JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

24 May 2007 *

In Case T-151/01,

Der Grüne Punkt — Duales System Deutschland GmbH, formerly Der Grüne Punkt — Duales System Deutschland AG, established in Cologne (Germany), represented by W. Deselaers, B. Meyring, E. Wagner and C. Weidemann, lawyers,

applicant,

v

Commission of the European Communities, represented initially by S. Rating, and subsequently by P. Oliver, H. Gading and M. Schneider, and finally by W. Mölls and R. Sauer, acting as Agents,

defendant,

supported by

Vfw AG, established in Cologne (Germany), represented by H.F. Wissel and J. Dreyer, lawyers,

* Language of the case: German.

and by

Landbell AG für Rückhol-Systeme, established in Mayence (Germany),

BellandVision GmbH, established in Pegnitz (Germany),

represented by A. Rinne and A. Walz, lawyers,

interveners,

APPLICATION for annulment of Commission Decision 2001/463/EC of 20 April 2001 relating to a proceeding pursuant to Article 82 [EC] (Case COMP D3/34493 — DSD) (OJ 2001 L 166, p. 1)

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of R. García-Valdecasas, President, J.D. Cooke and I. Labucka, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 11 and 12 July 2006,

gives the following

Judgment

Law

A — *Ordinance on the avoidance of packaging waste*

1 On 12 June 1991 the German Government adopted the Verordnung über die Vermeidung von Verpackungsabfällen (Ordinance on the avoidance of packaging waste (BGBl. 1991 I, p. 1234)), the amended version of which — applicable in the present case — entered into force on 28 August 1998 ('the Ordinance' or 'the Packaging Ordinance'). That ordinance is intended to prevent and reduce the impact of packaging waste on the environment. For that purpose it requires manufacturers and distributors to take back and recover used sales packaging outside the public waste disposal system.

2 Under Paragraph 3(1) of the Ordinance, sales packaging ('packaging') is packaging which is provided as a unit at the point of sale and passes to the final consumer. It also includes packaging used by trades, restaurants and other service providers which enables or supports the handing over of goods to final consumers (service packaging), and non-returnable tableware and cutlery.

3 Paragraph 3(7) of the Ordinance defines the manufacturer as someone who manufactures packaging, packaging materials or products from which packaging is directly made, or who imports packaging into German territory. Paragraph 3(8) of the Ordinance provides that a distributor is someone who puts into circulation, regardless of the marketing stage, packaging, packaging materials or products from which packaging is directly made, or packaged goods. The mail-order trade may also be a distributor within the meaning of the Ordinance. Lastly, a final consumer is principally defined in Paragraph 3(10) of the Ordinance as someone who does not resell the goods in the form in which they are delivered to him.

4 The obligations to take back and recover which are imposed on manufacturers and distributors under the Ordinance can be met in two ways.

5 First, pursuant to Paragraph 6(1) and (2) of the Ordinance, manufacturers and distributors are obliged to take back from final consumers used sales packaging, free of charge, at or in the immediate vicinity of the actual point of sale and to recover it ('the self-management solution'). The distributor's take-back obligation is limited to packaging of the type, shape and size, and of the goods which are part of his range. In the case of distributors with a sales area of less than 200 square metres, the take-back obligation applies only to packaging for the brands sold by the distributor (fourth and fifth sentences of Paragraph 6(1) of the Ordinance). Under the third sentence of Paragraph 6(1) of the Ordinance, in a self-management solution, the distributor must draw the attention of the final consumer 'by means of clearly visible and legible signs' to the fact that the packaging may be returned.

6 Second, in accordance with the first sentence of Paragraph 6(3) of the Ordinance, manufacturers and distributors may participate in a system which guarantees the regular collection, throughout the distributor's sales territory, of used sales packaging from the final consumer or in the vicinity of the final consumer in

order for them to be recovered ('the exemption system'). Manufacturers and distributors participating in an exemption system are exonerated from their take-back and recovery obligations in respect of all packaging covered by that system. Pursuant to the second sentence of point 4(2) of Annex I to Paragraph 6 of the Ordinance, manufacturers and distributors have to make it known that they are participating in an exemption system 'by marking packaging or by other suitable means'. They can thus make such participation known on the packaging or use other measures, such as informing customers at the point of sale or by a package leaflet, for example.

7 Pursuant to the 11th sentence of Paragraph 6(3) of the Ordinance, exemption systems need to be approved by the competent authorities in the *Länder* concerned. To be approved, those systems must, inter alia, cover the territory of at least one *Land*, ensure regular collections reaching the final consumer and have signed agreements with the local bodies responsible for waste management. Any undertaking which satisfies those conditions in a *Land* is entitled to organise an authorised exemption system in that *Land*.

8 Since 1 January 2000 both self-management solutions and exemption systems are subject to the same recovery rates. Those rates, which are laid down in Annex I to the Ordinance, vary depending on the packaging material. Compliance with the take-back and recovery obligations is ensured, in the case of self-management solutions, by certificates provided by independent experts and, in the case of exemption systems, by the provision of verifiable data on the quantities of packaging collected and recovered.

9 In addition, the ninth sentence of Paragraph 6(1) of the Ordinance states that, if a distributor does not comply with his take-back and recovery obligations by means of a self-management solution, he must do so by means of an exemption system.

10 In that regard, in their observations of 24 May 2000, sent to the Commission in the context of the administrative proceedings ('the observations of the German authorities'), the German authorities stated that the Packaging Ordinance allowed distributors to combine the taking back of packaging in the vicinity of his business, in the context of a self-management solution, and the collection of packaging in the vicinity of the final consumer, in the context of an exemption system, by participating in the exemption system for only part of the packaging which it had put into circulation.

11 In the observations of the German authorities it was also stated that, if the distributor chose to participate in an exemption system for all the packaging which he put into circulation, he was no longer subject to the obligations laid down in Paragraph 6(1) and (2), which meant that a subsequent individual waste collection solution was not possible. However, if the distributor chose to participate from the outset in a self-management solution, subsequent participation in an exemption system was possible if the recovery rate was not achieved in the context of the individual waste disposal.

B — *The exemption system of Der Grüne Punkt — Duales System Deutschland GmbH and the Trade Mark Agreement*

12 Since 1991, Der Grüne Punkt — Duales System Deutschland GmbH ('the applicant' or 'DSD') is the only undertaking which operates a Germany-wide exemption system ('the DSD system'). For that reason, in 1993, DSD was approved by the competent authorities in all of the *Länder*.

13 The relationship between DSD and the manufacturers and distributors which participate in its system is governed by a standard agreement which concerns the use of the Der Grüne Punkt logo ('the Agreement' or 'the Trade Mark Agreement').

In signing that agreement, the participating undertaking is authorised, in return for a fee, to affix the Der Grüne Punkt logo to sales packaging included in the DSD system (Article 1(1) of the Trade Mark Agreement).

14 DSD ensures, on behalf of the undertakings which participate in its system, the collection, sorting and recovery of the used sales packaging which it decides to include in the DSD system, thus relieving them of their take-back and recovery obligations of that packaging (Article 2 of the Agreement).

15 The participating undertakings are obliged to notify the types of packaging which they wish to dispose of by means of the DSD system and to affix the Der Grüne Punkt logo to each piece of packaging belonging to those types and destined for domestic consumption in Germany so that DSD may release the participating undertaking from that obligation (Article 3(1) of the Agreement).

16 The user of the logo pays DSD a fee for all the packaging bearing the Der Grüne Punkt logo which he distributes on German territory in accordance with the Trade Mark Agreement. The exceptions to that rule must be given separate written approval (Article 4(1) of the Agreement). Article 5(1) of the Agreement also specifies that all packaging bearing the Der Grüne Punkt logo and distributed by the user of the logo on Germany territory are billed (Article 5(1) of the Agreement).

17 The amount of the fee is determined on the basis of two factors, namely, (i) the weight of the packaging and the type of material used, and (ii) the volume or surface area of the packaging. Fees are calculated without any profit mark-up and they serve solely to cover the costs incurred in collecting, sorting and recovering packaging and the associated administrative costs (Article 4(2) and (3) of the Agreement). Fees may be adjusted by decision of the DSD if those costs vary.

18 In the context of the DSD system, packaging bearing the Der Grüne Punkt logo may be collected in either special bins and divided up into metal, plastic and composite materials, or in containers placed close to private households (in particular for paper and glass), while residual waste must be put into the bins provided by the public waste disposal bodies.

19 However, DSD neither collects nor takes back used packaging itself, but sub-contracts that service to collection undertakings. The relations between DSD and those undertakings are governed by a standard agreement, amended on a number of occasions, which seeks to create and operate a system to collect and sort packaging. By reason of those Service Agreements signed between DSD and 537 local undertakings, each of those undertakings has the exclusive power to carry out, in a determined zone, the collection of packaging on DSD's behalf. Once sorted, that packaging is transported to a recycling centre for it to be recovered.

20 The Service Agreement is the object of Commission Decision 2001/837/EC relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Cases COMP/34493 — DSD, COMP/37366 — Hofman + DSD, COMP/37299 — Edelhoff + DSD, COMP/37291 — Rechmann + DSD, COMP/37288 — ARGE and five other undertakings + DSD, COMP/37287 — AWG and five other undertakings + DSD, COMP/37526 — Feldhaus + DSD, COMP/37254 — Nehlsen + DSD, COMP/37252 — Schönmakers + DSD, COMP/37250 — Altvater + DSD, COMP/37246 — DASS + DSD, COMP/37245 — Scheele + DSD, COMP/37244 — SAK + DSD, COMP/37243 — Fischer + DSD, COMP/37242 — Trienekens + DSD, COMP/37267 — Interseroh + DSD) (OJ 2001 L 319, p. 1). That decision was the subject of an action for annulment brought by applicant in Case T-289/01 *Duales System Deutschland* v *Commission.*

Facts at the origin of the dispute

21 On 2 September 1992 DSD notified the Commission of its Statutes and also of a number of agreements, including the Trade Mark Agreement and the Service Agreement with a view to obtaining negative clearance or, failing that, a decision granting exemption.

22 Following publication of the notice in the *Official Journal of the European Communities* of 27 March 1997 (OJ 1997 C 100, p. 4), pursuant to Article 19(3) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), in which the Commission announced its intention to take a favourable view of the agreements notified, it received observations from interested third parties concerning, inter alia, various aspects of the application of the Trade Mark Agreement. In particular, those interested third parties complained of the distortion of competition which might arise if an undertaking were charged twice as a consequence of participating in the DSD system and the system of another service provider.

23 On 15 October 1998 DSD submitted to the Commission a series of commitments aimed at preventing manufacturers and distributors of packaging participating in the DSD system and in another exemption system operating at regional level from being charged twice. In particular, DSD envisaged the situation in which exemption systems, restricted to one or more *Länder*, are set up alongside the DSD system. In that case, packaging of the same type and of the same distributor or manufacturer could be taken back, in those *Länder*, by one of the new exemption systems and, in the other *Länder*, by the DSD system. DSD gave the following commitment in that regard (recitals 4, 58 and 59 of the contested decision):

'On condition that regional alternative systems to [the DSD system] are created and are formally approved by the highest competent regional authority under Paragraph 6(3) of the Packaging Ordinance, [DSD] is prepared to apply the Trade Mark

Agreement in such a way that licensees are able to participate in such a system as regards some of their packaging. [DSD] will not charge a licence fee under the Trade Mark Agreement for packaging that can be shown to be covered by such an alternative system. A further condition for release from the licence fee obligation in respect of packaging bearing the mark [Der Grüne Punkt] is that protection of the trade mark [Der Grüne Punkt] should not be impaired.'

24 On 3 November 1999, the Commission considered that the series of commitments given by DSD on 15 October 1998 should also include self-management solutions used for the disposal of some of the packaging and not be restricted only to exemption systems.

25 On 15 November 1999 certain manufacturers of packaging sent a complaint to the Commission. They claimed that the Trade Mark Agreement prevented the setting up of a self-management solution for taking back packaging. They considered that the use of the logo, where the waste disposal service has not actually been provided by DSD, constituted an abuse of a dominant position on the part of DSD.

26 By letter of 13 March 2000, DSD submitted two further commitments to the Commission. The first one concerned the case where manufacturers and distributors of packaging opt for a self-management solution for part of their packaging and participate in the DSD system for the remainder. In that case, DSD undertook not to charge a fee under the Trade Mark Agreement for the part of the packaging taken back by the self-management solution, on the condition that it is provided with evidence in respect of that second type of collection. That evidence should be furnished in accordance with the requirement laid down in point 2 of Annex I to the Packaging Ordinance. In its letter of 13 March 2000 DSD also stated that it did not seem necessary to amend the series of commitments given on 15 October 1998 (see recitals 7, 60 and 61 of the contested decision).

27 On 3 August 2000 the Commission sent a Statement of Objections to DSD, which replied by letter of 9 October 2000.

28 On 20 April 2001 the Commission adopted Decision 2001/463/EC relating to a proceeding pursuant to Article 82 [EC] (Case COMP D3/34493 — DSD) (OJ 2001 L 166, p. 1; 'the contested decision').

Procedure and forms of order sought

29 By application lodged at the Registry of the Court of First Instance on 5 July 2001, the applicant brought an action seeking annulment of the contested decision under the fourth paragraph of Article 230 EC.

30 By a separate document, lodged on the same day, the applicant also brought an application under Article 242 EC to suspend application of Article 3 of the contested decision, and Articles 4, 5, 6 and 7 thereof in so far as they refer to Article 3, until the Court of First Instance gives a ruling on the substance.

31 By order of 15 November 2001 in Case T-151/01 R *Duales System Deutschland* v *Commission* [2001] ECR II-3295, the President of the Court of First Instance rejected the application to suspend application of the contested decision.

32 By applications registered at the Registry of the Court of First Instance on 16, 19 and 20 July 2001, Vfw AG, Landbell AG für Rückhol-Systeme ('Landbell') and BellandVision GmbH sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. Those applications for leave to intervene were notified to the parties, which submitted their observations within the prescribed period.

33 By order of 5 November 2001, the Court of First Instance (Fifth Chamber) granted the three undertakings leave to intervene and they submitted their observations on 7 February 2002.

34 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, sent the parties a number of questions to be answered orally at the hearing. Those questions concerned the different stages of the collection of recovery process of packaging and the conditions in which competition between self-management solutions and exemption systems could exist. The Court also called on the Commission to produce a document presented by the German authorities in the context of the administrative proceedings. The Commission sent that document on 26 June 2006.

35 The parties presented oral argument and answered the questions put by the Court at the hearing on 11 and 12 July 2006.

36 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

37 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

38 Vfw claims that the Court should dismiss the action.

39 Landbell claims that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

40 BellandVision claims that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

41 Before examining the arguments of the parties on the admissibility and the substance of the dispute, the content of the contested decision must first be set out.

A — *The contested decision*

42 By contrast with the Ordinance, in which it is not stated whether it is possible to combine a self-management solution with an exemption system or even to use several exemption systems to take back and recover the marketed packaging, the contested decision takes as a starting point the possibility that a manufacturer or distributor of packaging may combine those different systems in order to comply with the obligations imposed on him under the Ordinance.

43 In that respect, the Commission's legal assessment is divided into two parts: the first part concerns the analysis of DSD's conduct in light of Article 82 EC (recitals 65 to 160 and Article 1 of the contested decision). The second part relates to the examination of the measures enabling the Commission, on the basis of Article 3(1) of Regulation No 17, to bring an end to the abuse found (recitals 161 to 167 and Articles 3 to 7 of the contested decision). The contested decision does not take a view on the legality of DSD's conduct in the light of Article 86(2) EC.

1. *The possibility of combining several take-back and recovery systems to comply with the obligations under the Packaging Ordinance*

44 The possibility of using several take-back and recovery systems to comply with the obligations under the Packaging Ordinance ('mixed systems') constitutes the premiss of the contested decision in which the Commission envisages the following three cases (recital 101 of the contested decision):

— Case No 1 corresponds to the case in which a manufacturer or distributor uses the DSD (national) exemption system for part of its packaging and uses another (regional) exemption system for the remainder of the packaging;

— Case No 2 corresponds to the case in which a manufacturer or distributor uses the DSD system for part of its packaging and uses a self-management solution for the remainder of the packaging;

— Case No 3 corresponds to the case in which a manufacturer or distributor has all of his sales packaging in Germany disposed of by systems in competition with the DSD system, while participating in a system which uses the Der Grüne Punkt logo in other Member States.

45 The contested decision sets out several facts enabling the finding that it is possible to use mixed systems. Thus, the decision states that it is apparent from the observations of the German authorities (recital 20 of the contested decision) that the Ordinance makes it possible to combine a self-management solution and an exemption system by participating in an exemption system only for the taking back of some of the packaging put into circulation. In such a case, the German authorities state, however, that it is necessary to clearly define, in the interests of the consumer and of the authorities, which packaging is subject to the take-back obligation at, or

in the immediate vicinity of, the points of sale and the packaging which is not (recital 20 of the contested decision). The contested decision also points out that it is apparent for an earlier response of the German authorities that Article 6(3) of the Ordinance does not imply that it is possible to use only one system. It was never the intention of the German authorities that only one exemption system should be created in the whole of the country or in each *Land* (recital 23 of the contested decision).

46 The observations of the German authorities also permit the finding that the alternative presentation of the Ordinance, according to which a manufacturer or distributor of packaging may use a self-management solution or an exemption system to respect its obligations, does not preclude a mixed system. Moreover, the Court points out that, in the present case, the applicant does not dispute that a manufacturer or distributor of packaging may use a mixed system, but challenges the Commission's assessment of its conduct in relation to Article 82 EC and Article 3(1) of Regulation No 17.

2. *Assessment relating to Article 82 EC*

47 According to the contested decision, DSD is the only undertaking which offers a Germany-wide exemption system and the DSD system collects approximately 70% of the sales packaging in Germany and approximately 82% of the sales packaging collected in Germany from final consumers (recital 95 of the contested decision). DSD's dominant position is not contested in this case.

48 In the present case, the abuse of a dominant position found in the contested decision is based on the fact that the fee which DSD charges manufacturers and distributors of packaging who participate in the DSD system is not conditional upon the actual

use of that system, but calculated on the basis of the amount of packaging bearing the Der Grüne Punkt logo which those manufacturers and distributors put into circulation in Germany (Article 4(1) and Article 5(1) of the Agreement). Manufacturers and distributors who participate in the DSD system must affix the Der Grüne Punkt logo to every piece of packaging notified to DSD and intended for consumption in Germany (Article 3(1) of the Agreement). Thus, according to the decision, DSD abuses its dominant position by not linking the fee payable under the Agreement to the actual use of the DSD system. It is apparent from the investigation carried out by the Commission, on the basis of complaints lodged by customers and competitors with DSD, that the method of calculation of the fee paid to DSD stands in the way of the wish of certain packaging manufacturers, which are customers of the DSD system, to be able to use their own self-management solution or another exemption system to take care of part of the packaging which they put into circulation (recitals 100 to 102 of the contested decision).

49 In that regard, the contested decision considers that the solution proposed by DSD, namely to refrain from marking with the Der Grüne Punkt logo packaging which is not to be covered by the DSD system, but by another system, whether a self-management solution or exemption system, would, 'in a not inconsiderable number of cases', be economically unrealistic (recital 103 of the contested decision). Such a solution would require selective labelling of packaging (with or without the Der Grüne Punkt logo), which results in significant additional costs in the case where only one form of presentation is used for packaging or where different distribution channels are used (recitals 104 and 105 of the contested decision). In addition, such a solution requires manufacturers and distributors of packaging which use mixed systems to ensure that packaging bearing the Der Grüne Punkt logo ends up only in places where it is picked up by the DSD system and that the packaging which does not bear that logo is placed where the other systems can ensure that it is taken back, which is impossible in practice (recital 106 of the contested decision). Finally, in the light of the fact that the final consumer will often not decide until after buying the packaged product and sometimes after consuming the product whether to dispose of the packaging by means of an exemption system close to his home or to bring it back to the place where he bought it for it to be taken back by a self-management solution, it is impossible to allocate the portion of the packaging bearing the Der Grüne Punkt logo to one type of collection or another (recital 107 of the contested decision).

50 In the contested decision, the Commission considers that the effects of the abuse, established as regards the fee system linked to the Trade Mark Agreement, are two-fold. First, by making the fee subject exclusively to the use of the logo, DSD exposes to unfair prices and trading conditions the undertakings which do not use the service assuming the obligation to dispose of packaging, or those which use the service for only some of their packaging. As a result of the excessive difference between the cost of the service provision and its price, there is an abuse of a dominant position for the purposes of point (a) of the second paragraph of Article 82 EC (recitals 111 to 113 of the contested decision). Second, by virtue of the fee system established in the Trade Mark Agreement undertakings subject to it have no economic interest, in participating in a competing self-management solution or exemption system because those undertakings must either pay a fee to DSD in addition to the remuneration paid to the competitor or introduce separate lines of packaging and distribution channels. The fee system thus makes it more difficult for organisations competing with the DSD system to enter the market (see recitals 114 and 115 of the contested decision).

51 The Commission describes the abuse constituted by the contractual fee in further detail in the three cases cited above. As regards Case No 1, namely a mixed system combining the use of the national DSD exemption system with the use of another regional exemption system, the contested decision states that that case currently requires either the affixing of a different mark depending on the system used, or payment of a fee to two systems. Therefore, for DSD to require payment of a fee for the total amount of packaging put into circulation in Germany has the effect of depriving participation in a regional exemption system of any financial interest (see recitals 118 to 123 of the contested decision).

52 In order to address that problem, DSD undertook, in the context of the administrative proceedings (recitals 58 and 59 of the contested decision), to apply the Trade Mark Agreement in such a way that the manufacturers and distributors concerned are able to participate in another exemption system for some of their packaging, on the condition, however, that the protection of the mark Der Grüne

Punkt is not impaired. Since DSD refused to withdraw the condition concerning the protection of the mark, an expression which was not explained in more detail, the contested decision considered that that commitment was not sufficient to allay the Commission's concerns (recitals 122 and 123 of the contested decision).

53 As regards Case No 2, concerning a mixed system combining the use of a self-management solution and the DSD system, the contested decision states that for DSD to require payment of the fee for the total amount of packaging put into circulation in Germany has the effect of excluding participation in a self-management solution for some of that packaging (see recitals 124 to 128 of the contested decision).

54 In order to address that problem, DSD undertook, during the administrative proceedings (recitals 60 and 61 of the contested decision), not to charge a fee under the Agreement for the part of the packaging taken back by a self-management solution, on the condition, however, that evidence is furnished thereof. In that commitment, DSD also stated that the use of the Der Grüne Punkt logo remained restricted to packaging taken back by the DSD system and that it could thus not be affixed to packaging taken back by a self-management solution. The Commission considered that it was hardly conceivable, in practice, to put in place separate packaging lines and distribution channels given that it was virtually impossible for the manufacturer or distributor of the packaging concerned to be able to determine, at that stage, which packaging consumers were going to bring back to the exemption system and which packaging they were going to bring back to the self-management solution. Therefore, the Commission considered that that commitment was not sufficient to allay the Commission's concerns regarding the competition situation (see recitals 127 and 128 of the contested decision).

55 As regards Case No 3, which assumes the absence of participation in the DSD system in Germany but participation in a take-back and disposal system which uses

the Der Grüne Punkt logo in another Member State, a case in which DSD could request payment of a fee in Germany, the contested decision states that a commitment and a declaration from DSD presented in the context of the administrative proceedings enable the problems identified by the Commission in that regard to be addressed (see recitals 62 to 64 and 129 to 135 of the contested decision).

56 The contested decision states that the abuse found is not justified by the alleged incompatibility between the provisions of the Ordinance and the affixing of the Der Grüne Punkt logo to packaging for which no service assuming the obligation to dispose of waste is provided (see recitals 136 to 142 of the contested decision). It is also not justified by the need to preserve the distinctive character of the Der Grüne Punkt logo (see recitals 143 to 153 of the contested decision). In that regard, the decision refers to a judgment of the Kammergericht Berlin (Higher Regional Court, Berlin, Germany) of 14 June 1994 and states that the essential function of that logo is fulfilled 'when it signals to the consumer that he has the option of having the packaging collected by DSD'. Therefore, the function of that logo does not require, where participation in the DSD system is only partial, that it be affixed only to the packaging which the DSD system is responsible for (see recital 145 of the contested decision).

57 The contested decision also points out that, in the light of the circumstances specific to the taking back and recovery of the packaging in Germany and in the common market, the abuse of the dominant position constituted by the way in which the contractual fee in dispute is imposed is likely to have an appreciable effect on trade between Member States (see recitals 155 to 160 of the contested decision). The effect on trade between the Member States is moreover not contested in the present case.

58 By way of conclusion in its assessment under Article 82 EC, the contested decision states that, in certain cases, the conduct of DSD in requiring payment of a fee for the total quantity of the packaging carrying the Der Grüne Punkt logo and put into

circulation in Germany constitutes an abuse of a dominant position. That infringement of Article 82 EC is characterised in Article 1 of the contested decision in the following terms:

'The conduct of [DSD] in requiring, under the first sentence of Article 4(1) and the first sentence of Article 5(1) of the Trade Mark Agreement, payment of a licence fee for the total quantity of sales packaging carrying the [Der Grüne Punkt logo] and put into circulation in Germany is incompatible with the common market even where undertakings subject to the obligations arising out of the Packaging Ordinance:

(a) either use DSD's exemption service as referred to in Article 2 of the Trade Mark Agreement only for partial quantities [Cases No 1 and 2] or, instead of using the said service, put into circulation in Germany uniformly designed packaging which is also in circulation in another member country of the European Economic Area and participates in a take-back system using the [Der Grüne Punkt logo] [Case No 3], and

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

3. *Assessment relating to Article 3(1) of Regulation No 17*

59 After finding the existence of an abuse of a dominant position, the contested decision determines, in accordance with Article 3(1) of Regulation No 17, the way in

which DSD must bring the infringement to an end (recitals 161 to 167 and Articles 2 to 7 of the contested decision).

60 The most important of those measures requires DSD not to charge any licence fee for such quantities of packaging carrying the Der Grüne Punkt logo as are put into circulation in Germany for which the exemption service is not used and for which the Packaging Ordinance obligations have been fulfilled in another way. That measure, established in Article 3 of the contested decision, as regards Cases No 1 and 2, is the following:

'DSD shall undertake vis-à-vis all parties to the Trade Mark Agreement not to charge any licence fee for such partial quantities of sales packaging carrying the [Der Grüne Punkt logo] as are put into circulation in Germany for which the exemption service referred to in Article 2 of the Trade Mark Agreement is not used and for which the Packaging Ordinance obligations have demonstrably been fulfilled in another way.

The commitment in the first paragraph shall replace a derogation under the second sentence of Article 4(1) of the Trade Mark Agreement.'

61 In addition, in Article 5 of the contested decision, the Commission sets out the rules of evidence required in those Cases as follows:

'1. [Case No 1] Where there is partial or complete participation in a competing exemption system, the system operator's confirmation that the relevant quantity of

packaging is covered by the competing system shall constitute sufficient proof that the Packaging Ordinance obligations under Articles 3 and 4 have been fulfilled in another way.

2. [Case No 2] Where there is partial or complete participation in a self-management solution, the subsequent presentation of an independent expert's certificate stating that the take-back and recovery requirements for the relevant amount of packaging have been fulfilled shall be sufficient. The certificate may be issued either to the individual manufacturer or distributor or to an association of self-managers.

3. DSD may on no account require the certificate to be presented at an earlier time than is laid down under the Packaging Ordinance.

4. Irrespective of the version of the Packaging Ordinance in question, the fact that the certificate confirms to the contractual partner that the take-back and recovery requirements, related to a specific quantity of packaging, have been fulfilled shall suffice for the proof to be furnished to DSD.

5. Should the certificate contain other information, this shall be obliterated.

6. Both the system operator's confirmation and the independent expert's certificate may be replaced by an accountant's certificate confirming retrospectively the fulfilment of the Packaging Ordinance obligations in respect of a specific volume of packaging.

7. Other provisions of the Trade Mark Agreement shall not be applied in such a way as to require a higher level of proof to be furnished to DSD.'

62 Article 4 of the decision envisages the specific situation of Case No 3:

'1. In the case of packaging which is collected and recovered in another Member State under a system using the [Der Grüne Punkt logo] and which is put into circulation using the trade mark in the territory covered by the Packaging Ordinance, DSD shall not charge a licence fee if the requirements of the Packaging Ordinance have demonstrably been met otherwise than through participation in the system set up by DSD under [Paragraph] 6(3) of the Ordinance.

2. DSD may require, as a precondition for the waiver of the licence fee, that it be made clear to the final consumer on the packaging referred to in paragraph 1, in words or other suitable form placed close to the [Der Grüne Punkt logo], that the packaging does not participate in the dual system set up by DSD under [Paragraph] 6(3) of the Ordinance.

3. In the event of disagreement over the recognisability of the notice, the parties shall within one week of either or both sides finding that such disagreement has arisen, ask the Commission to appoint an expert.

The expert shall be charged with determining within four weeks whether, having regard to the packaging's basic function, the possible forms of the notice discussed by the parties fulfil the requirements set out in paragraph 2.

...'

63 It is against that background that the arguments of the parties need to be examined.

B — *The admissibility of the action*

1. *The admissibility of the action in so far as it concerns Article 4 of the contested decision*

64 The Commission claims that the action seeks the annulment of the contested decision in its entirety without referring to the particular situation laid down in Article 4, which is separable from the rest of the contested decision. The applicant's failure to mention that point does not conform with the requirements of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance and the action must be declared inadmissible in so far as it concerns Article 4 of the contested decision.

65 The applicant submits that, in accordance with the requirements of the Rules of Procedure, the application contains a clear and precise presentation of the facts and pleas in law which enables the Commission to prepare its defence and the Court to exercise its power of judicial review (order in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20). In particular, the applicant lists the reasons why the provisions of the Trade Mark Agreement at issue cannot be considered to be abusive in the light of Article 82 EC. This has the effect of depriving the measures laid down in Article 4 of the contested decision of all effect.

66 The Court observes that the contested decision finds an abuse of a dominant position (Article 1) and therefore imposes certain obligations on DSD in order to bring an end to that abuse (Articles 3 to 7). In particular, in Article 4 of the contested decision, the Commission imposes an obligation seeking to bring an end to the abuse of a dominant position in the case where a manufacturer or a distributor

envisages marketing packaging in a Member State other than Germany by participating in a take-back and recovery system which uses the Der Grüne Punkt logo, but which, for the same packaging put into circulation in Germany, complies with its obligations without participating in the DSD system.

67 In the context of the first plea in law, alleging infringement of Article 82 EC, the applicant seeks annulment of the contested decision in so far as it, erroneously, finds there to be an abuse of a dominant position. If the Court finds in favour of that plea, all the obligations imposed on DSD by the contested decision, seeking to put an end to that abuse, would have to be annulled without the need to examine the particular situation laid down in Article 4 of the contested decision.

68 Similarly, in the context of the second plea in law, alleging infringement of Article 3 of Regulation No 17 and of the principle of proportionality, the applicant seeks annulment of the obligation laid down in Article 4 of the contested decision in so far as it is disproportionate in view of the possibility of selectively labelling packaging or refraining from using the mark 'Der Grüne Punkt', it requires DSD to provide its services while being paid for them at a later stage and it excludes payment of a fee just for using the mark.

69 It must be found that the application satisfies the formal conditions laid down in Article 44(1)(c) of the Rules of Procedure and that the Court is thus able to exercise its power of judicial review. The Commission's application for the action be found inadmissible in so far as it concerns Article 4 of the contested decision must consequently be rejected.

2. *The introduction of new pleas in the course of proceedings*

70 The Commission submits that the reply contains three new pleas, concerning a new interpretation of the Trade Mark Agreement (see paragraph 115 below), the criticism of the citations of an old version of the Packaging Ordinance in the presentation of the facts of the contested decision and the fact that the consumer cannot request self-management solutions to collect packaging in the vicinity of his home. Those pleas should therefore be declared inadmissible.

71 The Court points out that, under the first subparagraph of Article 48(2) of the Rules of Procedure, the introduction of a new plea in law in the course of proceedings is not allowed 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 constitutes an amplification of a submission previously made, either expressly or by implication, in the original application and is closely linked to it must be declared admissible (see Case T-195/00 *Travelex Global and Financial Services and Interpayment Services* v *Commission* [2003] ECR II-1677, paragraphs 33 and 34, and the case-law cited).

72 In the present case, the alleged new pleas criticised by the Commission amount, in reality, to nothing more than arguments developed by the applicant in response to the arguments presented by the Commission in its defence as to the first plea in law, alleging infringement of Article 82 EC.

73 Consequently, the plea of inadmissibility raised by the Commission as regards the introduction of new pleas in the course of proceedings must be dismissed.

3. *The taking into account of certain annexes produced by the applicant*

(a) The annexes prepared by C. Weidemann

74 The Commission submits that the annexes prepared by C. Weidemann, one of DSD's lawyers, concerning the environmental management of the packaging system in Germany (Annex A to the application) and the justification for the DSD system in the light of Article 86 EC (Annex A to the reply), contain explanations which are not referred to in the applicant's pleadings. Therefore, the Court cannot take account of those annexes in so far as an allegation of infringement of the legislation cannot be made by a mere referral to annexes.

75 The Court observes that, in order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential points of fact and of law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible (Joined Cases 19/60, 21/60, 2/61 and 3/61 *Société Fives Lille Cail and Others* v *High Authority* [1961] ECR 281, 294, and Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraph 155, and the case-law cited). In that regard, although specific points in the text of the application can be supported and completed by references to specific passages in the documents attached, a general reference to other documents cannot compensate for the lack of essential elements of legal arguments which, under Article 44(1) of the Rules of Procedure, must be included in the application (order in Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703, paragraph 49, and *EDP* v *Commission*, paragraph 155 and the case-law cited).

76 In the present case, it must be found that the annexes prepared by C. Weidemann, concerning the environmental management of the packaging system in Germany and the justification for the DSD system in the light of Article 86 EC constitute actual written pleadings submitted by one of the lawyers representing DSD before

the Court. The essential elements of the legal arguments developed in those annexes must therefore be included in the application or in the reply, which must refer to the extracts of those annexes in order to substantiate or to complement the content of those arguments and not merely make a general reference to those annexes.

77 Where it refers to the first of those annexes, the application indicates only — without further explanation — that the conclusion reached by Mr Weidemann, at the end of his examination of the environmental management of the packaging system in Germany, is also the conclusion referred to in the application, without stating the specific points of that 54 page annex to which reference is made.

78 It is only in regard to that indication alone, from which it is apparent that the author of the annex shares the analysis presented in the application, that account should be taken of the annex on the environmental management of the packaging system in Germany.

79 As regards the second annex prepared by C. Weidemann, concerning the justification for the DSD system in the light of Article 86 EC, it should be pointed out that that 58 page annex was submitted 'as an additional reference' at the stage of the reply, which refers 'completely to the arguments in the annex for the statement of the pleas relating to Article 86 EC'.

80 In principle, such indications cannot be considered to be sufficient in the light of the case-law cited above, in so far as a general reference to an annex cannot compensate for the lack of essential elements of legal arguments which must be included in the application. The reply takes care, however, to give a succinct resume of the content of that annex, which supplements the line of argument put forward in that regard in the application and enables, as such, the Commission to prepare its defence and the Court to examine the third plea alleging infringement of Article 86(2) EC.

81 Accordingly, the annex concerning the justification for the applicant's system in the light of Article 86 EC will be taken into consideration by the Court only in so far as it relates specifically to the arguments raised expressly by DSD in its written pleadings.

(b) The opinion polls joined to the reply

82 The Commission submits that the applicant did not give any reasons for the delay in presenting the evidence constituted, in particular, by two opinion polls annexed to the reply, which is contrary to Article 48(1) of the Rules of Procedure.

83 The Court points out the opinion polls produced by the applicant in the reply are not offers of evidence for the purposes of Article 48(1) of the Rules of Procedure, but serve to substantiate the arguments submitted, in the reply, in response to the arguments raised in the defence as to the roles played by the mark Der Grüne Punkt and by the final consumer in the taking back and recovery of packaging.

84 Consequently, the plea of inadmissibility opposed by the Commission as regards the opinion polls annexed to the reply must be dismissed.

C — *Substance*

85 The applicant raises three pleas in support of its action. The first alleges infringement of Article 82 EC. The second alleges infringement of Article 3(1) of Regulation No 17 and of the principle of proportionality. The third plea alleges infringement of Article 86(2) EC.

1. *The first plea, alleging infringement of Article 82 EC*

(a) Preliminary observations on the contention that there is a free, compulsory licence

Arguments of the parties

86 The applicant submits that, in Article 3 of the contested decision, the Commission requires it to grant 'free, compulsory licenses' to use its mark Der Grüne Punkt to undertakings which participate in its system, in so far as the logo corresponding to that mark may now, as a result of the decision, be affixed to all packaging, irrespective of the take-back and recovery system concerned. According to the case-law of the Court of Justice, a compulsory licence of an intellectual property right may be granted only in 'exceptional circumstances', namely when the refusal of the licence concerns an industrial property right for which the licence is indispensable for the carrying on of the activity in question and is likely to exclude all competition on the derivative markets and when that refusal is not objectively justified (Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* (*'Magill'*) [1995] ECR I-743, paragraphs 50 to 56, and Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 39). Since none of those factors is established in the present case, no abuse of a dominant position can be found on the basis of Article 82 EC. In support of its contention the applicant essentially raises the following arguments: (i) the mark Der Grüne Punkt is not indispensable to participation in a system in competition with the DSD system; (ii) competition is not excluded by the contractual provisions in dispute; (iii) several objective reasons justify DSD's conduct, namely the need to meet the objectives of the Ordinance, the need to preserve the different functions of the mark Der Grüne Punkt, which cannot be the subject of a compulsory licence under trade mark law, and the need to enable the DSD system to function properly.

87 The Commission, supported by the interveners, maintains that the contested decision does not require DSD to grant free, compulsory licences contrary to international law and Community law. The abuse found results from the mere fact that the fee system is contrary to Article 82 EC in that DSD requires remuneration for a service which it does not provide and which is shown to have been provided by another system.

Findings of the Court

88 In the context of the first plea, which concerns Article 82 EC, the applicant essentially contests the consequences which would follow from the implementation of the obligation adopted on the basis of Article 3(1) of Regulation No 17, as laid down in Article 3 of the contested decision (see paragraph 60 above), in order to bring an end to the abuse of a dominant position found in Article 1 of the decision (see paragraph 58 above). According to the applicant, the obligation defined in Article 3 of the decision requires it to grant a 'free, compulsory licence' to use the mark Der Grüne Punkt for packaging intended to be disposed of by systems in competition with the DSD system.

89 However, in criticising the legality of such a compulsory licence, the applicant submits that the mark Der Grüne Punkt is not indispensable to participation in a system in competition with DSD (see paragraph 93 below) and that competition is not excluded by the contractual provisions at issue (see paragraph 95 below). Those arguments are tantamount to claiming DSD's conduct, as found in Article 1 of the contested decision, does not have an impact on competition and does thus not constitute an abuse of a dominant position within the meaning of Article 82 EC.

90 Similarly, the applicant claims that the fee system established by the Trade Mark Agreement is justified by considerations drawn from the Ordinance (see paragraphs 98 to 100 below), from trade mark law (see paragraphs 103 to 114 below) and the

need to ensure the proper functioning of the DSD system (see paragraphs 115 and 116 below). Those considerations represent just as many objective justifications for the fee system which is the subject of the abuse found in Article 1 of the decision and that system can thus not be considered to be abusive under Article 82 EC.

91 Consequently, rather than examining the consequences which the applicant's arguments could have with regard to the obligation imposed in Article 3 of the contested decision — namely, according to DSD, the 'free, compulsory licence' — which are covered by the second plea alleging infringement of Article 3(1) of Regulation No 17, it is necessary to restrict the Court's assessment in relation to the first plea — which concerns Article 82 EC — to only the arguments relating to the abuse of a dominant position found in Article 1 of the contested decision. In the absence of abuse of a dominant position for the purposes of Article 82 EC, Article 3 of the contested decision is unfounded by reason of Article 3(1) of Regulation No 17, since there is no longer an infringement to bring to an end. *A contrario*, if there is an abuse of a dominant position, the Commission has the power, under Article 3(1) of Regulation No 17, to require the undertaking concerned to bring the infringement found to an end.

92 It is in that context that the arguments of the parties in relation to the abuse of a dominant position found in the contested decision need to be set out.

(b) Arguments of the parties regarding the abuse of a dominant position

(i) No need to use the mark Der Grüne Punkt to participate in a system competing with DSD

93 First, the applicant submits that a compulsory licence for use of its mark is in no way indispensable, within the meaning of *Magill*, to enabling a manufacturer or

distributor of packaging to opt for a competitor system (paragraph 50 above and *Bronner*, paragraph 41). In that regard, in the contested decision, the Commission confines itself to stating that it is merely 'more convenient and simpler' to affix DSD's mark to packaging for which a competitor system is used in order to avoid the additional costs linked with the selective labelling of packaging (see recitals 103 to 105 of the contested decision). In that regard, the applicant points out that, in the case of concurrent use of a system other than the DSD system, the Der Grüne Punkt logo could be affixed to packaging or not, depending on the system used. That process is used moreover in the wine sector, in which the only bottles which are labelled with the DSD mark are those sold in the retail trade and which are not taken back to the shop, in the IT and construction sectors, in which products are sold in packaging bearing DSD's mark in the case of delivery to the retail trade and in packaging not bearing that mark in the case of deliveries to specialised trades or professional clients, and in the food sector, in which large packaging, tinned food and boxes are not labelled with the mark if they are delivered to the industry, restaurants or canteens, even though they are labelled when delivered to the retail trade. Manufacturers and distributors of packaging could thus make sure that packaging bearing the Der Grüne Punkt logo is deposited only in the facilities belonging to the DSD system and that packaging which does not bear that logo is deposited only in facilities for which competitor systems ensure disposal.

94 The Commission, Landbell and BellandVision claim that selective labelling is not economically viable for manufacturers and distributors of packaging. Vfw also points out that DSD required its customers to pay the fee for all packaging bearing the mark Der Grüne Punkt, regardless of whether that packaging is actually disposed of by the DSD system or not.

(ii) No elimination of competition in the absence of a compulsory licence for the mark Der Grüne Punkt

95 Second, the applicant criticises the contested decision in so far as it states (recital 115) that the fee system makes it more difficult for organisations competing with the

DSD system to enter the market, which is not sufficient to show the elimination of competition required in *Magill* (paragraph 56, and *Bronner*, paragraph 41). As a result of the requirements of the Ordinance, self-management solutions can, as a general rule, compete with the DSD system only for packaging delivered at small craft, retail and industrial undertakings. In that small segment of the market, there are approximately 40 self-management solutions which do not use the mark Der Grüne Punkt and the quantities attributed to such systems increased by 60% between 1997 and 2000. Several large distribution chains have also moved to a system other than the DSD system, which is thus possible without difficulty and without DSD being required to grant a compulsory licence. There is thus no question of making market entry more difficult.

96 The Commission contests the statistical information provided by the applicant, which is explainable by the 1998 reform and the fact that there was, initially, very little packaging covered by self-management solutions.

(iii) The different forms of justification for DSD's conduct

97 Third, the applicant submits that the provisions of the Trade Mark Agreement in dispute are necessary to ensure the attainment of the objectives of the Ordinance, to preserve the different functions of the mark Der Grüne Punkt — which cannot, in any case, be subject to a compulsory licence — and to enable the DSD system to function properly.

— The need to ensure the objectives of the Ordinance

98 The applicant sets out the content of the transparency requirement linked to the principle of responsibility for the product, which is laid down in the Packaging

Ordinance and the object of which is, according to the observations of the German authorities, to 'establish, in a transparent way for consumers and the authorities, which packaging is subject to the take-back obligation in the shop or in the direct vicinity and which packaging is not' (response to Question 2.a). Thus, in the case of use of an exemption system, the transparency requirement takes the form of a labelling requirement as defined in point 4(2) of Annex I to Paragraph 6 of the Ordinance, according to which 'manufacturers and distributors have to make it known that [certain packaging is part of the exemption system] by labelling or by other appropriate measures', whereas, in the case of use of a self-management solution, it takes the form of the requirement to provide information as defined in the third sentence of Paragraph 6(1) of the Ordinance, according to which 'the distributor must make it known to the final, private consumer, by means of clearly identifiable and legible signs, that it is possible to return [the packaging]'. That transparency requirement makes it possible to know whether, for a specific piece of packaging, the manufacturer or distributor in charge of that packaging complies with his obligations by means of a self-management solution or an exemption system. That also enables the consumer to know which system he needs to take that packaging to. Therefore, packaging participating in the DSD system should be taken back and recovered by that system and packaging participating in another exemption system or self-management solution should be taken back and recovered by that system. Packaging cannot belong to two systems.

99 Next, the applicant states that Article 3 of the contested decision infringes that transparency requirement since it is now possible for packaging participating in competing systems to bear the mark Der Grüne Punkt, which identifies the DSD system. If all packaging were to bear that mark, the final consumer would not be able to know which packaging should be brought back to the point of sale as part of a self-management solution, and which should be deposited in the vicinity of his home as part of an exemption system. In that regard, the applicant points out that it is impossible to determine with any degree of certainty ex ante whether a specific type of packaging will actually be disposed of by the DSD system or by another system and that it is also impossible to determine, even ex post, whether a consumer has actually disposed of packaging through the DSD system (recital 134 of the contested decision). It is precisely for that reason that it is stipulated in the Ordinance that the consumer must be informed by means of clear labelling so that he knows whether the specific packaging in question is part of the DSD system and must, consequently, be taken to that system.

100 In addition, the applicant submits that the take-back and recovery obligation of a self-management solution does not apply to packaging participating in an exemption system (see the letter of the Environment Minister of the *Land* Baden-Württemberg of 27 November 2001, p. 7). According to the Ordinance, such packaging is 'exonerated' from that obligation since it is allocated to the DSD system and bears the Der Grüne Punkt logo. That packaging can thus not be taken back by a self-management solution. The Ordinance aims to prevent a 'waste war' in which competitor systems seek to collect any amount of waste in order to be able to achieve their recovery rates. Fair and orderly competition supposes rather that the different systems take back and recover only the packaging for which they assume the responsibility of disposing of the product (the case of self-management solutions) or take over that responsibility (the case of exemption systems).

101 In addition, the applicant submits that the contested decision misinterprets the observations of the German authorities when it asserts that the consumer may freely decide whether he is to recover packaging through the DSD system or through another system where the manufacturer of distributor of packaging decides to use the DSD system together with another exemption system or with a self-management solution (recitals 138, 141 and 145 of the contested decision). In response to a question put by the Commission, the German authorities merely stated that, in the case of use of a self-management solution and an exemption system, the final consumer was free to decide whether to leave the packaging in the shop or to take it back there, or to take it to a disposal point near to his home, since 'the Packaging Ordinance does not contain any precise instructions requiring the final consumer to return packaging' (answer to Question 1.b.aa). The concept of disposing of waste in the vicinity of the home of the final consumer refers only to the disposal by means of public waste disposal bodies, the 'grey bin', and not to disposal through the DSD system, which also takes place in the vicinity of the home of the final consumer, the 'yellow bin'. Consumers are thus not free to chose the waste disposal system used.

102 The Commission claims that the applicant exaggerates the importance of marking packaging, since the obligation to take back and recover applies to quantities of

packaging and not to specific packaging. In addition, according to Landbell and BellandVision, the Ordinance does not require that DSD's mark be affixed to packaging.

— The justification relating to trade mark law

103 First, the applicant submits that, in the contested decision, the Commission denies the distinctive function — also termed indication-of-origin — of the mark Der Grüne Punkt, whose objective is to distinguish packaging allocated to the DSD system from that covered by a competing exemption system or self-management solution, by making it possible for that mark to be affixed to packaging intended to be disposed of by a system other that the DSD system. Such an impairment of the distinctive function of the mark Der Grüne Punkt is, in principle, contrary to German, Community and international trade mark law.

104 As regards German law, the applicant states that the mark Der Grüne Punkt is registered in Germany as a collective mark and that it thus makes it possible to 'distinguish the goods or services of the undertakings affiliated to the owner of the collective mark from those of other undertakings in terms of commercial or geographical origin, type, quality or other property' (Article 97(1) Markengesetz of 25 October 1994 (Law on trade marks)). Therefore, a compulsory licence to use the mark Der Grüne Punkt would have the effect of depriving that mark of its distinctive character and would risk leading it to being deleted from the trade mark register.

105 As regards Community law, the applicant submits that the specific object of the mark Der Grüne Punkt, namely to guarantee the identity of the origin of the marked goods to the final consumer (Case 3/78 *Centrafarm* [1978] ECR 1823, paragraphs 11 to 14) and to protect its proprietor against a risk of confusion (Case C-317/91

Deutsche Renault [1993] ECR I-6227, paragraph 30, and the case-law cited), would no longer be respected if certain packaging participating in the DSD system and others covered by a competitor system were to bear the mark Der Grüne Punkt without any distinction so that competitors with DSD could benefit from the fact that the DSD system is well known.

106 In addition, the applicant points out that the unlawfulness of the principle of compulsory licences for marks is laid down in Article 5A of the Paris Convention for the Protection of Industrial Property of 20 March 1883, as last revised at Stockholm on 14 July 1967 and amended on 28 September 1979 (*United Nations Treaty Series*, Vol. 828, No 11847, p. 108), ratified by all of the Member States, and in Article 21 of the Trade-Related Aspects of Intellectual Property Rights of 15 April 1994 (Annex 1 C to the Agreement establishing the World Trade Organisation, ratified by all of the Member States and approved by the European Community by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1, 214), which do not provide for compulsory licenses for marks.

107 The Commission maintains that the contested decision concerns only the fee system put in place by DSD and not the presumed effects of the decision on its activity as the proprietor of the mark Der Grüne Punkt. In that regard, the only effect of the decision is that undertakings which use the DSD system are not charged the fee twice if they use another system. Landbell and BellandVision also point out that the contested decision concerns only the legal relationship between DSD and its contractual partners in the context of the Trade Mark Agreement, and does not give third parties, which are not contractual partners, the right to use the mark Der Grüne Punkt.

108 Second, the applicant submits that the contested decision fails to have regard to the distinctive function of the mark Der Grüne Punkt, which makes it possible to influence consumer behaviour in the field of waste disposal in a way which is

essential to the proper functioning of its system. If consumers do not place packaging bearing the Der Grüne Punkt logo back into the DSD system, the applicant risks no longer being able to achieve the recovery rates laid down in the Ordinance and losing its authorisation. Similarly, if consumers place into the DSD system packaging which does not bear the Der Grüne Punkt logo, the applicant is still required to recover that packaging even if the rates imposed have already been achieved (see the first sentence of point 1(5) of Annex I to Paragraph 6 of the Ordinance).

109 In that regard, the applicant criticises the assertion in recitals 138, 139 and 145 of the contested decision that the essential function of the Der Grüne Punkt logo is met once that logo informs the consumer that he has the option of having the packaging collected by DSD, in so far as it is based on a quote, taken out of context, of the judgment of 1994 of the Kammergericht Berlin (footnote 22 of the contested decision). The passage cited in the decision merely states that the mark Der Grüne Punkt does not contain any assertion regarding the recyclable nature of the packaging. In another passage of the judgment the Kammergericht recognises the appeal function of the mark Der Grüne Punkt in holding that secondary packaging could bear that mark on overriding environmental grounds, even though, in a sense, consumers would be deceived.

110 Similarly, the applicant also contests the assertion contained in the contested decision that the consumer is free to decide whether to recover the packaging in question by the DSD system or by a competitor self-management solution or exemption system (recital 145 of the contested decision), given that it is fundamental that the consumer be able to identify, by means of the mark Der Grüne Punkt, the fact that the packaging concerned is covered by the DSD system and not by another system. In that regard, the applicant submits that the distinctive function of its mark is confirmed by the survey conducted when preparing the reply. Thus, 60.8% of the consumers surveyed understood the mark Der Grüne Punkt as an 'indication of an entirely specific organisation which is responsible for recovering and disposing of such packaging' and 27.9% of those consumers referred specifically to the DSD system (see the results of the poll conducted by the Infratest Burke

Institute, report of August 2001, Annex 85 to the reply), which shows the link existing between the mark and the DSD system in the mind of the consumer. According to another survey, conducted by the same institute, only 3.3% of the consumers surveyed stated that the mark conveys the information which is attributed to it in the contested decision, namely the indication that it is possible to dispose of the packaging (see the results of the survey conducted by the Infratest Burke Institute, report of August 2001, Annex 86 to the reply).

111 Finally, the applicant submits that the affixing of the mark Der Grüne Punkt to packaging participating in a competitor system impairs the distinctive function of that mark, since consumers are deceived in all of the cases envisaged in the contested decision. In the applicant's view, even where several systems are used, the consumer must always be able to determine for each piece of packaging the system which needs to be used, whether that be the DSD system — by the mark Der Grüne Punkt — or another exemption system — in a way consistent with point 4(2) of Annex I to Paragraph 6 of the Ordinance — or a self-management solution — in a way consistent with Paragraph 6(1) of the Ordinance. Thus, in the case of competitive use of a self-management solution and the DSD system, almost 48.4% of the consumers surveyed in the context of one of the surveys cited above would not understand the contradictory information represented, first, by the indication that packaging may be taken back to a shop in accordance with Paragraph 6(1) of the Ordinance and, second, by the indication transmitted by the Der Grüne Punkt logo that packaging is taken back in the vicinity of the home of the final consumer by the DSD system.

112 More broadly speaking, the applicant submits that the contested decision will lead to a situation where almost all packaging in Germany will bear the mark Der Grüne Punkt. Thus, participation in the DSD system for just 1% of marketed packaging could enable a user of the logo to use that mark, free of charge, for the remaining 99%. The DSD system therefore is likely, in the short term, to have to treat packaging brought erroneously to its system and for which DSD does not receive any fee. In addition, and almost simultaneously, by virtue of the restriction of the meaning of the mark Der Grüne Punkt to a mere possible means of disposal, the DSD system's collection figures would fall and it would be in danger of not being able to achieve the statutory recovery rates.

113 In addition, the applicant asserts that the mark Der Grüne Punkt also fulfils a control function which makes it possible to prevent and take action against abuses committed by manufacturers and distributors of packaging which use the DSD system without paying a fee by means of checks carried out in shops, sorting checks or checks by the authorities. In that regard, the contested decision makes it more difficult to protect effectively against the problem of the profiteers which very nearly led DSD to bankruptcy in 1993.

114 The Commission, supported by the interveners, observes that, in the absence of deception or confusion, the indication-of-origin function of a mark, which serves to distinguish or individualise the origin of goods or services, is not affected. In the present case, the perception of the mark Der Grüne Punkt by the final consumer buying the consumer goods and using different systems to dispose of the packaging is in essence that it is possible to ensure the disposal of packaging by the applicant's system. In addition, the mark Der Grüne Punkt does not play a decisive role during the collection of packaging since it is far from the case that the yellow bins and glass and paper containers used by the DSD system bear the mark in all of the collection areas. It is indeed for that reason that consumers do not associate the collection bins with the logo, but with the type of material concerned.

— The proper functioning of the DSD system

115 After having initially submitted that the provisions in dispute concerning the fee were proportionate to the services rendered, in so far as flat-rate payment for authorisation to use the mark Der Grüne Punkt and the making available of the DSD system constituted the only practical solution in the absence of being able to determine the exact amount of packaging actually brought to the DSD system, the applicant submitted, at the reply stage, that the fee payable under the contested provisions was valid only for packaging for which the DSD system was used. Thus,

the licence conferred by DSD under the Trade Mark Agreement was valid only for packaging participating in the DSD system and not for packaging covered by another exemption system or self-management solution. Such a restriction of the licence to packaging bearing the Der Grüne Punkt logo is consistent with the Ordinance, which requires clear labelling of packaging participating in an exemption system in order to indicate that the manufacturer or distributor concerned is 'exonerated' from the obligation to take back and recover packaging, which is now DSD's responsibility (order of the Verwaltungsgerichtshof Kassel (Higher Administrative Court, Kassel, Germany) of 20 August 1999). Such a system could not function if the packaging for which the DSD system was not used were also to bear the logo identifying that system. No provision of the Trade Mark Agreement thus enables or requires the user of the logo to affix the mark Der Grüne Punkt to the packaging for which the DSD system was not used and there is no imbalance between DSD's service provision (the taking back and recovery of packaging) and the fee charged in consideration.

116 As regards the reference made by the Commission in the judgment of the Bundesgerichtshof (Federal Court of Justice, Germany) of 15 March 2001, given in *BäKo*, the applicant states that in that judgment the Bundesgerichtshof did not find that the contractual provisions relating to the fee were not appropriate. On the contrary, it noted that the applicant cannot claim the full fee under Article 4(1) and Article 5(1) of the Trade Mark Agreement for packaging which does not fall within its statutory competence, namely packaging from the industry and large undertakings. In that case, which is not covered in the contested decision (footnote 14 of the contested decision), the applicant had not provided the service providing exemption from the obligations which it had been called upon to provide. However, in the present case, the packaging at issue bears the mark Der Grüne Punkt and thus falls indisputably within DSD's competence, that is to say that it is deposited at the homes of private final consumers to whom DSD supplies the service providing exemption from the packaging treatment and recovery obligations, and even when consumers take packaging, by mistake, to a public waste disposal system or a competitor system which collects and recovers packaging.

117 The Commission submits that, in the case of use of the DSD system and another exemption system or self-management solution, the relation between the service provided by DSD and the fee charged in consideration would be imbalanced if it were limited to taking into account the affixing to packaging of the Der Grüne Punkt logo since such a system would not take account of the reality of the service provided to the participating undertakings.

118 In addition, the Commission observes that the arguments put forward by the applicant in the reply, according to which the fee applies only to packaging treated by its system, is contrary to its former practice. In that regard, the Commission invokes, first, the judgment in *BäKo* (paragraph 116 above), in which the Bundesgerichtshof held that, contrary to DSD's assertions, no claim could be made by that undertaking against one of its customers in relation to packaging bearing the mark Der Grüne Punkt which was delivered to professional buyers. Second, the Commission refers to the judgment in *Hertzel*, in which DSD relied on the Trade Mark Agreement to oppose the request of one of its customers for reimbursement of the part of the fee corresponding to the packaging for which DSD was not in a position to ensure a service providing exemption from the obligation to dispose of packaging (judgment of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) of 11 August 1998, *Hertzel*, which was the subject of an appeal before the Bundesgerichtshof).

(c) Findings of the Court

(i) The abuse established in the contested decision

119 According to the contested decision, DSD abuses a dominant position in requiring payment of a fee for the total quantity of packaging bearing the Der Grüne Punkt logo and put into circulation in Germany, even though evidence is provided that, as regards the quantity of packaging for which the manufacturer or distributor does

not use the DSD system, the take-back and recovery obligations laid down in the Ordinance are met by means of another exemption system or self-management solution (see paragraph 58 above). The effects of that abuse are, according to the contested decision, two-fold and demonstrate both an exploitation of DSD's customers, as a result of the disproportion between the payment required and the service provided, and an obstacle to the entry onto the market of competitors offering alternative solutions to the DSD system, in the light of the costs related to the linked use of a system other than the DSD system (see paragraph 50 above).

120 In that regard, it should be pointed out that the concept of abuse is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 91).

121 In particular, it is apparent from point (a) of the second paragraph of Article 82 EC that such abusive practice may consist, inter alia, of directly or indirectly imposing unfair prices or other unfair trading conditions. Thus, an undertaking abuses its dominant position where it charges for its services fees which are disproportionate to the economic value of the service provided (Case 26/75 *General Motors* v *Commission* [1975] ECR 1367; Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 235 to 268; and Case 226/84 *British Leyland* v *Commission* [1986] ECR 3263, paragraphs 27 to 30).

122 Similarly, an undertaking in a dominant position may commit an abuse by obstructing its competitors though binding its customers in law or in fact to its services and thereby prevent them from using competing suppliers (see, to that effect, *Hoffman-La Roche* v *Commission*, paragraph 90).

(ii) The exclusivity claimed by the applicant

123 In that regard, the main argument raised by the applicant in its action is that competition between the systems can take place only as a result, first, of the fact that the manufacturer or distributor concerned transfers to DSD the packaging in respect of which it wishes to be exonerated from the take-back and recovery obligation imposed in the Ordinance and, second, of the fact that the final consumer must be able to clearly identify the packaging which he may put back into the DSD system and that which he may put back into another exemption system or self-management solution (see paragraph 115 above).

124 The mark Der Grüne Punkt thus makes it possible, at the same time, to indicate the packaging which is to be transferred to DSD, and thus exonerated from the take-back and recovery obligations imposed on manufacturers and distributors, and to inform the consumer as to what he is to do with it, which makes it possible to ensure that DSD is able to carry out the tasks assigned to it by that manufacturer or distributor of packaging. Consequently, only packaging for which the DSD system is used should be marked with the Der Grüne Punkt logo corresponding to that system, since it is packaging for which the applicant relieves the manufacturer or distributor concerned, both contractually and legally, of his take-back and recovery obligations under the Ordinance. In addition, the fact that the packaging concerned is the subject of a single indication regarding the take-back and recovery system to

be used makes it possible to influence the behaviour of the final consumer, who is thus not mislead by other indications requesting him to take that packaging back to another system.

125 On the basis of that line of argument, the applicant submits that its fee system does not constitute an abuse in the light of Article 82 EC, given that that system restricts the remuneration payable in consideration for the take-back and recovery service by the DSD system solely to packaging bearing the Der Grüne Punkt logo for which the manufacturer or distributor of packaging has sought to be exempted from his obligations under the Ordinance. By way of example, that means that, if a manufacturer or distributor of packaging decided to market 100 items of packaging in Germany and to entrust the taking back and recovery of half of that packaging to DSD, he should affix the Der Grüne Punkt logo to 50 items of packaging to indicate to the consumer that those 50 items of packaging are intended to be taken back and recovered by DSD, namely the undertaking he has entrusted to treat that packaging. If the manufacturer or distributor decided to affix the logo to all 100 items of the packaging which it markets, it should thus pay a fee calculated on that basis — and do so even if, in concrete terms, only 50 items of that packaging are part of the DSD system — given that DSD could potentially find itself required to take back and recover the 100 items of packaging bearing the Der Grüne Punkt logo which it has been entrusted with pursuant to the Ordinance. The amount of the fee paid under the Trade Mark Agreement thus depends on the amount of packaging bearing the Der Grüne Punkt logo.

126 None the less, the applicant does not contest the fact that the manufacturer or distributor of packaging may combine the DSD system with another exemption system or a self-management solution in order, inter alia, to avoid paying for a service which is not actually provided by the DSD system (see paragraph 46 above). However, in such a case, the applicant submits that that manufacturer or distributor should be in a position — before delivering the product to the final consumer — to distinguish the packaging for which it uses the DSD system from that for which it uses a different system. Taking the above example again, that means that for the other half of the 100 items of packaging placed on the market, the manufacturer or

distributor should make it apparent that that packaging is part of another exemption system and not DSD's by a note on the packaging or any other appropriate means or by ensuring, in the case of use of a self-management solution, that the distributor informs the final consumer that it is possible to return the packaging to the point of sale. In any event, the applicant considers that the Der Grüne Punkt logo cannot be affixed to the 50 items of packaging for which that manufacturer does not use the DSD system.

127 Following the applicant's line of argument, the Der Grüne Punkt logo is exclusive and may not be used jointly with another indication likely to identify a system competing with the DSD system. The packaging marked with the Der Grüne Punkt logo comes exclusively within its system and cannot be taken into account by another system.

128 In order to support those arguments and contest the content of the contested decision, the applicant puts forward both the way in which competition takes place (see paragraph 93), which could be done on the basis of exclusive marking of the relevant packaging of the system used (see paragraph 95), and the Ordinance (see paragraphs 98 to 100), trade mark law (see paragraphs 103 to 113) and the individual needs of the functioning of the DSD system (see paragraphs 115 and 116), which that exclusive marking would require in the case of use of the DSD system.

(iii) The detailed rules for the operation of mixed systems

129 The examination of the applicant's arguments requires the Court to check the premises on which they are based. It is necessary, inter alia, to establish whether, as

asserted by the applicant, the manufacturer or distributor of packaging transfers to DSD a set amount of packaging intended to bear the Der Grüne Punkt logo and whether, which the applicant contests, the packaging which DSD is entrusted with may be covered by another take-back and recovery system at the same time as the DSD system.

130 At the hearing, the parties were questioned about the detailed rules for the operation of mixed systems in order to enable the Court to understand what the role of the packaging was, as such, and more specifically, that of the packaging bearing the Der Grüne Punkt logo in fulfilling the take-back and recovery obligations imposed in the Ordinance. That adversarial account enables the Court to make the following findings.

131 First, the recovery rates established in Annex I to Paragraph 6 of the Packaging Ordinance are calculated as a percentage of the total of the marketed material which is actually taken back and recovered and not according to the number or type of packaging concerned, whether it bears a logo identifying an exemption system or not. Point 1(1) of Annex I to Paragraph 6 of the Ordinance thus states that manufacturers and distributors of packaging must meet the requirements relating to the recovery of the packaging which they have put into circulation and that the same applies to operators of exemption systems for packaging in respect of which manufacturers and distributors participate in those systems. In that regard, it is stated in point 1(2) of Annex I to Paragraph 6 of the Ordinance that the quantities of relevant packaging are determined 'as a percentage of the total', whether it concerns packaging put into circulation by the manufacturer or by the distributor or packaging in respect of which the manufacturer or the distributor participates in an exemption system. In addition, since 1 January 2000, self-management solutions and exemption systems have been subject to the same recovery rates per material (recital 19 of the contested decision).

132 Second, it follows from the above that the division of the quantities of packaging between the different systems, decided by the manufacturer or the distributor of

packaging, does not concern predetermined quantities of packaging, but totals of the material which correspond to that packaging. That means, in practice, that where a packaging manufacturer decides to entrust in DSD the take back and recovery of half of the plastic packaging which it puts into circulation in Germany, DSD assumes the responsibility of taking back and recovering a quantity of material corresponding to half of that packaging. In order to achieve the recovery rates laid down in the Ordinance, DSD must therefore show the German authorities that it has submitted for recovery 60% of the total amount of plastic assigned to it by that manufacturer (60% is the recovery rate applicable to plastic). Similarly, if the manufacturer can show that it has placed on DSD the burden of the obligation to take back and recover in respect of half of the quantity of plastic put into circulation, it must also prove that it took back and recovered the remaining quantity of the material, corresponding to the remaining half, by means of a self-management solution or another exemption system.

133 Third, as soon as the recovery rates laid down in the Ordinance are achieved and the quantities of packaging are divided between the systems on the basis of the mass of material concerned and not by reference to the packaging as such, whether it bears the Der Grüne Punkt logo or not, that logo ceases to have the role or importance which the applicant claims. Thus, a manufacturer or distributor of packaging which decides to entrust DSD with the taking back and recovery of part of the packaging which it puts into circulation in Germany and to deal personally with the taking back and recovery of the other part of that packaging, by means of a self-management solution or by assigning it to another exemption system, must merely divide the quantities of materials between the different systems concerned without worrying about a specific definition of the conduct of the final consumer, contrary to the applicant's assertion.

134 Taking the specific example of a fast-food chain, raised at the hearing, that means that, where the final consumer purchases a sandwich sold in packaging intended to retain heat, that consumer is free to decide either to consume the product there and then and to place the packaging in the bins provided by the fast-food chain, in the

context of its self-management solution, or to take that product home and to place the packaging into the DSD collection facilities situated in the vicinity of his home. That packaging can thus be put back into two collection and recovery systems made available by the fast-food chain to comply with its obligations laid down in the Ordinance.

135 Contrary to the applicant's assertion (see paragraph 112), the fact that the packaging at issue may bear the Der Grüne Punkt logo, even though it may be taken back and recovered by another system, does not adversely affect the proper functioning of the DSD system, since what is important, in the contractual relations between the applicant and the manufacturer or distributor of packaging, is to ensure that the quantities of material to be recovered which are placed on the market are actually taken back and recovered in order to achieve the rates laid down in the Ordinance. As stated above, the achievement of those rates by the DSD system is not based on whether the packaging at issue bears the Der Grüne Punkt logo or not.

136 Also, in the case where a fast-food chain markets 100 tonnes of plastic in a given year and where it knows, in the light of the results of the previous year, that 50 of those 100 tonnes end up in its own self-management solution, it must engage an exemption system to show that the other 50 tonnes of plastic placed on the market will be taken back or recovered in accordance with the obligations under the Ordinance. If the behaviour of that fast-food chain's customers is in line with that division of quantities, that is to say 50 tonnes of plastic to be taken back and recovered by a self-management solution and 50 other tonnes of plastic to be taken back and recovered by an exemption system, the recovery rates of the different systems concerned will be achieved.

137 If, however, the consumer behaviour of that chain is not in line with the anticipated division of quantities, correction mechanisms will be implemented in order to take

account of that reality. For example, if only 10 tonnes of plastic end up in the self-management solution, the fast-food chain will thus have to buy back the missing 40 tonnes of plastic from systems which have a surplus, precisely, for having to take back and recover 40 extra tonnes of plastic. Similarly, if 90 tonnes of plastic end up in the self-management solution, the fast-food chain will be able to request the exemption system concerned to reduce its fee, in so far as that chain has shown that it took back and recovered 40 of the 50 tonnes entrusted to it. Those rectification possibilities ensure that each system complies with the obligations laid down in the Ordinance while being remunerated for the service actually provided.

138 Such possibilities for rectification of quantities of material attributed on a contractual basis depending on actual collection and recovery results also exist in the case where a manufacturer or a distributor of packaging decides to use two or more exemption systems, such as the DSD system and the Landbell system. Incidentally, it must also be pointed out that concrete expression has been given to those rectification possibilities in a compensation agreement, referred to at the hearing, which enables different system operators to share the quantities of material recovered by the collection undertakings to which they have recourse in respect of the quantities of the material for which they are responsible under the contracts signed with manufacturers and distributors of packaging.

139 Consequently, it follows from the above that the manufacturer or distributor of packaging does not transfer to DSD a set number of items of packaging intended to bear the Der Grüne Punkt logo, but rather a quantity of material which that manufacturer or distributor is going to market in Germany and whose taking back and recovery he intends to entrust to the DSD system. It is therefore possible for a manufacturer or distributor of packaging to use mixed systems in order to comply with the recovery rates laid down in the Ordinance.

(iv) The applicant's criticism of the analysis in the contested decision

140 That account of the practical detailed rules for the operation of mixed systems makes it possible to assess the significance of the applicant's criticism of the analysis in the contested decision.

141 As a preliminary point, it should be recalled that only the provisions of the Trade Mark Agreement concerning the fee are regarded as abusive in the contested decision (namely Article 4(1) and Article 5(1) of the Agreement). Thus, the contested decision does not criticise the fact that Article 3(1) of the Agreement requires the manufacturer or distributor wishing to use the DSD system to affix the Der Grüne Punkt logo to each piece of notified packaging which is intended for domestic consumption. On the contrary, the Commission regards as abusive the conduct of DSD in requiring payment of a fee for the total quantity of packaging carrying that logo and put into circulation in Germany, even though evidence is provided that certain items of that packaging have been taken back and recovered by another exemption system or self-management solution.

— The lack of need to affix the Der Grüne Punkt logo to all packaging in the case of use of a mixed system because it is possible to use selective marking on the basis of the system used

142 First, as regards the applicant's argument that it is not necessary that the Der Grüne Punkt logo feature on the packaging in the case of use of a mixed system, as the

mark Der Grüne Punkt may be affixed, or not, to all packaging on the basis of the system being used, it is apparent from the above that no provision of the Ordinance requires selective marking of packaging.

143 In addition, as is stated in the contested decision (recitals 103 to 107 of the contested decision), the selective marking of packaging on the basis of the system used leads to a significant additional costs for manufacturers and distributors wishing to put uniform packaging into circulation in Europe or use mixed systems, because of the need to intervene at the stage of deciding on the packaging range and the need to control its marketing up until delivery to the final consumer. Furthermore, such efforts are likely to be nugatory in the light of the fact that it is the final consumer and not the manufacturer or distributor who decides on the place of take back and recovery of the packaging. In any event, in it arguments the applicant does not contest that selective marking has the effect of dissuading manufacturers and distributors of packaging from using alternative systems to the DSD system, which constitutes, precisely, one of the effects of DSD's conduct which is characterised as abusive in the contested decision (recitals 114 and 115 of the contested decision).

144 Moreover, the examples of selective marking cited by the applicant do not fall within the ambit of the contested decision, since they concern sectors for which part of the packaging at issue, namely the part aimed at business clients, is situated outside of the applicant's field of action, namely packaging for the final consumer.

145 It must therefore be found that the solution of selective marking, advocated by the applicant, is not imposed by the Ordinance and does not make it possible to put an end to the abuse found in the contested decision.

— The arguments relating to the lack of elimination of competition

146 Second, as regards the applicant's arguments that competition is not eliminated by its conduct given that the quantities of packaging attributed to self-management solutions increased by 60% between 1997 and 2000 and that some of DSD's customers went from using its system to using a different exemption system (see paragraph 95 above), it should be pointed out that that information does not take into account mixed systems which use partly the DSD system and partly a different exemption system or self-management solution.

147 In addition, the increase in the quantities attributed to self-management solutions cited by the applicant is decisive in the light of the information provided by the Commission in the rejoinder, in so far as very little packaging was actually handled by self-management solutions in 1997 and only 333 000 tonnes were collected by self-management solutions in 2000, namely only 6% of the 5.5 million tonnes collected by the DSD system in that same year.

148 In any event, that information cannot suffice to call into question the Commission's assessment in the contested decision as regards the abusive nature, in the light of Article 82 EC, of the conduct of DSD in requiring payment of a fee for all packaging carrying the Der Grüne Punkt logo and put into circulation in Germany, even where it has been proved that some of that packaging has been taken back and recovered by another exemption system or self-management solution.

149 The argument based on the development of self-management solutions and the moving of certain customers from the DSD system to another exemption system must therefore be rejected.

— The need to ensure that the objectives of the Ordinance are met

150 Third, as regards the need to ensure that the objectives of the Ordinance are met by enabling the applicant to require that packaging which is entrusted in the DSD system be equipped only with the Der Grüne Punkt logo (see paragraphs 98 to 100 above), it is apparent from the account of the practical detailed rules for the operation of mixed systems that such exclusivity is not imposed by the Ordinance in the case of use of mixed systems. In addition, the examination of those detailed rules shows that the logo does not have the effect which the applicant claims it to have, given that the recovery rates which must be achieved in order to comply with the take-back and recovery obligations laid down in the Ordinance are calculated on the basis of the material collected and not on the basis of the mark affixed to the packaging.

151 In that regard, as regards determining the role played by the final consumer, the applicant agrees that it is impossible to determine with any degree of certainty ex ante whether a specific type of packaging will actually be disposed of by the DSD system. In addition, the applicant cannot validly deny that, in response to a question put by the Commission which was seeking to find out whether it was accurate that, 'according to the Packaging Ordinance, the final consumer is free to decide whether to leave the packaging in the shop or to bring it back there, or to take it to a disposal point near his home', the German authorities responded that 'the Ordinance does not contain any express provision requiring the final consumer to return the packaging' and that 'the assumption contained in the question [put by the Commission] is therefore correct' (see the observations of the German authorities, response to Question 1.b.aa; reproduced in the contested decision, recital 20, footnote 8). In that regard, the applicant may claim only that the term 'disposal point near his home' concerns disposal by means of the public waste disposal system and not use of an exemption system, given that it follows clearly from the wording of the first question put by the Commission, concerning ways of complying with the recovery rates laid down in the Ordinance, and from the observations of the German authorities in response to Question 1(a), which states that collection in the vicinity

of the final consumer is to take place on the basis of an exemption system, that that term refers to an exemption system within the meaning of Paragraph 6(3) of the Ordinance.

152 Consequently, none of the arguments presented by the applicant makes it possible to call the contested decision into question in so far as it is stated there that, under the Ordinance, the final consumer is free to decide, in the case of a mixed system, which system he wishes to return the packaging to (recitals 138, 141 and 145 of the contested decision).

153 In addition, in respect of the possibility of indicating to the consumer that packaging may be taken back and recovered by several systems, it is apparent from the contested decision (recitals 141 and 145) that the different types of advertising laid down in the Ordinance — namely by marking packaging or other suitable means for exemption systems (point 4(2) of Annex I to Paragraph 6 of the Ordinance) and the indication of the possibility of returning packaging at the point of sale for self-management solutions (third sentence of Paragraph 6(1) of the Ordinance) — make it possible to inform the final consumer about the different possibilities for returning the packaging at issue without thereby validating the applicant's arguments that the affixing of the Der Grüne Punkt logo to packaging has the effect of preventing the take back and recovery by a system other than the DSD system.

154 In that regard, it should be pointed out that it is not stated in the Ordinance that the Der Grüne Punkt logo may not be affixed to packaging collected in the context of a competitor exemption system or a self-management solution if they comply, in addition, with the conditions laid down in the Ordinance to identify the system used in conjunction with the DSD system. Such indications may be cumulative and the same piece of packaging may thus be covered by several systems at the same time. It is with that in mind that the Commission rightly interprets the transparency requirement defined by the German authorities in their observations, namely that it is necessary to clearly define, in the interests of the consumer and of the authorities,

which packaging is subject to the take-back obligation at or in the immediate vicinity of the points of sale and which is not (see the observations of the German authorities, the response to the final sentence of Question 2.a; recitals 20, 141 and 142 of the contested decision).

155 The arguments relating to the need to ensure that the objectives of the Ordinance are met must therefore be rejected.

— The justification relating to trade mark law

156 Fourth, as regards the applicant's arguments relating to trade mark law (see paragraphs 103 to 113 above), the fact that, in the case of shared use of two exemption systems, the Der Grüne Punkt logo and the indication by a 'suitable means' of another exemption system within the meaning of point 4(2) of Annex I to Paragraph 6 of the Ordinance feature on the same packaging, and the fact that, in the case of shared use of the DSD system and a self-management solution, the Der Grüne Punkt logo and an indication that it is possible to return the packaging to the shop appear on the same packaging, does not adversely affect the essential function of DSD's mark (see, to that effect, Case 238/87 *Volvo* [1988] ECR 6211, paragraph 9; *Magill*, paragraphs 49 and 50; and Case T-198/98 *Micro Leader* v *Commission* [1999] ECR II-3989, paragraph 56). As stated in the contested decision, it is apparent from a judgment of the Kammergericht Berlin of 14 June 1994 that 'for the market in question' that mark 'says no more than that the product thus identified may be collected via the DSD system' and gives no indication as to the quality of the service offered (recital 145 of the contested decision). In addition, in the case of allocation of part of the packaging to one of DSD's competitors, the consumer is free to decide whether he has the packaging recovered through the DSD system or a competitor system.

157 Therefore, since the function of the Der Grüne Punkt logo is to identify the possibility of having the package at issue collected by the DSD system and since that logo may be affixed together with other signs of other mechanisms making it possible to identify another possibility for collection by a competitor self-management solution or exemption system, it cannot be claimed that the contested decision constitutes a disproportionate impairment of the trade mark right or, in any event, an impairment which is not justified by the need to prevent an abuse of a dominant position within the meaning of Article 82 EC.

158 In that regard, the applicant's criticism of the use made, in the contested decision, of the judgment of the Kammergericht Berlin (see paragraph 109 above) is not relevant. It merely points to the particular context of the judgment in which the Kammergericht Berlin rejects the idea that the Der Grüne Punkt logo could give any indication as to the quality of the waste disposal service, but does not call into question the conclusion arrived at by the Commission, namely that several indications informing the consumer about the steps to be taken in relation to the different take-back and recovery services may feature on the same packaging. The above example of the fast-food chain thus shows the actual meaning of the mark Der Grüne Punkt where it is affixed to packaging which is also collected and recovered by another system.

159 As regards the arguments based on the surveys provided by the applicant (see paragraph 110 above), it should be pointed out that the results of those polls do not call into question the reasoning in the contested decision. It is logical that consumers identify the Der Grüne Punkt logo affixed to the packaging as being the indication that that packaging may be placed in the collection facilities situated close to their homes. However, that does not disclose the reactions of those consumers when faced with packaging to which several logos identifying exemption systems are affixed. The Commission and the interveners state in that regard, as was confirmed at the hearing, that the collection facilities used by those systems are generally the same and that, most of the time, the consumer deposits packaging in those facilities

on the basis of the material used and not on the basis of the logo on the packaging. Similarly, as regards the case of a mixed system combining the DSD system and a self-management solution, the indication that 48.4% of consumers would not understand the contradictory indications referring to those two systems does not seem relevant in the light of the fact that they merely indicate the free choice given to consumers in the case of a mixed system and that, consequently, they cannot give rise to a contradiction, as illustrated by the example of the fast-food chain examined above.

160 In addition, the argument based on deception of the public targeted by the mark cannot be upheld (see paragraph 111 above), given that the Trade Mark Agreement concerns only users of that logo, namely manufacturers and distributors of packaging which use the DSD system, and not consumers.

161 Moreover, accepting the exclusivity claimed by the applicant would have no other effect than to prevent manufacturers and distributors of packaging from using a mixed system and to legitimise the possibility, for the applicant, of being paid for a service which the interested parties have nevertheless shown that it did not actually provide, they having entrusted it to another exemption system or self-management solution in accordance with the detailed rules laid down in Article 1 of the contested decision.

162 The arguments relating to trade mark law must therefore be rejected since the specific function of the mark Der Grüne Punkt in the case of mixed systems is not adversely affected.

— The proper functioning of the DSD system

163 Finally, as regards the arguments concerning the need to respect the proper functioning of the DSD system (see paragraphs 115 and 116 above), it follows from the above that the proper functioning of that system is not called into question in the case of mixed systems. In any event, the specific needs of the functioning of the DSD system cannot justify the applicant's conduct, described in the *Bäko* judgment of the Bundesgerichtshof and the *Hertzel* judgment of the Oberlandesgericht Düsseldorf, cited by the Commission (see paragraphs 116 and 118 above), the various complaints put forward by the Commission (recitals 3 and 6 of the contested decision) and DSD's initial submission in its application (see paragraph 115 above), whereby it requires payment of a fee for all packaging carrying the Der Grüne Punkt logo and put into circulation in Germany, even where it is proved that some of that packaging has been taken back and recovered by another exemption system or a self-management solution.

(v) Conclusion

164 It follows from the above that, in accordance with what is stated in the contested decision, neither the Packaging Ordinance, nor trade mark law or the specific needs of the functioning of the DSD system authorise the applicant to require undertakings which use its system to pay a fee for all packaging carrying the Der Grüne Punkt logo and put into circulation in Germany, where those undertakings show that they do not use the DSD system for some of that packaging.

165 Consequently, the first plea must be dismissed.

2. *The second plea, alleging infringement of Article 3 of Regulation No 17 and infringement of the principle of proportionality*

166 The applicant states that, according to Article 3 of Regulation No 17, the Commission may, by decision, require the undertakings to bring the infringement found to an end. The decision seeking to bring an end to the infringement must respect the principle of proportionality and can, therefore, order only what is appropriate and necessary to bring an end to the infringement and to re-establish compliance with the rules infringed (Case T-76/89 *ITP* v *Commission* [1991] ECR II-575, paragraph 80, and Case T-7/93 *Langnese Iglo* v *Commission* [1995] ECR II-1533, paragraph 209). In the present case, the measures imposed by Articles 3, 4 and 5 of the contested decision do not satisfy those requirements.

(a) The selective marking

167 In essence, the applicant alleges that selective marking of packaging depending on the system used is more appropriate than the obligation imposed in the contested decision.

168 The applicant observes that, in the contested decision, the Commission states that, for DSD's customers, the selective labelling of uniformly-designed packaging (with or without the mark Der Grüne Punkt) 'would, in a not inconsiderable number of cases, be economically unrealistic' (recital 103 of the contested decision). No compulsory licence should therefore be imposed in cases where selective labelling would not fail because of economic realities. In such cases, an abuse of a dominant position is, in itself, excluded and the measures laid down in Article 3 and Article 4(1) of the contested decision are disproportionate.

169 The Commission submits that the contested decision envisages cases where the packaging is identical and that it gives the reasons why it would not be realistic to ask manufacturers and distributors of packaging to differentiate the packaging on the basis of the take-back and recovery system which it belongs to.

170 The Court points out that, when characterising the abuse of a dominant position, the contested decision examined DSD's arguments that manufacturers and distributors of packaging which use its system should be in a position not to affix the Der Grüne Punkt logo to packaging which is not covered by the DSD system. According to the contested decision, the selective marking of packaging on the basis of the system used does not constitute a suitable solution for enabling manufacturers and distributors of packaging to use a self-management solution or another exemption system in conjunction with the DSD system. The Commission considers that that would lead to a significant increase in production and distribution costs (recitals 104 and 105 of the contested decision), that it is difficult, if not impossible, to control the actual route taken by packaging right up to the final point of sale (recital 106 of the contested decision) and that it is up to the consumer to decide on the place where he wishes to return the packaging in the case of use of a self-management solution and an exemption system (recital 107 of the contested decision).

171 It is in that context that the extract of the contested decision cited by the applicant needs to be understood, where it states that the non-affixing of the Der Grüne Punkt logo to packaging which does not come under the DSD system 'would, in a not inconsiderable number of cases, be economically unrealistic' (recital 103 of the contested decision).

172 However, it cannot be inferred from that assessment that the measures imposed in Articles 3 to 5 of the contested decision are disproportionate. Those measures merely require DSD not to charge a fee on the total amount of packaging marked with the Der Grüne Punkt logo where it is shown that some of that packaging has

been taken back and recovered through another system. As shown by the examination of the detailed rules for the operation of mixed systems carried out in the context of the first plea (see paragraphs 131 to 138 above), the competition between systems takes place on the basis of the quantities of material to be recovered and not on the basis of predetermined quantities of packaging which fall exclusively — in particular by means of selective marking — within one or the other of the systems used. In addition, the measures at issue do not disproportionately impair DSD's interests, since it is still remunerated for the service which it provides, namely the taking back and recovery of quantities of material entrusted by the manufacturers and distributors of packaging which participate in its system.

173 Therefore, the fact that it may theoretically be possible to affix the logo to packaging selectively cannot entail the annulment of the above measures, since that solution is more expensive and difficult to implement for manufacturers and distributors of packaging than the measures laid down in Articles 3 to 5 of the contested decision, which seek only to limit the remuneration for the service offered by DSD to the service actually provided by its system.

174 Moreover, for the Commission to accept the principle of selective marking would be akin to permitting DSD to continue to abuse its dominant position, in so far as the costs related to that solution and the practical difficulties involved in its implementation are likely to dissuade DSD's customers from using an alternative system to the DSD system to take back and recover in Germany some (Cases No 1 and 2), or all, of their packaging (Case No 3).

175 In consequence, the first complaint must be rejected.

(b) The imposition of a compulsory licence without any time restriction

176 The applicant submits that Articles 3 and 4(1) of the contested decision are disproportionate because they require the granting of a licence to third parties to use the mark Der Grüne Punkt without any time restriction and even if the case of non-participation in the DSD system, although the only reasoning given in that regard relates to the fact that as a result of the provisions in dispute of the Agreement, it is much more difficult for competitors to enter the market (see recital 115 of the contested decision). A compulsory licence could thus be envisaged only for the period corresponding to the entry of competitors on the market.

177 The Commission observes that the applicant's potential competitors would be excluded from the market once again if their customers were to become liable (again) for payment of the fee to DSD for the quantities outside the DSD system.

178 The Court points out that, in the context of its assessment concerning Article 82 EC, the contested decision considers that the conduct of DSD in requiring payment of a fee for the total quantity of packaging carrying the Der Grüne Punkt logo and put into circulation in Germany amounted to an abuse of its dominant position and a barrier to market entry (recitals 110 to 135 and Article 1 of the contested decision). According to the decision, the fee cannot be required when the manufacturers and distributors of packaging which use the DSD system for only some of the packaging put into circulation in Germany show that they fulfil the take-back and recovery obligations laid down in the Ordinance through competitor exemption systems or self-management solutions (Cases No 1 and 2). Similarly, the fee cannot be required when the manufacturers and distributors of packaging which have not used the DSD system in Germany, but put into circulation in that country standardised packaging which they also put into circulation in another Member State for which they

participate in a take-back system using the Der Grüne Punkt logo, show that they fulfil the obligations under the Ordinance through competing exemption systems or self-management solutions (Case No 3).

179 It is in order to bring an end to the infringement of Article 82 EC that the Commission requires DSD to comply with the obligations laid down in Article 3 and Article 4(1) of the contested decision.

180 Those obligations thus do not concern third parties but manufacturers and distributors of packaging which are either contractual partners of DSD in the context of the Trade Mark Agreement (the case of Article 3, which concerns Cases No 1 and 2), or holders of a licence to use the mark Der Grüne Punkt in another Member State in the context of a take-back and recovery system using the logo corresponding to that mark (the case of Article 4(1), which concerns Case No 3).

181 Similarly, those obligations do not seek to force DSD to grant a licence to use the mark Der Grüne Punkt without any restriction in time, but merely to require it to not charge a fee on the total amount of packaging bearing the Der Grüne Punkt logo where it is shown that all or only some of that packaging has been taken back or recovered through another system.

182 Consequently, as long as the users of the Der Grüne Punkt logo prove that the quantities of packaging for which they do not use the DSD system have actually been taken back and recovered by the exemption system(s) or self-management solution(s) which they use, the applicant cannot claim that it is disproportionate to ask it not to be paid for a service which it does not provide.

183 Accordingly, the second complaint must be rejected.

(c) The prior provision requirement

184 The applicant states that it is apparent from the first sentence of Article 3, Article 4(1) and Article 5(2) and (3) of the contested decision that users of the logo are free to refuse to pay the fee to use the mark Der Grüne Punkt by affirming that they no longer intend to use the DSD system for some of their packaging and that they are going to satisfy the obligations resulting from the Ordinance by personally disposing of the packaging. Article 5(3) and (7) of the contested decision prohibits the applicant from demanding the submission of the certificate from an expert before the date laid down in the Ordinance (1 May of the following year) or to demand other proof. In the applicant's view, that measure is disproportionate and leads to an unfair division of risks in so far as the applicant is to forgo payment of the fee in advance and subject that payment to a submission of evidence procedure, which should take place 16 months later, while bearing its customer's liquidity risk during that period.

185 The Commission claims that a situation in which almost all of the distributed packaging is taken back from the DSD system is hardly likely to materialise in view of the obligations to furnish evidence which are associated with it. In addition, the concept of 'prior provision' is inexact since the applicant would be required to obtain payment after the event only if the other collection systems did not achieve the rates laid down. Undertakings which offer self-management solutions for collection will not advise their customers to act in that way since they seek to

achieve the rate laid down for the quantity which has been allocated to them contractually, in order to avoid the subsequent obligation to obtain a partial licence, from a competitor, supplemented by payment of interest if necessary, if that rate is not achieved.

186 First of all, the Court points out that the case put forward by the applicant that certain users of the logo could refuse to pay the fee to use the mark Der Grüne Punkt by affirming that they no longer intend to use the DSD system for some of their packaging is, in practice, hardly likely in the light of the fact that the Ordinance requires those users to prove that they have complied with their obligations to take back and recover packaging marketed through another system and that, if that were not the case, those users would then have to buy the missing quantities from the DSD system if that system had taken back the quantities of material corresponding to that packaging (see paragraphs 137 and 138 above).

187 In addition, it is apparent from Article 5(3) of the contested decision that 'DSD may on no account require the certificate to be presented at an earlier time than is laid down under the Packaging Ordinance' and Article 5(7) that 'other provisions of the Trade Mark Agreement shall not be applied in such a way as to require a higher level of proof to be furnished to DSD'.

188 Those measures seek to guarantee the possibility, for the manufacturer or the distributor of packaging who uses a competitor exemption system or a self-management solution for some of the packaging which he puts into circulation, to provide DSD with the confirmation from the operator or independent expert, or an accountant's certificate, necessary to show that the obligations imposed in the Ordinance are met by a system other than the DSD system for a specific quantity of packaging (see Article 5(1), (2), (4) and (6)).

189 Therefore, the applicant cannot claim that those measures are disproportionate since the certification process is valid for all systems, including the DSD system, and it does not give any particular reasons justifying its derogation from that process. In addition, the concept of 'prior provision' raised by the applicant is deceptive, given that DSD is remunerated in consideration for the quantities of material entrusted to it by its customers and that it is only in the case of problems, namely if the other collection systems do not achieve the rates laid down for the quantities with which they are entrusted, that DSD may request payment for the surplus.

190 Consequently, the third complaint must be rejected.

(d) The exclusion of an adequate fee for merely using the mark

191 The applicant claims that, by Articles 3 and 4 of the contested decision, the Commission requires it to not charge a fee where it is proven that the obligations resulting from the Ordinance are complied with in some other way. DSD is thus not entitled to claim a fee from users of the logo for merely using the mark Der Grüne Punkt. That exclusion is contrary to the case-law of the Court of Justice which accepts that a reasonable fee may be levied (see *Volvo*, paragraph 11).

192 The Commission submits that the contested decision does not impose a compulsory licence on DSD but merely seeks to prevent DSD from levying a fee when the packaging to which the logo is affixed is not taken back and recovered by the DSD system. At the hearing, the Commission stated that, as the Trade Mark Agreement

notified by DSD does not distinguish the fee payable for use of the mark from that due for use of the DSD system, the decision does not address the issue as to whether a fee may be requested for merely using the mark.

193 The Court observes that the obligation imposed on DSD, in Article 3 of the contested decision, enables manufacturers and distributors which use its system for only some of their packaging not to pay the fee to DSD where it is proved that the packaging bearing the Der Grüne Punkt logo has not been collected and recovered by the DSD system but by a competitor system.

194 However, even in that case, it cannot be excluded that the mark Der Grüne Punkt affixed to the packaging at issue may have economic value as such, since it can inform the consumer that the packaging at issue may be brought to the DSD system, as is also stated in the contested decision (recital 145). Therefore, even if that packaging is not actually brought to the DSD system and it is shown that its equivalent in material has been collected or recovered by a competitor system, it is none the less the case that the mark leaves it open to the consumer to dispose of that packaging through the DSD system. Such a possibility offered to the consumer for all the packaging put into circulation with the Der Grüne Punkt logo, whether part of the DSD system or not, after checking the quantities collected, is likely to have a price which, even if it cannot represent the actual price of the collection and recovery service, as could be the case under the provisions in dispute of the Trade Mark Agreement, should be able to be paid to DSD in consideration for the service offered in the present case, namely the making available of its system.

195 When questioned in that regard at the hearing, the Commission accepted that that question was not envisaged in the contested decision, which merely examined the

legality of DSD's conduct as regards the payment of a fee for a service in respect of which it has been proved that it was not provided by the DSD system but by another system.

196 Consequently, it must be found that the contested decision must be interpreted as not precluding the possibility for DSD to levy an adequate fee for merely using the mark where it is shown that the packaging bearing the Der Grüne Punkt logo has been taken back and recovered by another system.

(e) The possibility of affixing an explanatory note

Arguments of the parties

197 The applicant claims that the obligation laid down in the first paragraph of Article 3 of the contested decision is disproportionate in so far as it prevents it from requiring users of the logo to affix an explanatory note to packaging in Cases No 1 and 2. According to DSD, such a note, which could be affixed without great difficulty by the manufacturers and distributors of packaging which use its system, would make it possible to attenuate the infringement of the mark Der Grüne Punkt which follows from the contested decision. That note could thus indicate to the consumer that, in a given *Land*, the packaging is not part of the DSD system but part of another exemption system (Case No 1) or that, even if the packaging is labelled with the Der Grüne Punkt logo, certain points of sale do not use the corresponding system but a self-management solution (Case No 2).

198 In addition, the applicant states that, under Article 4(2) of the contested decision, it may require manufacturers or distributors of packaging which do not use the DSD system in Germany but put into circulation in another Member State standardised packaging for which they participate in a take-back system using the Der Grüne Punkt logo (Case No 3), to affix an explanatory note to the packaging in order to draw the attention of the consumer to the fact that that packaging is not taken back by the DSD system in Germany. According to the applicant, such a measure is disproportionate since a different measure, namely the total concealment of the Der Grüne Punkt logo and not the mere affixing of a note next to that logo, would have less of an adverse effect on the indication-of-origin function of its mark.

199 The Commission observes that, as regards Case No 1, nothing permits the inference that the Ordinance prohibits competitor systems from using the same logo. In the applicant's view, undertakings subject to the fee should amend the explanatory note each time that the competitor system is introduced into a new *Land*. That would, in particular during the launch of the competitor system, require continuous amendment of the packaging. For Case No 2, an explanatory note on the packaging would be impossible. As regards Case No 3, the Commission states that, if the mark Der Grüne Punkt were to benefit from the protection claimed by the applicant, manufacturers would have to provide different packaging for each Member State, which would not be of any economic interest and would constitute a barrier to trade.

Findings of the Court

200 As regards the complaint relating to the first paragraph of Article 3 of the contested decision, the affixing of explanatory notes desired by the applicant cannot have the effect of putting an end to the abuse of a dominant position characterised in Article

1 of the decision. Such notes are based on the idea that it would be possible to distinguish packaging bearing the Der Grüne Punkt logo, which is part of the DSD system, from that to which the Der Grüne Punkt logo is indeed affixed but which is not part of the DSD system and which should thus be the subject of a note aimed at drawing the consumer's attention. However, as has been pointed out (see paragraphs 131 to 138 above), the specific rules for the operation of mixed systems are not based on the identification of packaging by consumers, who remain free to decide which system they are going to bring the packaging back to, but on the allocation of total material to be recovered.

201 The affixing of the notes sought by the applicant thus does not make it possible to bring an end to the abuse of a dominant position found by the Commission in Cases No 1 and 2.

202 Consequently, the Court must reject the complaint alleging that Article 3(1) of the contested decision is disproportionate in so far as it does not envisage the possibility of affixing an explanatory note.

203 As regards the complaint concerning Article 4(2) of the contested decision, it is apparent from that measure that 'DSD may require, as a precondition for the waiver of the licence fee, that it be made clear to the final consumer on the packaging referred to [in Case No 3], in words or other suitable form placed close to the [Der Grüne Punkt logo], that the packaging does not participate in the dual system set up by DSD under Paragraph 6(3) of the Ordinance'. That provision is merely a reproduction of a commitment proposed by DSD in the context of the administrative proceedings (recitals 63 and 133 of the contested decision). DSD cannot therefore claim, in the context of the current proceedings, that a solution other than that which DSD itself proposed to the Commission now constitutes a

more appropriate solution to address the problem identified during the proceedings. In addition, to accept the solution advocated by the applicant, namely the concealing of the Der Grüne Punkt logo rather than placing a note close to that logo would be akin to requiring packaging manufacturers to provide different types of packaging for each Member State, which would not be economically rational.

204 Consequently, the complaint alleging that Article 4(2) of the contested decision is disproportionate in so far as it requires the affixing of a note to packaging even though it would have been possible to conceal the Der Grüne Punkt logo must be rejected.

3. *The third plea, alleging infringement of Article 86(2) EC and of Article 253 EC*

(a) Arguments of the parties

205 The applicant submits that an infringement of Article 82 EC is ruled out because it is entrusted with the operation of services of general economic interest within the meaning of Article 86(2) EC, namely waste management for environmental purposes and, more precisely, the collection and recovery of packaging throughout Germany including in unprofitable rural areas (Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 47; Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, paragraphs 75 and 76; and Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, paragraph 72). That service of general economic interest has been entrusted to it by the German *Länder* as a result of the recognition of the DSD system under the 11th sentence of Paragraph 6(3) of the Ordinance. The contested

decision threatens the carrying out, under economically acceptable conditions, of that service, since it destroys the signal effect of the mark Der Grüne Punkt and is likely to prevent it from disposing of waste throughout the country. Similarly, the contested decision infringes the duty to give the reasons upon which it is based, to which it is subject under Article 253 EC, since it does not deal with Article 86(2) EC.

206 The Commission, supported by the interveners, disputes that DSD provides a service of general economic interest entrusted to it by the German regional waste authorities, in so far as any operator of an exemption system may obtain the same authorisation as DSD on the basis of the 11th sentence of Paragraph 6(3) of the Ordinance. In addition, it follows from the Ordinance that the legislature did not seek to prevent the coexistence of self-management solutions and exemption systems, parallel to the system put in place by the applicant. That competition is not a risk but the objective of the Ordinance.

(b) Findings of the Court

207 Under Article 86(2) EC, undertakings entrusted with the operation of services of general economic interest are to be subject to the rules contained in the Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. That article also states that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

208 In the present case, it must be pointed out that, even supposing that the applicant is entrusted with a service of general economic interest within the meaning of Article

86(2) EC, and in the same way as all exemption systems approved by the authorities of the *Länder*, the fact remains that the risk of that task being called into question as a result of the contested decision has not been shown.

209 Contrary to the applicant's claim in the context of the present plea, the fact that DSD cannot be remunerated for a service which has been shown to be provided by another system in no way leads to the conclusion that the contested decision threatens the carrying out, under economically acceptable conditions, of the take-back and recovery service entrusted to the DSD system.

210 In particular, it is apparent from paragraphs 156 to 158 above, that the contested decision does not call the essential function of the mark Der Grüne Punkt into question in the context of the Trade Mark Agreement. Similarly, there is nothing in the case-file which leads to the conclusion that the contested decision is likely to prevent DSD from disposing of packaging throughout Germany.

211 In addition, since the applicant did not rely on Article 86(2) EC in the administrative proceedings, the Commission cannot be accused of not having given reasons in that regard in its decision.

212 Consequently, the third plea must be dismissed.

213 It follows from the above that the action must be dismissed in its entirety.

Costs

214 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, Landbell and BellandVision have applied for costs, the applicant must be ordered to pay, in addition to its own costs, those of the Commission, Landbell and BellandVision, including those relating to the interlocutory proceedings. Vfw, which has not applied for costs, shall bear its own costs, including those relating to the interlocutory proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant, Der Grüne Punkt — Duales System Deutschland GmbH, to bear its own costs and those incurred by the Commission, Landbell AG Rückhol Systeme and BellandVision GmbH, including those relating to the interlocutory proceedings;

3. **Orders Vfw AG to bear its own costs, including those relating to the interlocutory proceedings.**

García-Valdecasas Cooke Labucka

Delivered in open court in Luxembourg on 24 May 2007.

E. Coulon J.D. Cooke

Registrar President

Table of contents

Law ..... II - 1612

A — Ordinance on the avoidance of packaging waste ..... II - 1612

B — The exemption system of Der Grüne Punkt — Duales System Deutschland GmbH and the Trade Mark Agreement ..... II - 1615

Facts at the origin of the dispute ..... II - 1618

Procedure and forms of order sought ..... II - 1620

Law ..... II - 1623

A — The contested decision ..... II - 1623

1. The possibility of combining several take-back and recovery systems to comply with the obligations under the Packaging Ordinance ..... II - 1624

2. Assessment relating to Article 82 EC ..... II - 1625

3. Assessment relating to Article 3(1) of Regulation No 17 ..... II - 1630

B — The admissibility of the action ..... II - 1634

1. The admissibility of the action in so far as it concerns Article 4 of the contested decision ..... II - 1634

2. The introduction of new pleas in the course of proceedings ..... II - 1636

3. The taking into account of certain annexes produced by the applicant ... II - 1637

(a) The annexes prepared by C. Weidemann ..... II - 1637

(b) The opinion polls joined to the reply ..... II - 1639

C — Substance ..... II - 1639

1. The first plea, alleging infringement of Article 82 EC ..... II - 1640

(a) Preliminary observations on the contention that there is a free, compulsory licence ..... II - 1640

Arguments of the parties ..... II - 1640

Findings of the Court ..... II - 1641

(b) Arguments of the parties regarding the abuse of a dominant position. II - 1642

(i) No need to use the mark Der Grüne Punkt to participate in a system competing with DSD ..... II - 1642

(ii) No elimination of competition in the absence of a compulsory licence for the mark Der Grüne Punkt ..... II - 1643

(iii) The different forms of justification for DSD's conduct ..... II - 1644

— The need to ensure the objectives of the Ordinance ..... II - 1644

— The justification relating to trade mark law ..... II - 1647

— The proper functioning of the DSD system ..... II - 1651

(c) Findings of the Court ..... II - 1653

(i) The abuse established in the contested decision ..... II - 1653

(ii) The exclusivity claimed by the applicant ..... II - 1655

(iii) The detailed rules for the operation of mixed systems ..... II - 1657

(iv) The applicant's criticism of the analysis in the contested decision . II - 1662

— The lack of need to affix the Der Grüne Punkt logo to all packaging in the case of use of a mixed system because it is possible to use selective marking on the basis of the system used ..... II - 1662

— The arguments relating to the lack of elimination of competition II - 1664

— The need to ensure that the objectives of the Ordinance are met II - 1665

— The justification relating to trade mark law ..... II - 1667

— The proper functioning of the DSD system ..... II - 1670

(v) Conclusion ..... II - 1670

2. The second plea, alleging infringement of Article 3 of Regulation No 17 and infringement of the principle of proportionality ..... II - 1671

(a) The selective marking ..... II - 1671

(b) The imposition of a compulsory licence without any time restriction . II - 1674

(c) The prior provision requirement ..... II - 1676

(d) The exclusion of an adequate fee for merely using the mark ..... II - 1678

(e) The possibility of affixing an explanatory note ..... II - 1680

Arguments of the parties ..... II - 1680

Findings of the Court ..... II - 1681

3. The third plea, alleging infringement of Article 86(2) EC and of Article 253 EC ..... II - 1683

(a) Arguments of the parties ..... II - 1683

(b) Findings of the Court ..... II - 1684

Costs ..... II - 1686