. Hartung, lawyers,

and by

Bundeskammer für Arbeiter und Angestellte, established in Vienna, represented by K. Wessely, lawyer,

interveners,

APPLICATION for annulment of Articles 2 and 3 of Commission Decision 2004/208/EC of 16 October 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Cases COMP D3/35470 — ARA and COMP D3/35743 — ARGEV, ARO) (OJ 2004 L 75, p. 59),

THE GENERAL COURT (Second Chamber),

composed of I. Pelikánová, President, K. Jürimäe and S. Soldevila Fragoso (Rapporteur), Judges,

Registrar: K. Andová,

having regard to the written procedure and further to the hearing on 15 June 2010,

gives the following

Judgment

Background to the dispute

1 Altstoff Recycling Austria AG ('ARA') is a public limited company, privately owned, founded in 1993. Its owner and sole shareholder is Altstoff Recycling Austria Verein ('the ARA Association'). The ARA Association includes firms in the packaging industry, the bottling and packing industry and the retail trade.

2 ARA operates a countrywide collection and recycling system for packaging in Austria. At the material time, within the framework of this system, ARA concluded waste disposal contracts with economically independent sectoral recycling companies (Branchenrecyclinggesellschaften — 'BRGs'), assigning to them the task of organising the collection, sorting, transport and recycling of packaging. Each BRG was responsible for specific categories of packaging materials. The BRGs in turn concluded service contracts with regional partners, that is to say with undertakings or local authorities, which then do the actual collection, sorting, transport and recycling of packaging ('partner agreements'). ARA and the BRGs together form 'the ARA system.'

3 At the material time, the ARA system comprised eight BRGs, namely ARGEV Verpackungsverwertungs-Gesellschaft mbH ('ARGEV'), which was responsible for the collection, sorting and conditioning of metal packaging (ferrous, aluminium) and of light packaging (wood, ceramics, plastics, bonded materials, textile fibre); Österreichischer Kunststoff Kreislauf AG ('ÖKK'), which was responsible for the recycling of plastic and textile-fibre packaging; Aluminium-Recycling GmbH ('Alurec'), which was responsible for the recycling of aluminium packaging collected by ARGEV; Arbeitsgemeinschaft Verbundmaterialien GmbH, which was responsible for the recycling of packaging made of bonded materials, except for bonded drinks cartons; Verein für Holzpackmittel ('VHP'), which was responsible for the recycling and some collection of wood packaging; Ferropack Recycling GmbH ('Ferropack'), which was responsible for the recycling of ferrous metal packaging collected by ARGEV; Altpapier-Recycling-Organisationsgesellschaft mbH ('ARO'), which was responsible for collection and recycling of packaging made of paper, cardboard, paperboard or corrugated board and, finally, Austria Glas Recycling GmbH ('AGR'), which was responsible for the collection and recycling of glass packaging. On 14 September 2009, ARA took over ARGEV and the other BRGs in the ARA system, with the exception of AGR.

4 At the material time, ARGEV was operating three collection systems: a household system for light packaging, a household system for metal packaging and a commercial system for light and metal packaging. ARGEV's shareholders at the material time were ARA, which had an 11% holding, and the ARGEV Association, which comprised around a hundred members, including manufacturers and importers, retailers, the packaging industry and disposal/recycling firms.

5 ARA offers its services to all Austrian and foreign businesses directly affected by the Ordinance of the Federal Minister for the Environment, Youth and Family Affairs on the avoidance and recycling of packaging waste and certain waste goods and the establishment of collection and recycling systems (Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen und bestimmten Warenresten und die Einrichtung von Sammel- und Verwertungssystemen) (BGBl., 648/1996), which

came into force on 1 December 1996 ('the Packaging Ordinance'). The Packaging Ordinance is based on the Austrian Law on waste management (Abfallwirtschaftsgesetz) (BGBl., 434/1996), as amended (BGBl., 102/2002), ('the Law'), and implements Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10). In addition, the rights of licensees in relation to the BRGs are represented by ARA acting as trustee.

6 On 24 March 1994, the Bundeskammer für Arbeiter und Angestellte (Federal Chamber of Wage and Salary-earners — 'the BAA') lodged a complaint against the ARA system with the European Free Trade Association Surveillance Authority ('the EFTA Surveillance Authority'). This complaint has since been transferred to the European Commission.

7 On 30 June 1994, ARA and ARGEV notified various agreements to the EFTA Surveillance Authority seeking negative clearance or alternatively a block exemption from the ban on restrictive practices. By letter of 21 March 1995, responsibility for examining these notified agreements was transferred to the Commission.

8 On 8 May 1996 FRS Folien-Rücknahme-Service GmbH & Co KG and Raiffeisen Umweltgesellschaft mbH lodged a complaint with the Commission against the planned formation of a joint venture to set up a collection and recycling system for packaging. However, the complainants did not pursue their complaint.

9 By letter of 28 August 2001, ARA notified further agreements to the Commission and, with ARGEV, also sought to have their notifications joined with a view to obtaining negative clearance or exemption under Article 81(3) EC. At the same time, ARO applied to become a party to the notification as it, too, wished to notify agreements. The notification concerned agreements which together form the basis of the ARA system, that is to say:

— the dispensation and licence agreements between ARA and undertakings obligated under the Packaging Ordinance (without list of charges),

— the waste disposal contract between ARA and ARGEV as a model for the waste disposal contracts concluded between ARA and the other BRGs (Arbeitsgemeinschaft Verbundmaterialien GmbH, ARO, AGR, Alurec, VHP, Ferropack and ÖKK);

— the waste disposal or cooperation contracts between ARGEV and ÖKK and between ARGEV and Alurec, as models for the contracts concluded by ARGEV with ÖKK, Alurec, Ferropack and VHP;

— the contracts concluded by ARGEV and ARO with their respective regional disposal partners.

10 By letters of 19 February 1996 and 22 March 2002, the BAA submitted a statement on the ARA system to the Commission, citing the complaint it had lodged against the system with the EFTA Surveillance Authority on 24 March 1994. By letter of 27 April 2000, EVA Erfassen und Verwerten von Altstoffen GmbH ('EVA') submitted

a complaint against the companies in the ARA system, which took up and elaborated on the initial complaint lodged on 8 May 1996 by FRS Folien-Rücknahme-Service and Raiffeisen Umweltgesellschaft.

11 On 24 July 2002, the Commission decided to initiate proceedings in the present case.

12 The Commission, by Notice of 19 October 2002 (OJ 2002 C 252, p. 2), gave the interested third parties the opportunity to make their views known in accordance with Article 19(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87), as amended.

13 In response to comments made by the Commission in that notice, the ARA and ARGEV submitted four undertakings, of which the following are relevant:

— Undertaking 1: with effect from 29 November 2000, ARGEV and ARO would refrain from invoking the most-favoured clauses agreed with the disposal companies;

— Undertaking 3: ARGEV would not prevent its regional partners from working for competitors of the ARA system nor from concluding and fulfilling contracts with competitors of the ARA system concerning the shared use of containers or other facilities for the collection and/or sorting of used packaging from households; however, this undertaking does not restrict ARGEV's right to enforce contractual

arrangements for the shared collection and recycling system and to take all necessary measures to fulfil its obligations, whether imposed by the law or by the official authorisations.

— Undertaking 4: ARGEV and ARO would terminate their contracts with regional partners when the contracts had run for three years, unless the contracting parties agreed on extension of the contract for no more than a further two years; no later than at the end of a five-year contract period, ARGEV and ARO would again put the service contracts out to tender through a competitive, transparent, objective procedure (invitation to tender of whatever kind, invitation to submit quotations, etc.).

14 On 16 October 2003, the Commission adopted Decision 2004/208/EC relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Cases COMP D3/35470 — ARA and COMP D3/35743 — ARGEV, ARO) (OJ 2004 L 75, p. 59) ('the contested decision').

15 In connection with Article 81(1) EC, the various relevant markets were identified in the contested decision. First of all, the market on which dispensation systems and self-disposal solutions for the taking back and recycling of packaging operate is referred to as a 'system market'. Dispensation systems are intended for undertakings obligated under the Packaging Ordinance, in order to discharge their obligations by setting up a joint dispensation service. Self-disposal solutions organise private dispensation services for any undertaking which does not wish to join the existing dispensation systems. In view of the obligations stemming from the Packaging Ordinance, the market at issue is confined to packaging waste.

16 The contested decision states that, where the services are not functionally interchangeable, a distinction must be made, within the system market, between the market for systems for household packaging and the market for systems for packaging from trade and industry.

17 Next, the contested decision indicates the existence of a second level of markets — markets for the collection and sorting of used packaging, on which the BRGs act as customers for collection and sorting services, while companies and local authorities act as service providers, since the BRGs do not themselves carry out disposal of used packaging. Where the services at issue are not functionally interchangeable, a distinction is made according to the source of the waste, between the market for the collection and sorting of used household packaging and the market for the collection and sorting of used packaging from industry. Similarly, in the household packaging sector, if particular features of certain materials are taken into account, three markets can be distinguished — namely, the market for the collection of used paper, the market for the collection of used glass and the market for the collection and sorting of light packaging.

18 Finally, a distinction is made, in the contested decision, between the markets for collection and sorting and the markets for services for recycling materials collected and secondary raw materials, since the organisation of recycling of the materials collected and the supply of secondary raw materials are each different levels of a given product market. The view is also taken, in the contested decision, that there are as many markets for recycling services and for secondary raw materials as there are categories of material. Furthermore, no differentiation can be made between household and commercial packaging of one and the same type of material.

19 From the geographical point of view, as far as system markets and the markets for collection and sorting are concerned, the territory of Austria must be taken as the relevant territory, in accordance with the contested decision. On the other hand, with regard to the markets for recycling services and secondary raw materials, the European Economic Area (EEA) is to be taken as the relevant territory.

20 Having defined the relevant markets, the Commission examined the partner agreements and took the view that they generated an appreciable restriction of competition within the meaning of Article 81(1) of the EC Treaty, firstly on the markets for the collection and sorting of household packaging, with the exception of the contract between ARO and the local authorities, and secondly on the markets for the collection and sorting of commercial packaging. This restriction resulted from the existence of an exclusive territorial arrangement for the benefit of each of ARGEV's or ARO's regional partners. In view of ARGEV's and ARO's dominant market position in terms of demand, any other supplier of collection and sorting services for household and commercial packaging waste would, during the lifetime of the contracts, be denied access to substantial markets or be deprived of significant supply opportunities.

21 As far as household packaging is concerned, according to the contested decision, the restriction identified was appreciable within the meaning of Article 81(1) EC. Given that, at the material time, ARGEV was the main customer for collection and sorting services, the network of service contracts, which included an obligation of exclusivity, had the cumulative effect, across the entire geographical market, of closing off the market to excluded collectors and sorters. On the supply side, spatial and logistical reasons militated against the establishment of a second collection infrastructure. Therefore, realistically, according to the contested decision, any dispensation system wishing to compete with the ARA system would have to work with that system's regional partners, which made alternative supply opportunities for excluded collection and sorting service providers unlikely. Consequently they are excluded from central supply opportunities for as long as five years — the maximum term of the contracts.

22 As far as commercial packaging is concerned, the contested decision states that, at the material time, ARGEV and ARO were not the main customers for collection and sorting services. For commercial packaging there were other systems that were also in the market for disposal services, and disposal firms could also offer their services to major sources of waste. Nevertheless, according to the contested decision, the competing collection systems and the major sources of waste bore no comparison with the ARA system in terms of their economic importance and, in this context, the restriction identified deprived the excluded suppliers, for the lifetime of the agreements, of significant supply opportunities, and therefore had appreciable effects on competition.

23 According to the contested decision, the obligation of exclusivity in the service contracts was nevertheless necessary for the construction and smooth operation of collection and sorting infrastructures, which required considerable investment from the regional partners and was a direct means of implementing environmental requirements. Similarly, contracting a single partner per collection region for a maximum period of five years allowed the contracting parties to undertake the long-term planning and organisation of their services and to achieve economies of scale and scope that led to efficiency gains. Therefore the exclusive arrangements for the benefit of regional partners contributed to improving production and to promoting technical or economic progress and benefited consumers, who enjoyed a fair share of the resulting gains, within the meaning of Article 81(3) EC. Similarly, an exclusive arrangement for at least three years was indispensable on economic grounds in order to ensure lasting, reliable collection and sorting services and to create certainty for the investment required by the regional partners to fulfil the collection and sorting agreements.

24 According to the contested decision, the restriction identified was not likely to eliminate competition on the markets in question. However, in respect of collection and sorting services for household waste, the Commission gave the following clarification.

25 Firstly, concerning the collection of household waste, it is recognised in the contested decision that putting the service contracts out to tender again after no more than five years will guarantee a situation of free competition for collection regions. However, the contested decision also states that, in practice, it would not be possible to duplicate the collection infrastructure in the household sector because of spatial constraints, because of legal problems relating to environmental and countryside protection and because of final consumers' waste disposal patterns. Because of this special supply situation on the relevant market, the Commission considered that the containers put in place close to households for used sales packaging created a competitive bottleneck.

26 In the light of the foregoing, the Commission took the view that free, unhindered access to the collection infrastructure set up was therefore a crucial precondition both for greater competition in terms of demand for household collection services and for greater competition on the vertical upstream market for organising the take-back and recycling of used packaging from private final consumers. Therefore, according to the contested decision, competition in terms of demand for collection services could exist only if ARGEV did not prevent its regional partners from concluding contracts with competitors of the ARA system for shared use of containers.

27 However, the contested decision states that, in Undertaking 3, ARGEV wished to impose considerable restrictions in connection with this shared use. The Commission therefore considered it necessary to impose certain obligations in order to ensure that the tests of exemption in Article 81(3) EC would be satisfied. Firstly, ARGEV could not prevent disposal firms from concluding and fulfilling contracts with competitors of ARA and ARGEV for the shared use of containers or other facilities for the collection and sorting of used sales packaging. Secondly, in order to avoid ARGEV binding the entire volume of collected packaging to itself, so making it impossible for competitors to meet the quotas laid down, ARGEV could only require regional partners

to provide evidence of packaging quantities corresponding to the ARA system's share of the total quantities of packaging collected under licence by the different collection systems. This second obligation related to all disposal firms with which ARGEV had concluded a collection partner agreement and applied to the extent that a competing system in the particular collection region wished to obtain shared use, and once the system licence had been granted.

28 As regards, secondly, sorting services for household waste, the contested decision states that the separation of packaging according to the materials used was technically demanding and that investment could be used for other sorting processes to a limited extent only. The large investment required for the construction of new facilities would constitute a not inconsiderable entry barrier for the ARA system's competitors.

29 Although ARGEV has stated that disposers are not prevented from making sorting facilities available to competing systems, the Commission considered that, in Undertaking 3, ARGEV wished to make shared use conditional on substantial restrictions. The Commission therefore held it necessary, since unimpeded access to sorting facilities is important for stimulating competition, to attach the following obligation to the exemption under Article 81(3) EC: ARGEV should not prevent disposers from concluding and fulfilling contracts for the shared use of sorting facilities.

30 The contested decision includes, in particular, the following provisions:

'*Article 2*

The provisions of Article 81(1) … EC … and Article 53(1) of the EEA Agreement are declared to be inapplicable, pursuant to Article 81(3) … EC … and Article 53(3) of the EEA Agreement, to individual collection and sorting contracts of ARGEV and ARO with their respective regional disposal partners which contain an exclusive obligation and expire at the latest on 31 December 2006.

The exemption shall run from 30 June 1994 to 31 December 2006.

Article 3

The exemption in Article 2 is conditional on the following obligations:

(a) ARGEV does not prevent disposers from concluding and fulfilling contracts with competitors of the ARA system for the shared use of containers or other facilities for the collection and sorting of used sales packaging arising at households;

(b) ARGEV may ask disposers for evidence only of those packaging quantities that correspond to the ARA system's share of the total packaging quantities licensed by systems in the household sector for specific categories of material. In that case it may reduce the remuneration in accordance with point 3.1.1 of the collection partner agreement in the proportion mentioned in the first sentence of this point. As regards the remuneration referred to in points 3.1.2 and 3.1.3 of the collection partner agreement, the quantities reported to ARGEV shall be authoritative. This obligation relates to all disposers with whom ARGEV has concluded a collection partner agreement.'

Procedure and forms of order sought

31 By application lodged at the Registry of the Court of First Instance (now 'the General Court') on 22 December 2003, ARA and ARGEV brought the present action.

32 By separate document lodged at the Court Registry on the same day, ARA and ARGEV applied for suspension of the operation of Article 3(b) of the contested decision (Case T-419/03 R). By letter of 11 March 2004, they withdrew that application. By order of the President of 26 March 2004, Case T-419/03 R was removed from the Register of the General Court and the related costs were reserved.

33 By documents lodged at the Registry of the General Court on 19 February and 23 April 2004 respectively, EVA and the BAA applied for leave to intervene in the present proceedings in support of the Commission. By order of 20 January 2005, the President of the First Chamber of the General Court granted EVA and the BAA leave to intervene. The interveners lodged their statements in intervention on 17 May 2005.

34 On 16 September 2007 and after a partial renewal of the membership of the General Court, the case was reassigned to the Second Chamber and a new Judge-Rapporteur was designated.

35 Upon hearing the report of the Judge-Rapporteur, the General Court (Second Chamber) decided, on 8 July 2009, to open the oral procedure. The date of the hearing was set for 29 September 2009 and the Report for the Hearing was served on the parties on 12 August 2009.

36 On 14 September 2009, ARA ('the applicant') informed the Court that it had taken over ARGEV and the other BRGs in the ARA system, with the exception of AGR.

37 On 21 September 2009, the applicant requested that the Court stay the proceedings in accordance with Article 77 of the Rules of Procedure of the General Court. By order of 22 September 2009, the Court stayed the proceedings for a period of six months.

38 The proceedings were resumed on 23 March 2010 and the hearing took place on 15 June 2010.

39 The applicant claims that the Court should:

— annul Articles 2 and 3 of the contested decision;

— in the alternative, annul Article 3 of the contested decision;

— order the Commission to pay the costs.

40 The Commission, EVA and the BAA contend that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

41 At the hearing, the Commission declared that it had withdrawn its claim that the action was inadmissible in so far as it was brought by ARA, and formal note thereof was taken in the minutes of the hearing.

42 The applicant relies on six pleas in law in support of its application. The first plea alleges infringement of Article 81 EC and of Article 2 of Regulation No 17. The second plea alleges that the service contracts are compatible with the conditions of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) [EC] to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21). The third plea alleges that Articles 2 and 3 of the contested decision do not comply with the requirements of the 'essential facilities' doctrine. The fourth plea alleges that the obligations laid down in the contested decision cannot be

fulfilled. The fifth plea alleges that the obligations laid down in the contested decision are disproportionate and the sixth plea alleges that there are contradictions between the operative part and the statement of reasons of the contested decision.

43 It should be noted at the outset that the Commission considers that the arguments that there is no connection between restriction of competition and the obligations imposed, that the applicant has the right to organise its system and that the contested decision lacks precision are new pleas in law raised at the reply stage, which are consequently inadmissible. Similarly, it regards the argument raised by the applicant with respect to the allocation of costs as a new plea, raised at the hearing, which is therefore inadmissible.

44 In that regard, the General Court observes that, under the first subparagraph of Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. In that regard, a plea which amplifies a submission put forward previously, whether directly or by implication, and which is closely connected with that submission, will be declared admissible (Case T-195/00 *Travelex Global and Financial Services and Interpayment Services* v *Commission* [2003] ECR II-1677, paragraphs 33 and 34, and Case T-151/01 *Duales System Deutschland* v *Commission* [2007] ECR II-1607, paragraph 71).

45 In the present case, it must be held that the pleas in law considered to be new amplify the arguments put forward by the applicant in response to the Commission's reasoning in its defence in respect of the fourth plea, concerning whether or not the obligations can be fulfilled, the fifth plea, concerning the proportionality of the obligations, and the sixth plea, alleging that there are contradictions between the operative part and the statement of reasons of the contested decision.

46 Therefore the Commission's contention of inadmissibility of new pleas in law must be rejected.

The first plea, alleging infringement of Article 81 EC and of Article 2 of Regulation No 17

Arguments of the parties

47 The applicant submits that the partner agreements do not include any provision which would lead to the conclusion that it is explicitly or implicitly bound by an obligation of exclusivity. It considers that, even though it has restricted itself and decided to co-operate with only a single regional partner per disposal region, there is nothing to prevent it from contracting other undertakings to collect and/or sort packaging in each contractual area. Consequently, the alleged restrictive effects on competition would result from the existence of a commutative contract, by which a private or commercial consumer would meet its needs, and therefore they would not fall within the scope of Article 81(1) EC.

48 The applicant also considers that its decision to restrict itself does not have the effect of leaving only a single partner per collection region able to carry on its activities under an alternative collection system. In support of this view, it maintains that, in practice, the choice of potential partners will be increased by the fact that, when disposing of commercial packaging, the source is free to choose a collection firm to transport the packaging to the ARA system's transfer points. This means that several other disposal companies are active in the various collection regions, apart from the applicant's regional collection partner for household waste. The applicant adds that, when disposing of household waste, AGR and ARO organise collection systems in

each collection region which often rely on other regional partners. Thus there are no 'local waste disposal sector monopolies', and the Commission ought to have given these contracts negative clearance under Article 2 of Regulation No 17.

49 The Commission and the interveners dispute all the arguments put forward by the applicant.

Findings of the Court

50 According to the applicant, the partner agreements do not include any provision which would lead to the conclusion that it is explicitly or implicitly bound by an obligation of exclusivity. This argument should be examined first of all.

51 Examination of the partner agreements shows that they contain no formal territorial exclusivity clause for the benefit of collection and/or sorting partners. No provision has committed the applicant to bind itself to only a single collection and/or sorting partner in each region. Therefore it is the task of the General Court to examine whether the Commission has satisfactorily proved, in the particular circumstances of the relevant market, that these contracts, concluded for a given period with a single collection and/or sorting partner, in reality operate as an exclusive arrangement which restricts competition. It should subsequently be determined, if necessary, whether the restriction of competition identified is sufficiently great to constitute an infringement of Article 81(1) EC. In this regard, it should be borne in mind that, according to case-law, judicial review of Commission measures involving complex economic assessments must be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or

misuse of powers (see Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraph 80, and the case-law cited).

52 According to the Commission's examination of these agreements, the applicant intends to bind itself to only a single collection and/or sorting partner in each collection region for a period of three to five years (see recitals 95, 111 and 220 of the contested decision), the applicant taking the view that its needs for the services in question are sufficiently covered by a single partner.

53 It is apparent from the partner agreements that the applicant wishes to assign collection and sorting services for household packaging to a single partner per collection region for a period of between three and five years. No aspect of these agreements leads to the conclusion that the applicant might withdraw from its self-imposed restriction during that period and ask other collectors and sorters to provide it with these services simultaneously in the collection regions in question — for example, in order to deal with an increase in licensed packaging quantities.

54 Furthermore, other aspects of the partner agreements prove that the participation of an additional partner in the territory concerned is excluded. Thus, a change in the remuneration of regional partners is provided for when the collection system or the framework quantity is changed, but there is no plan for circumstances in which a new collection partner enters the market. Similarly, standard tenders to be submitted by undertakings wishing to be awarded the contract must always relate to the whole collection region concerned.

55 The effect of the foregoing is that excluded suppliers cannot bid to the applicant during the lifetime of the partner agreements (see recitals 221 to 223, 228 and 236 of the contested decision). Consequently, even though the partner agreements contain no formal clause to that effect, their impact is the same as if they included a territorial exclusivity clause for the benefit of each collection and/or sorting partner. Therefore the applicant's argument that it is not bound by an obligation of exclusivity is unfounded.

56 As regards the analysis of the restrictive effects of the partner agreements on competition, it should be pointed out that, in accordance with the case-law, when examining the correctness of the Commission's assessment of the existence of an appreciable restriction of competition within the meaning of Article 81(1) EC, the Court cannot confine itself to looking at the effects of exclusive arrangements, considered in isolation, referring only to the restrictions imposed by the partner agreements in the different collection regions (see, to that effect, *Van den Bergh Foods* v *Commission*, paragraph 82). As to whether the applicant's partner agreements fall within the prohibition contained in Article 81(1) EC, it is appropriate, according to the case-law, to examine whether, taken together, all the similar agreements entered into in the relevant market and the other features of the economic and legal context of the agreements at issue show that those agreements cumulatively have the effect of denying access to that market for new competitors. If, on examination, that is found not to be the case, the individual agreements making up the bundle of agreements cannot impair competition within the meaning of Article 81(1) of the Treaty. If, on the other hand, such examination reveals that it is difficult to gain access to the market, it is then necessary to assess the extent to which the agreements at issue contribute to the cumulative effect produced, on the basis that only those agreements which make a significant contribution to any partitioning of the market are prohibited (Case C-234/89 *Delimitis* [1991] ECR I-935, paragraphs 23 and 24, and *Van den Bergh Foods* v *Commission*, paragraph 83).

57 The Commission stated in recital 176 of the contested decision that, in the household sector, the ARA system is the only countrywide collection and recycling system in

Austria that covers all types of materials, except for bonded drinks cartons. It is clear from recital 182 of the contested decision that the applicant is the main customer for waste disposal services, and the applicant has not disputed this.

58 Since the partner agreements are concluded by the main customer for waste disposal services, namely the applicant, the practical consequence of creating this network of agreements is to close off the market to excluded collectors and sorters and to restrict competition on the supply side of the market for the collection and sorting of household packaging during the lifetime of the agreement — that is to say, for three to five years.

59 Given that the network of partner agreements created by the applicant covers the whole of Austria, this restriction of competition cannot be limited to a single collection region. It will have countrywide impact and will therefore affect the entire relevant geographical market for the collection and sorting (see recital 226 of the contested decision). Consequently, the excluded suppliers will have difficulties in circumventing the network of agreements and entering the market for the collection and sorting of household waste in Austria and then in remaining on that market.

60 This situation is aggravated by the existence of additional barriers to entering the market for the collection and sorting of household packaging. Spatial and logistical reasons militate against the establishment of other collection infrastructure facilities for final consumers (see recital 227 of the contested decision), and this is confirmed by the Austrian authorities' comments in that connection (see recital 285 of the contested decision). Thus any competitors of the ARA system will be unable to conclude agreements with other disposal firms for the establishment of additional collection infrastructure alongside the containers already in place, in order to provide collection and sorting services from the start of their activities, and therefore they will be forced to work with the applicant's collection partners. For example, the competing

Öko-Box system has to make partial use of the applicant's collection infrastructure in order to carry on its business of collecting and recycling bonded drinks cartons (see recitals 177 and 227 of the contested decision), a fact which is not disputed by the applicant.

61 As far as sorting infrastructure is concerned, the applicant does not dispute the Commission's finding that access to the market is obstructed by the fact that the construction of new sorting facilities requires large investment, which constitutes a not inconsiderable entry barrier to the collection and sorting market for household waste (see recital 318 of the contested decision).

62 All these circumstances led the Commission to conclude, in recital 227 of the contested decision, that 'it has to be considered unlikely that new supply opportunities will arise on the relevant market for excluded collection service providers to any appreciable, i.e. substantial, extent during the lifetime of the sorting partner agreement in each area.' According to recital 236 of the contested decision, that conclusion also applies to sorting service providers.

63 It follows that the applicant's self-imposed restriction does not restrict only its own freedom of action. On the supply side, it restricts the access of excluded collection and sorting service providers to the collection and sorting market for household packaging, since it limits the opportunities for these undertakings to act on that market. Consequently, and contrary to the applicant's argument, the effects of the restriction go beyond those of a commutative contract, by which a private or commercial consumer would meet its needs. Therefore the Commission has not committed a manifest error of assessment in holding that the network of partner agreements closed off the relevant market to these undertakings, thus proving an appreciable restriction of competition within the meaning of Article 81(1) of the EC Treaty. Consequently the

network of partner agreements notified to the Commission cannot obtain negative clearance under Article 2 of Regulation No 17.

64 Having established the existence of an appreciable restriction of competition, the Commission accepted, in recitals 275, 276 and 316 of the contested decision, that the partner agreements were justified from the point of view of organising collection and sorting activities, since there are management and efficiency considerations, a need to ensure reliable collection services and a need for planning and investment certainty for the investment required in order to fulfil the collection and sorting agreement. According to the Commission, this obligation of exclusivity is therefore a restriction that is indispensable to attaining the objective of rational organisation of collection and sorting activities on the Austrian market, within the meaning of Article 81(3) EC (see recitals 268 to 287 and 316 of the contested decision).

65 However, the Commission considered that this restriction of competition on the market for the collection and sorting of household packaging could lead to a restriction of competition on the upstream market — that is to say, the market for household packaging disposal systems — if the applicant were to succeed in imposing on its partners de facto exclusivity in collection and sorting services (see recitals 230, 234 and 286 of the contested decision). These exclusive arrangements would enable it to block its potential competitors' access to the existing collection and sorting infrastructure. In such circumstances, these potential competitors would have no real, tangible opportunity to circumvent the network of contracts created by the applicant, since, on the market for the collection and sorting of household packaging, there would be no other collection and sorting company which could offer them these services on competitive terms from the start of their activities. Consequently, the applicant's undertaking to bind itself to only a single collection and/or sorting partner in each collection region could give rise to a restriction of competition on the market for household packaging

disposal systems, which would immediately limit demand for collection and sorting services on the market for the collection and sorting of household packaging (see recital 287 of the contested decision).

66 Therefore, contrary to the applicant's claims, the problem lies not in the fact that the partner agreements give rise to 'local waste disposal sector monopolies', which infringe Article 81(1) EC, but in the fact that the restriction of competition on the market for the collection and sorting of household packaging would lead, in the circumstances mentioned in paragraph 65 above, to the elimination of competition on the market for household packaging disposal systems, thus limiting demand for collection and sorting services on the market for the collection and sorting of household packaging.

67 In the present case, the Commission has recognised, in recitals 231, 234 and 236 of the contested decision, that the applicant is not forbidding shared use of the collection and sorting infrastructure. Nevertheless, the Commission held that some of the powers which the applicant gave itself in Undertaking 3 could be used to make access to the market more difficult for its potential competitors. In order to neutralise this risk, the Commission decided to impose on the applicant the two obligations stated in Article 3 of the contested decision, mentioned in paragraph 27 above, pursuant to Article 8(1) of Regulation No 17 (see recitals 287, 288 and 318 of the contested decision).

68 According to the Commission, the imposition of the obligations stated in Article 3 of the contested decision was justified by the possibility that the applicant might take advantage of the existence of a single partner per collection region and of the powers which it gave itself in Undertaking 3 to eliminate competition on the market for household packaging disposal systems. These obligations, which essentially aim to prevent the applicant forbidding the shared use of collection and sorting infrastructure and, where there is shared use, from binding to itself the part of the collected packaging for which it is not responsible, make it possible to avoid a situation where the applicant prevents competing systems from accessing the existing collection and

sorting infrastructure and so is able to restrict competition on the market for household packaging disposal systems and, therefore, limit demand for collection and sorting services on the market for the collection and sorting of household packaging.

69 The applicant disputes this conclusion, claiming that the choice of potential partners is extensive, given that, when disposing of commercial packaging, sources are free to choose their regional partners and that, with respect to the disposal of household waste, AGR and ARO organise collection systems in each collection region which often rely on other regional partners.

70 First, as far as the market for the collection of commercial packaging is concerned, it is apparent from the documents before the Court that, contrary to the applicant's claims, there is a single partner agreement for the collection of household and commercial packaging, under which only one of the applicant's partners provides collection services for both types of packaging. According to this agreement, both these types of packaging could even be picked up at the same time. The fact that a single partner must collect both types of packaging precludes any undertaking which specialises in the collection of only one of the types of packaging becoming a collection partner. Nevertheless, according to the applicant, this situation would not prevent them from entering the market, since they could offer transport or pick-up services to sources of commercial packaging waste under the terms indicated in paragraph 75 below.

71 Moreover, the markets for collection and for sorting of household and commercial packaging are sufficiently different for the services of collection and sorting partners specialising in one of those markets not to be interchangeable, and for the said undertakings not to be able to supply their services on the other market. The Commission found that collection and sorting services must be set up differently, taking

into account various needs specific to collection or to sorting (see recital 161 of the contested decision), and the applicant has failed to provide evidence to the contrary.

72 As far as sorting is concerned, trade and industry accumulate packaging in large quantities and this is first sorted into individual types of materials and then left at the point where the waste occurs. Therefore it is not necessary to set up a sorting infrastructure for commercial packaging, such as that provided for household packaging, and, moreover, the partner agreement allows the collection partner to penalise packaging suppliers presenting mixed packaging.

73 Similarly, as far as collection is concerned, according to the partner agreement, the collection of commercial packaging, when compared to the collection of household packaging, has certain particular features. Thus, in dealing with commercial packaging, the collection partner acts as manager of the regional transfer point. Its main activity is to receive materials delivered by large commercial sources, which act as waste suppliers, and to record all the weighing notes for materials delivered pursuant to the Austrian legislation, in order to check whether the minimum quantities have been reached (see also recital 166 of the contested decision). The sources are therefore obliged to transport the sorted materials to the transfer point. In highly industrialised regions, the collection partner also offers a secondary pick-up service for licensed packaging from the points where the waste occurs, which may, as the applicant has indicated, be refused by the sources. In contrast, in the case of household packaging, it is clear from the partner agreement that collection comprises the regular emptying of containers and the collection of sacks provided by the collection partner, according to an exact schedule of collection days drawn up by the collection partner, together with transport of the waste collected from households to the sorting facility; the collection partner is responsible to ARA for the quality of the packaging collected.

74 Consequently there are considerable differences b.etween collection and sorting services for household and commercial packaging. Therefore, as the contested decision states, there is no functional interchangeability between collection and sorting services for packaging collected from private final consumers and those in trade and industry (see recital 162 of the contested decision).

75 The applicant considers that excluded disposal companies could offer their services on the market for the collection and sorting of commercial packaging to the sources which are obliged to transport their waste to the transfer point or could even offer them pick-up services in competition with those offered by the collection partner in highly industrialised regions. Nevertheless, given that there is no functional interchangeability between the collection of household and commercial packaging, the view must be taken that undertakings specialising in the household sector will not as a rule be in a position to provide commercial packaging collection services. Therefore the fact that a source of commercial packaging waste is free to choose its partner cannot have any bearing on the present case.

76 Secondly, as far as the disposal of used paper accumulating in households is concerned, the Commission found, in recital 157 of the contested decision, that 'ARO purchases only certain quantities of the local authorities' used-paper collection', which already existed before the ARA system was set up; the applicant did not dispute this. According to recital 158 of the contested decision, the situation relating to disposal of used glass is identical.

77 The effect of the foregoing is that it is inconceivable that excluded household packaging collectors and sorters could easily gain access to the market for the collection and sorting of commercial packaging or could provide their services on either the used-paper collection market or the used-glass collection market, since the smooth operation of these markets is dependent on the existence of local authority collection systems and therefore they are closed off to potential competitors. Consequently, contrary to the arguments raised by the applicant, the existence of these markets is not relevant to extending demand for household packaging collection and sorting

services or to guaranteeing the continued presence of undertakings competing with the applicant's regional partners.

78 These conclusions cannot be invalidated by the applicant's argument at the hearing that a restriction of competition may be doubted if an agreement seems necessary for the penetration of a new area by an undertaking (Case T-328/03 *O2 (Germany)* v *Commission* ECR II-1231, paragraph 68).

79 It should be borne in mind that, in the present case, unlike in *O2 (Germany)*, it has not been established that the network of partner agreements created by the applicant allowed a competing enterprise to enter the market. Rather, as has been stated in paragraph 65 above, the cumulative effect of this network was likely to close off the market for household packaging disposal systems to the ARA system's competitors. This argument must therefore be discounted.

80 Therefore the Commission did not commit a manifest error of assessment in concluding, first, that competition on the market for the collection and sorting of light household packaging was restricted and that this restriction could be granted an individual exemption in the light of its positive effects on the organisation of the collection and sorting of household packaging and, secondly, that this restriction could affect the market for household packaging disposal systems and, therefore, the demand for collection and sorting services on the household packaging market. Furthermore, the Commission did not commit a manifest error of assessment in taking the view that, in order to avoid the possibility of the applicant eliminating competition on the market for household packaging disposal systems, the exemption should be made conditional on the two obligations mentioned in paragraph 27 above. This plea must therefore be rejected.

The second plea, alleging that the partner agreements are compatible with the conditions of Regulation No 2790/1999

Arguments of the parties

81 The applicant considers that, even though the partner agreements involve an obligation of exclusivity which binds it, this obligation is exempt from the application of Article 81(1) EC under Article 2(1) and Article 3(1) of Regulation No 2790/1999; furthermore, this regulation does not allow the imposition of obligations on those granted an exemption. According to the definition of the relevant market established by the Commission in recital 155 et seq. of the contested decision, none of the applicant's regional partners holds a share exceeding 30 % of the market for the collection and sorting of light packaging in Austria. In addition, the applicant points out that Regulation No 2790/1999 grants exemption to distribution systems which reserve exclusive territories for certain distributors and therefore it considers that the position cannot be otherwise where there is a network of partner agreements in which the awarding authority reserves exclusive territories for its partners.

82 The applicant also disputes the Commission's definition of the relevant geographical market, arguing that the collection regions do not correspond to any commercial/industrial zone, since it defined them itself when it called for tenders. Similarly, it considers that the test for determining the supplier's market share is the situation existing before the conclusion of the partner agreements, and not the situation after they were concluded.

83 Finally, the applicant claims that the reason why it did not refer to Regulation No 2790/1999 before lodging its application is that the Commission had not published its statement of objections.

84 The Commission and the interveners dispute all the arguments put forward by the applicant.

Findings of the Court

85 The first point to be examined is the applicant's claim that it did not have an earlier opportunity to put forward the arguments based on Regulation No 2790/1999.

86 In this connection, firstly, it should be remembered that, by letter of 28 August 2001, ARA and ARGEV sought to obtain negative clearance for the notified agreements or, alternatively, exemption under Article 81(3) EC. This request was submitted in accordance with the requirements of Article 2 of Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17 (OJ 1994 L 377, p. 28) and of Form A/B as shown in the Annex to that regulation; the Commission has made no observation on this point.

87 Secondly, according to paragraph 139 of the Notice of 19 October 2002 (see paragraph 12 above), the Commission intended to raise no objection to the notified agreements under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, or to grant the parties an individual exemption under Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, possibly with conditions attached.

88 Thirdly, the Commission sent a letter to the applicant on 1 April 2003, in which it indicated that it was contemplating taking a positive decision pursuant to Article 81 EC and, in accordance with Article 8(1) of Regulation No 17, making that decision conditional on certain obligations regarding the shared use of collection facilities. In the section entitled 'Statement of reasons', the Commission set out in detail the reasons why it was possible to grant an individual exemption in favour of the partner agreement and the reasons why it considered that some of the ARA system's agreements could have the effect of eliminating competition, which would justify imposing those obligations. Finally, that letter informed the applicant that it could submit observations within one month of the date on which the letter was received. In a second letter, of 6 June 2003, the Commission informed the applicant of an amendment to the obligations envisaged in response to its questions and to those of the Austrian authorities.

89 In these circumstances, it cannot be disputed that the applicant was able to acquaint itself during the course of the administrative procedure with the fact that the notified agreements might eliminate competition and with the obligations which the Commission was contemplating imposing on it in the context of an individual exemption. However, as is apparent from the letters of 16 May and 25 June 2003 sent by the applicant to the Commission in response to the letters of 1 April and 6 June 2003, the applicant did not expressly request the application of Regulation No 2790/1999 nor raise any objection concerning a failure to apply Article 3(1) of that regulation in the present case or concerning the definition of the relevant market in that context. This explains, as the Commission has pointed out, why there is no response to the arguments based on Regulation No 2790/1999 in the contested decision. Therefore the

absence of any reference to these arguments in the contested decision cannot affect its legality.

90 In any event, even supposing that the applicant, in seeking exemption under Article 81(3) EC, was implicitly requesting the application of Regulation No 2790/1999, the plea essentially alleging that that regulation does not apply cannot render the contested decision unlawful.

91 The partner agreements are service contracts which bind the applicant exclusively to a collection and/or sorting partner for each collection region, each of them operating at a different level of the household packaging disposal chain. Through these contracts, the parties lay down the conditions required to carry out the collection and sorting of the household packaging which is the applicant's responsibility in each collection region. Therefore they are subcontracting agreements between non-competing undertakings which are covered by Article 2(1) of Regulation No 2790/1999.

92 Recital 173 of the contested decision shows — and the applicant has not disputed — that for the purposes of assessing whether there is an appreciable restriction of competition within the meaning of Article 81(1) EC, the relevant geographical market is, in the cases of the systems market and the collection and sorting markets, the whole territory of Austria, since the objective supply and demand conditions on this market differ distinctly from those in other areas of the internal market. The Austrian waste disposal legislation cited in paragraph 5 above lays down countrywide conditions in which these activities must take place, and therefore these conditions are atypical when compared to those in other territories within the internal market. Moreover, the applicant has created its network of partner agreements across the whole of this

territory and, because of the cumulative effect of the contracts relating to each collection region, this is likely to affect competition both on the market for household packaging disposal systems and on the market for household packaging collection and sorting.

93 On the other hand, the relevant territory for assessing whether, in the present case, the 30 % threshold provided for in Article 3(1) of Regulation No 2790/1999 has been exceeded is the collection region, as the territory in which the collection and/or sorting partners are committed to the applicant and as the place where they supply their services. The applicant puts the services out to tender for each region and the partners offer their services for organising collection and sorting infrastructure in each region. In addition, paragraph 7 of the standard call for tenders shows that each collection region has specific features, which are described in a document entitled 'Select Regional, Teil L'. Similarly, the applicant's Annual Report for 2002 shows in more detail that districts and municipalities are grouped together within the collection regions, and that the applicant has designed an appropriate, entirely specific collection scheme for each region.

94 The effect of the foregoing is that service delivery conditions in a given collection region are homogeneous and each collection region can be distinguished from neighbouring regions on the basis of its particular features and service delivery conditions, in accordance with the criteria laid down in paragraph 90 of Commission Notice 2000/C 291/01 — Guidelines on Vertical Restraints (OJ 2000 C 291, p. 1) for determining the relevant geographical market for the purposes of calculating the threshold laid down by Regulation No 2790/1999.

95 The fact that the Commission has taken the view that the relevant geographical market for examining the anticompetitive effects of the notified agreements is the whole territory of Austria does not invalidate this conclusion. That fact is no barrier to the existence, within Austria, of geographical markets which are more limited from the point of view of collection and sorting service providers, where the conditions for

service delivery are homogeneous and differ from those of neighbouring regions. Therefore, as indicated in paragraph 93 above, the collection regions constitute the relevant markets for determining whether the applicant can be granted the block exemption provided for in Regulation No 2790/1999.

96 With regard to the applicant's claim that the test for determining a supplier's market share is the situation existing before the conclusion of the partner agreements, and not the situation after they were concluded, it should be noted that, in accordance with Article 9(2)(a) of Regulation No 2790/1999, for the purposes of applying Article 3, 'the market share shall be calculated on the basis of data relating to the preceding calendar year'. Another important point is that, as the Commission has observed, in the case of new markets, the time at which the market was created must be taken into account. It is only from then that it can be established how much market power the supplier has, by calculating its market share according to Article 9(2)(a) of Regulation No 2790/1999.

97 In the present case this means that, in order to calculate the market share of each of the collection and/or sorting partners, account must be taken of the situation after the conclusion of the household packaging collection and sorting agreements, and not, contrary to the applicant's claim, of the situation before they were concluded.

98 As suppliers of collection and sorting services to which the applicant is bound exclusively, the collection and sorting partners significantly exceed the 30 % market share threshold laid down by Article 3(1) of Regulation No 2790/1999. First, according to recital 225 of the contested decision, which the applicant has not disputed, in the light household packaging sector, only Öko-Box has set up a competing system for one type of household packaging, namely bonded drinks cartons. Secondly, as the applicant has acknowledged in its pleadings, Öko-Box has developed a system which

uses collection infrastructure for only part of the packaging, and in those circumstances it relies on the applicant's collection partners. Consequently, the regional collection and/or sorting partners' market share can easily reach 100% and therefore Article 2(1) of Regulation No 2790/1999 does not allow a block exemption free of any obligation.

99 In the light of the foregoing, this plea must be rejected.

The third plea, alleging that Articles 2 and 3 of the contested decision do not comply with the 'essential facilities' doctrine

Arguments of the parties

100 The applicant considers that the Commission has accorded crucial importance to free, unhindered access to its collection infrastructure by other dispensation systems with a view to increasing competition and maintains that Article 2 and, especially, Article 3 of the contested decision constitute an attempt to impose an obligation on the ARA system without regard to the requirements of the 'essential facilities' doctrine.

101 In support of this plea, the applicant first claims that, in principle, its partner agreements do not prevent shared use of containers and that therefore they do not give rise

to any exclusive arrangements in its favour with regard to the containers. In these circumstances, there are no substantive restrictions of competition and the obligations imposed by the Commission can have no basis in Article 81(3) EC and Article 8(1) of Regulation No 17.

102 Secondly, the applicant claims that, in reality, the contested decision imposes an obligation on it to 'give up' some of its capacities to competitors, a situation which is covered by Article 82 EC. Such an obligation can be lawful, under the case-law of the Court, only if the collection facilities organised for the applicant are essential facilities (Case C-7/97 *Bronner* [1998] ECR I-7791). This is not the situation in the present case, since, from a technical point of view, it would be possible to duplicate the existing infrastructure of the applicant's collection system by allowing competing collection systems to set up a pick-up system at places where the applicant manages a bring-it-yourself system and vice versa.

103 The Commission disputes all the arguments put forward by the applicant.

Findings of the Court

104 In accordance with settled case-law, the refusal by an undertaking holding a dominant position in a given market to supply an undertaking with which it was in competition in a neighbouring market with either raw materials or services, which were indispensable to carrying on the rival's business, constitutes an abuse, to the extent that the conduct in question was likely to eliminate all competition on the part of that undertaking (*Bronner*, paragraph 38, and Case C-418/01 *IMS Health* [2004] ECR I-5039, paragraphs 40 to 45). In these circumstances, after finding that there has

been an infringement, inter alia an abuse of a dominant position, the Commission is entitled under Article 3 of Regulation No 17, to ensure that its decision is effective by imposing certain obligations (Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraphs 90 and 91).

105 According to the partner agreements, the collection and sorting partners are obliged to set up the infrastructure needed to fulfil their contractual obligations (see recital 98 of the contested decision). This infrastructure belongs to the collection and sorting partners, not to the applicant, which merely negotiates the sites with the local authorities. Therefore the applicant claims that it has no right of ownership or control over these facilities which would allow it to abuse its position by refusing to provide collection services to its competitors in order to exclude them from the packaging disposal market.

106 However, under the partner agreements and the organisational powers which it gave itself in Undertaking 3, the applicant is in a position to control, jointly with its partners, access to the infrastructure set up in each collection region. In this way, the applicant is in a position to block its competitors' access to the collection and sorting infrastructure belonging to its partners.

107 As the Commission has pointed out in recital 234 of the contested decision, the problem that arises in the present case is that, under the organisational powers which it gave itself in Undertaking 3, the applicant could prevent the shared use of collection and sorting infrastructure. By taking advantage of these organisational powers, the applicant can, inter alia, prevent collection partners who wish to do so from opening up their infrastructure to the ARA system's competitors and so make it more difficult for them to enter the market for household packaging disposal systems. This conduct entails a risk of restricting competition on the market and therefore limiting demand

for collection and sorting services on the market for the collection and sorting of household packaging.

108 As indicated in paragraph 67 above, in order to eliminate this risk, the Commission considered it necessary to make the individual exemption conditional on the obligations provided for in Article 3 of the contested decision, pursuant to Article 8(1) of Regulation No 17.

109 Therefore the present case does not involve a unilateral refusal by the applicant to supply competing undertakings with a service they need in order to develop a neighbouring market, which would infringe Article 82 EC and therefore justify the application of the 'essential facilities' doctrine. Rather, it involves a situation where the applicant's position under its partner agreements with collectors and sorters may restrict competition on the market for household packaging disposal systems, thus limiting demand for collection and sorting services on the market for the collection and sorting of household packaging. Consequently, in the present case, the Commission was right not to apply the 'essential facilities' doctrine and the related case-law of the Court.

110 It follows, first, that the Commission has not tried to apply the 'essential facilities' doctrine in the present case and, second, that the 'essential facilities' doctrine and the related case-law of the Court are not applicable in the present case for the purposes of examining the legality of the obligations attached to the individual exemption granted by the Commission to the applicant. This plea must therefore be dismissed.

The fourth plea, alleging that the obligations laid down by the contested decision cannot be fulfilled

Arguments of the parties

111 The applicant claims that the obligations imposed by the contested decision fail to apply the case-law of the Court relating to the principle of proportionality, since they are not appropriate for achieving the objective sought and do not represent the least onerous measure.

112 In addition, the applicant considers that the Commission has not taken sufficient account of the particular features of the ARA system, since, unlike the waste disposal system which exists in Germany, collection, sorting and recycling are mainly carried out by different undertakings and these partners cannot provide a posteriori evidence establishing the volume of packaging collected, sorted and recycled but have to deliver the packaging actually collected to the applicant's transfer points on a continuous basis. Consequently, it submits, the sole objective of the obligation imposed in Article 3(b) of the contested decision is to prevent the applicant from claiming a larger quota share of the products collected than its corresponding share. This obligation would therefore necessitate the applicant being informed of the ARA system's market share when the collected packaging was delivered, which is not possible for two reasons. First, external dispensation systems, that is to say those which have no interest in shared use of collection infrastructure, do not have to inform the applicant of their licensed quantities, which makes it impossible to calculate the applicant's quota share of total household packaging. The second reason is that information relating to market shares is available only a posteriori, after manufacturers and importers have

made their periodic declarations of licensed quantities. Consequently, the applicant considers that, in order to divide the products collected between the different system operators, it would be necessary to use methods of division which were known beforehand, at the time when a given quantity of packaging was supplied.

113 Finally, the applicant adds that there is no link between restriction of competition and the obligation imposed in Article 3(b) of the contested decision and points out that on 28 August 2003 it sent a proposal to the Commission with a view to establishing another method of division, which provided that the different collection systems would reserve a take-back capacity each year in advance, determined for the disposal company according to the licensed quantities expected. However, the Commission did not take that model into consideration.

114 The Commission and the interveners dispute all the arguments put forward by the applicant.

Findings of the Court

115 First of all it must be observed that the applicant invokes the principle of proportionality both in support of its fourth plea in law, relating to whether or not the obligations under the contested decision can be fulfilled, and as a separate plea (the fifth plea in law). Therefore it is appropriate to examine the proportionality of the obligations, and inter alia the proportionality of the obligation under Article 3(b) of the contested decision, in the context of the fifth plea and to examine whether or not the obligation at issue can be fulfilled in the context of that plea.

116 In response to the arguments raised by the applicant, firstly, and as the file shows, it must be pointed out that, in the present case, the licensed quantities of external systems are not relevant in calculating the applicant's quota share of total household packaging. It should be made clear that the problem of dividing the collected packaging arises only where there is shared use of collection infrastructure. In those circumstances, since the applicant cannot claim all the packaging collected for itself, the part of the packaging corresponding to each of the dispensation systems which share the infrastructure will have to be calculated in order to divide the collected packaging between them. Consequently, the applicant's argument regarding the availability of data relating to external systems' licensed quantities is unfounded.

117 Secondly, despite its claims, the applicant has not succeeded in establishing why it will not be possible to calculate its quota share of the total quantities of household packaging at the time the collected packaging is delivered to the transfer points, so that division of the collected packaging requires a method fixed in advance and valid for a period of one year. On the contrary, it is clear from the dispensation and licence agreement between the applicant and the sources of the waste that, in order to calculate the amount of the annual fee payable to the applicant, sources must declare the exact quantities of packaging put into circulation monthly or quarterly, according to whether the source of the waste is large or small, and must do so no later than the tenth day of the second month following the end of the period to which the detailed breakdown relates. This means that the quantities of packaging covered by the licence and dispensation contracts can be calculated by the applicant on the basis of these contracts and of data that it receives periodically.

118 It is true that the final data relating to the preceding calendar year will not be available until the first ten days of the second month following the end of the last month

or last quarter of the calendar year. However, this does not mean, as the applicant claims, that the packaging can be divided only some fifteen months after the start of the trading year, thus preventing 'continuous division' of the collected packaging. The packaging can be divided as it is collected, on the basis of the licensed quantities of packaging actually put into circulation in the preceding months. The results of this division can be corrected at the end of the year by means of an offset based on the actual final quantities reported by the sources. As the Commission has indicated, division could also be systematically based on expected quantities which can be adjusted only at certain specific times. As the file shows, the latter possibility was put forward by the applicant and accepted by the Commission at the interlocutory proceedings before the General Court.

119 Thirdly, it must be pointed out that, as was apparent at the hearing, the contested decision was provisionally implemented to the satisfaction of the parties.

120 It follows from the foregoing that the continuous division of collected packaging does not represent a barrier to fulfilling the obligations under Article 3(b) of the contested decision and therefore, contrary to the applicant's claim, does not impose the use of a method of division fixed in advance and valid for a period of one year.

121 The other arguments put forward by the applicant do not invalidate that conclusion.

122 First, the argument that there is no link between the restriction of competition and the obligation imposed must be considered unfounded. It is apparent from recitals 290 and 293 of the contested decision that there is a clear link between the obligation imposed and the risk of closing off the vertical upstream market to the applicant's competitors and so reducing demand for collection and sorting services on the market for the collection and sorting of household packaging. That risk would result from an individual exemption being granted to agreements under which the applicant is bound to only a single partner per collection region and gives itself powers that could prevent the shared use of collection and sorting infrastructure. Therefore the objective of this obligation is to avoid the applicant being able to obtain certificates or other evidence corresponding to the packaging quantities of competing systems which share collection infrastructure with the applicant and binding those systems' quantities to itself, inter alia in relation to the supervising Austrian authority. Such conduct on the applicant's part would make it impossible for competing systems to meet their quotas and would make their continued existence on the market more difficult. Eliminating them from the market would lead to a reduction in demand for collection and sorting services on the market for the collection and sorting of household packaging. Thus, contrary to the arguments raised by the applicant and in the light of Article 8(1) of Regulation No 17, the Commission has rightly imposed the obligation at issue in order to avoid a situation where the individual exemption granted to the applicant could restrict competition on the market for household packaging disposal systems and, therefore, reduce demand for household packaging collection and sorting services.

123 Secondly, the applicant's allegation that the Commission copied a large part of the text of the obligation mentioned in Article 3(b) from the decision relating to the German waste disposal system, without taking into account the specific features of the ARA system, must also be considered unfounded. Examination of the two decisions at issue demonstrates that their sections are not the same. In addition, contrary to the applicant's claim, examination of the contested decision shows that the certificates or other evidence to which the obligation imposed in Article 3(b) of the contested decision refers cannot be used to replace the physical delivery of collected packaging,

but only to certify what part of the collected packaging is the applicant's responsibility. According to Article 11(8) of the Packaging Ordinance and the second obligation under the authorisation to set up and operate a collection and recycling system, these certificates demonstrate to the supervising Austrian authority that the applicant is meeting its collection quotas. According to recital 291 of the contested decision, they may also be used to reduce the partners' fees where there is shared use of collection infrastructure.

124 It follows from all the foregoing that the methods of division proposed by the Commission are based on data which are easily accessible to the applicant at the time the collected packaging is divided, such as the expected quantities or the quantities licensed for earlier months, and that these methods therefore take account of the particular features of the ARA system in the same way as the method proposed by the applicant. The only difference lies in the fact that, in the methods proposed by the Commission, the expected quantities or the quantities licensed for earlier months can be corrected a posteriori, for example on the basis of final actual quantities of licensed packaging put into circulation and notified by the sources. As was pointed out in paragraph 118 above, this a posteriori correction is not incompatible with continuous division of the collected packaging between the dispensation systems which share the collection infrastructure. Therefore, contrary to the applicant's claims, it is not impossible to fulfil the obligation.

125 Consequently, this plea must be dismissed.

The fifth plea, alleging infringement of the principle of proportionality

Arguments of the parties

126 The applicant claims that the obligation under Article 3(b) of the contested decision is disproportionate, on the ground that it imposes obligations on the applicant which could prevent it from meeting the quotas laid down and therefore would threaten its existence. This obligation would reduce the applicant's access to the collection capacities available to it. That is why the applicant gave itself the right to plan and organise its system, forbidding disposal companies by contract from acting on their own authority. The disproportion would be particularly obvious in two circumstances: where another dispensation system acquired additional licensed quantities and where other dispensation systems set up collection facilities which would be, in whole or in part, their own.

127 In the first case, the applicant considers that another dispensation system entering the market would reduce the ARA system's share of the total quantities of household packaging and, therefore, its market share. These competitors would not simply divert the ARA system's customers, but would also introduce onto the market additional licensed quantities of packaging which are currently not taken back by manufacturers or distributors, and which the applicant calls 'quantities of packaging from free-riding undertakings'. In this situation, the share of the waste collected by the regional partners which the applicant could claim would be limited, and this would prevent it meeting the quotas laid down, with the result that the Bundesministerium für Umwelt, Jugend und Familie (Ministry for the Environment, Youth and Family Affairs) could withdraw the applicant's licence. Thus the obligation imposed by the Commission would reduce the applicant's access to its collection capacities.

128 The applicant also considers that the solution proposed by the Commission, consisting of adapting container capacities in order to deal with larger collection quantities, is not satisfactory. The applicant would know only a posteriori that the collection capacities were not sufficient and it would be two years before corrective measures could actually be taken. This is why the applicant considers that, in order to share the containers, competing dispensation systems would have to fix the container capacities needed and the corresponding collection quantities each year in advance.

129 The applicant states that availability of collection capacities and access to quantities of collected packaging constitute a single issue and that, if the obligation in question required it to give up collection quantities to competitors, all forecasts of its capacities would become meaningless.

130 As far as the second case is concerned, the applicant points out that the competing systems are above all suppliers which specialise in certain specific types of packaging, who are in a position to set up other collection facilities and rely for supplementary capacity on the facilities operated by the applicant. This is the situation inter alia for the Öko-Box and Bonus systems. According to the applicant, this conduct on the part of competing systems is absolutely predictable, since the shared use of collection infrastructure does not create real price competition, which can arise only where each system sets up its own collection infrastructure. Therefore the applicant submits that, even where there is only partial shared use of collection infrastructure, the obligation imposed would require it to give up accepting a higher proportion of the quantities of collected packaging than the proportion which corresponds to the needs of the competing system, which would be manifestly unreasonable.

131 Furthermore, the applicant complains that the Commission has offered no solution to the problem of partial shared use of collection infrastructure and that it has not even examined the compromise proposal put forward.

132 Finally, the applicant claims that the obligation in Article 3(b) of the contested decision would force it to reorganise the collection of packaging, which would lead to an increase in collection costs and, consequently, a loss of efficiency for the ARA system. Therefore it takes the view that these costs will have to be passed on to those who enjoy shared use of the collection infrastructure, namely the competing systems and the collection partners. Similarly, it considers that the system's running costs (or system costs) should also be passed on to the competing systems.

133 The Commission and the interveners dispute all the arguments put forward by the applicant.

Findings of the Court

134 It should be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires, according to settled case-law, that measures should not exceed the limits of what is appropriate and necessary for attaining the objective pursued, and that where there is a choice between several appropriate measures recourse must be had to the least onerous (Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 59; Joined Cases C-184/02 and C-223/02 *Spain and Finland* v *Parliament and Council* [2004] ECR I-7789, paragraph 57; and Case C-558/07 *S P C M and Others* [2009] ECR I-5783, paragraph 41).

135 In the present case, the objective pursued by the Commission in imposing the obligation in Article 3(b) of the contested decision is to avoid eliminating competition on the market for household packaging disposal systems, which could follow if an individual exemption were granted to the collection and sorting agreements notified by the applicant and would reduce demand for collection and sorting services on the

market for the collection and sorting of household packaging. It is apparent from recitals 290 and 292 of the contested decision that, in circumstances where there is shared use of collection infrastructure, the applicant could try to bind all the collected packaging to itself and thus prevent competing systems from meeting their quotas. As was pointed out in paragraph 122 above, preventing the applicant from asking for certificates or other evidence relating to packaging quantities corresponding to its competitors' share of total household packaging avoids a situation where the applicant binds all the collected packaging to itself, inter alia in relation to the supervising Austrian authority, to which it must present evidence demonstrating that it has reached its quota. Similarly, as is clear from paragraph 123 above, this prohibition is compatible with the specific features of the ARA system.

136 In order to avoid the applicant trying to bind all the collected packaging to itself, a way of dividing this packaging must be established. In this respect, the Commission has proposed methods of division based on exact shares corresponding to each system's licensed quantities, which neutralises the risk of the applicant monopolising the collected packaging. These methods of division prevent the applicant from trying to weaken the position of competing systems by artificially increasing the quantities reported to the collection partners. Therefore these methods appear to be satisfactory with respect to the objective pursued, namely to avoid any elimination of competition on the market for household packaging disposal systems and so avoid a reduction in demand for collection and sorting services on the market for the collection and sorting of household packaging.

137 Therefore the obligation in Article 3(b) of the contested decision is not inappropriate in the light of the objective pursued by the Commission (see, to that effect, *Käserei Champignon Hofmeister*, paragraphs 60 to 64).

138 That conclusion cannot be invalidated by the applicant's arguments concerning the acquisition of additional licensed quantities by another dispensation system and the partial use of collection facilities set up by the applicant.

139 First, with respect to the argument relating to the acquisition of additional licensed quantities by another dispensation system, it should be pointed out that Article 11(7) of the Packaging Ordinance, in the version relevant to the present case, establishes that percentages are to be defined so that at least 50 % of the quantity of each packaging material for which there is participation in a system is collected. Pursuant to the first obligation under the authorisation to set up and operate a collection and recycling system, the minimum collection and recycling quotas for the applicant are to be calculated 'by reference to the quantities of packaging contracted for one calendar year, in accordance with Article 11(7) [of the Packaging Ordinance]'. Therefore, the introduction of 'free-riding packaging' — that is to say, packaging which up to now has not been accepted by any disposal system — will have no influence on the applicant's collection quotas, which will continue to be calculated as indicated above. It is of course true that the fact that free-riding packaging may become licensed packaging for systems competing with the applicant means that this packaging will not be available to the applicant for the purposes of reaching its collection quota. However, in view of the broad logic of the applicable national legislation, in a situation where there is shared use of collection infrastructure, in order to collect the quantity of packaging necessary to reach their collection quotas, dispensation systems must not rely on free-riding packaging but must increase their collection capacities, for example by increasing the frequency of container clearance.

140 The claim that the applicant will be able to know only a posteriori that its forecast collection capacities are insufficient does not invalidate this conclusion. As is indicated in paragraph 118 above, the applicant can estimate the licensed quantity of packaging in advance and can, from this figure, establish what its collection needs are and decide whether it should increase its collection capacities. Similarly, it will be able to correct

its forecast collection capacities according to the quantities of packaging actually put into circulation and reported by the licensees on a continuous basis.

141 Finally, contrary to the applicant's claims, the shared use of collection infrastructure does not constitute a genuine transfer of collection capacities to new competitors, which would be to the applicant's detriment. In reality, shared use does not reduce its collection capacities, since collection capacities are a function of the licensed quantity of packaging which each collection system reports to the collection partners, and so they take account of any increase in the licensed quantity of packaging in each collection region. Therefore, as has already been indicated in paragraph 139 above, the applicant, in order to ensure that it meets its collection quotas, will have to adapt collection to new needs — for example, by asking its partners to increase the capacity of containers or by increasing the frequency of clearance.

142 Consequently, the argument relating to the acquisition of additional licensed quantities by a competing dispensation system must be dismissed.

143 Secondly, the argument relating to partial use of the collection infrastructure set up by the applicant by systems which have their own collection infrastructure facilities cannot affect the proportionality of the obligation at issue. As the file shows, the obligation imposed on the applicant in Article 3(b) of the contested decision does not give competing systems which are asking for partial use of collection infrastructure the right to bind a quantity of packaging to themselves equivalent to the total quantity of packaging which they are licensed to put into circulation. On the contrary, competing systems will have to notify in advance the part of their licensed quantity of packaging for which they wish to share use of a facility, and only that part will be taken into account for dividing the packaging collected. Indeed, it should be noted that this

possibility was put forward by the applicant and accepted by the Commission at the interlocutory proceedings which took place before the General Court.

144 As regards the applicant's claim that total or partial shared use of collection infrastructure does not create real price competition, it must be pointed out that the contested decision allows the applicant to reduce the fee provided for in the partner agreements. Therefore its competitors will bear the costs of providing containers and collection sacks, the costs of collection from households and establishments accumulating similar packaging and the costs of transporting the licensed packaging for which they are responsible. It is true that this circumstance puts them, from the point of view of some costs, in the same situation as the applicant. Nevertheless, having regard to possible differences in organisation and management of the system, to the profitable recycling and marketing of materials, and to the commercial policies of the various undertakings, price competition cannot be ruled out.

145 As to whether or not the obligation at issue is necessary, it is apparent from recitals 290 and 293 of the contested decision that without this obligation the applicant would be in a position to try to control the division of the collected packaging, binding part of the packaging to itself which in reality does not correspond to its share. Even though the applicant has proposed another method of division based on a defined take-back capacity, fixed each year and in advance according to the expected licensed quantities, it has not succeeded in establishing the existence of other measures which would make this obligation pointless. Given the applicant's strong position on the market, the method of division which it proposes would not prevent it from altering the quantities requested each year, artificially increasing the expected licensed quantities in order to weaken the position of competing systems and thereby reducing the part of the container capacity available for competitors. As the Commission has argued in its pleadings — an argument which the applicant has failed to challenge successfully — the competing systems will attempt to respond, in their turn, by increasing the quantities requested, which will give rise to a race for shares between competing systems, especially in the more attractive economic areas, where the applicant will be very well placed in the light of its strong market position. In contrast, the division envisaged in Article 3(b) of the contested decision is based on appropriate, objective,

verifiable methods, which protect the interests of new competitors while still respecting the applicant's market position.

146 Consequently, there is no other measure which so effectively avoids eliminating competition on the vertical upstream market. Therefore the obligation in Article 3(b) of the contested decision is necessary to achieve the objective pursued by the Commission (see, to that effect, *Käserei Champignon Hofmeister*, paragraph 66, and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 139).

147 It follows from all the foregoing that the obligation at issue does not infringe the principle of proportionality, in so far as it constitutes a measure likely to achieve the objective pursued by the contested decision, namely to avoid restricting competition on the market for household packaging disposal systems and consequently reducing demand for collection and sorting services for household packaging, and that it does not go beyond what is necessary to achieve that objective.

148 This conclusion cannot be invalidated by the argument alleging a loss of efficiency for the ARA system arising from the fact that, in circumstances where there is shared use of collection infrastructure, the applicant is not authorised to pass certain costs on to competing systems and to collection partners. First, according to recitals 139 and 304 of the contested decision, the system costs result from setting up the ARA system and reflect particular features of that system. In circumstances where there is shared use, the applicant has not established that competitors who benefit from shared use of collection infrastructure may also take advantage of the whole ARA system in order to expand their waste disposal activities. On the other hand, it can be expected that, on the basis of shared use of a single collection infrastructure, competitors may set

up their own waste disposal technology. Therefore the fact that the applicant must bear these costs does not lead to any loss of efficiency for the ARA system and so there is no justification for passing them on to third parties. Secondly, with regard to costs resulting from shared use of collection infrastructure, the applicant has not succeeded in establishing how far the shared use of collection infrastructure would alter the costs per kilo of collected packaging. Therefore it is not possible to establish the proportion by which shared use could reduce the ARA system's efficiency if the applicant were not authorised to pass the costs on to third parties.

149 Consequently, this plea must be dismissed.

The sixth plea, alleging that there are contradictions between the operative part and the statement of reasons of the contested decision

Arguments of the parties

150 The applicant claims that there is a contradiction between recitals 301 and 313 of the contested decision and its operative part, in particular, Article 3(b). This article does not envisage the possibility that the obligation will not be implemented in circumstances where competing systems do not request shared use of collection infrastructure and it does not give any indication as to when the obligation should be implemented. According to the applicant, the operative part of the contested decision should be corrected so that its wording highlights the link which exists between the imposition of the obligation, the shared use of collection facilities and the time at

which the obligation would be implemented. The applicant concludes by claiming that the contested decision is neither sufficiently precise nor relevant.

151 The Commission disputes all the arguments put forward by the applicant.

Findings of the Court

152 Although it is true that Article 3(b) of the contested decision provides that the applicant 'may ask disposers for evidence only of those packaging quantities that correspond to the ARA system's share of the total packaging quantities licensed by systems in the household sector for specific categories of material', it has none the less been held that the operative part of a decision must be read in the light of the terms of its preamble, which provide its basis — in the present case, recitals 301 and 313 of the contested decision (see, to this effect, Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 211). According to recital 301 of the contested decision, '[i]f a competing system does not seek shared use but builds its own collection facilities, the obligations do not apply' and according to recital 313, '[r]emuneration will be reduced only if the competing system seeks to obtain shared use in the particular collection region and only once it has been granted a licence'.

153 Similarly, although it is true that Article 3(b) of the contested decision states that '[t]his obligation relates to all disposers with whom ARGEV has concluded a collection

partner agreement', it has nonetheless been held, in the case-law cited in recital 152 above, that this part of the article must also be read in the light of paragraph 292 of the contested decision. This recital states that the obligation relates to all disposal firms with which the applicant has concluded a partner agreement, regardless of whether they allow shared use of infrastructure, in order to give them an incentive to conclude agreements with competing systems, and that the obligation under Article 3(b) of the contested decision applies to the extent that a competing system wishes to obtain shared use of the collection infrastructure under the obligation in Article 3(a) of the contested decision.

154 Consequently, contrary to the applicant's claims, the operative part of the contested decision, read in the light of the terms of its preamble, states clearly and precisely that the obligation at issue is imposed only where a competing system asks for shared use of collection infrastructure and that the relevant date for implementation of the obligation is the date when the system licence is granted. This plea must therefore be rejected and the action dismissed in its entirety.

Costs

155 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful in its pleadings, and the Commission, EVA and the BAA have applied for costs, the applicant must be ordered to pay, in addition to its own costs, those of the Commission, EVA and the BAA, including those relating to the interlocutory proceedings.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Altstoff Recycling Austria AG to bear its own costs and pay those incurred by the European Commission, EVA Erfassen und Verwerten von Altstoffen GmbH and the Bundeskammer für Arbeiter und Angestellte, including those relating to the interlocutory proceedings.**

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 22 March 2011.

[Signatures]

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