JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

24 May 2007 *

In Case T-289/01,

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 and E. Wagner, 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,

* Language of the case: German.

supported by

Landbell AG für Rückhol-Systeme, established in Mayence (Germany), represented by A. Rinne and A. Walz, lawyers,

intervener,

APPLICATION for annulment of Article 3 of Commission Decision 2001/837/EC of 17 September 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Cases COMP/34493 — DSD, COMP/37366 — 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), or, in the alternative, annulment of that decision in its entirety and of the applicant's commitment reproduced in recital 72 of that decision.

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 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 on the market.

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 marketed, 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, the Trade Mark Agreement and the Service 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 In order to be able to take part in the DSD system, manufacturers and distributors have to sign a contract with DSD granting them the right to use the Der Grüne Punkt logo, which is the collective trade mark Der Grüne Punkt of which DSD is the

proprietor. In return, the manufacturers and distributors concerned pay a royalty to DSD. The Trade Mark Agreement is the subject-matter of Commission Decision 2001/463/EC of 20 April 2001 relating to a proceeding under Article 82 EC (Case COMP D3/34493 — DSD (OJ 2001 L 166, p. 1)). That decision was the subject of an action for annulment brought by applicant in Case T-151/01 *DSD* v *Commission*.

14 Under the DSD system, the applicant 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 ('the Service Agreement'). Once sorted, that material is transported to a recycling plant to be recovered.

Facts at the origin of the dispute

15 On 2 September 1992 DSD notified the Commission of its Statutes and also of a number of agreements, including the Service Agreement — the only agreement which is relevant in the present case — with a view to obtaining negative clearance or, failing that, a decision granting exemption.

16 On 27 March 1997 the Commission published the notice in the *Official Journal of the European Communities* (OJ 1997 C 100, p. 4), pursuant to Article 19(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ English Special Edition 1959-62, p. 87) in which it stated its intention to take a favourable view of the notified agreements.

17 In that notice, the Commission stated, inter alia, that DSD had given a series of commitments to it, including a commitment not to oblige collection undertakings to work exclusively for DSD and to refrain from obliging those undertakings to use containers or other collection facilities exclusively for the performance of the Service Agreement. DSD had however stated that that second commitment did not apply when the use of the containers and collection facilities by third parties was incompatible with 'the permission given by the public authorities', or when the Packaging Ordinance or other legislation determined otherwise, or when for other reasons it would have been unreasonable to permit them to be used, related, for example, to the use of dangerous substances. DSD also stated that it was able to take account of the use of containers and other collection facilities by third parties in the calculation of the remuneration of collection undertakings (recitals 66 and 67 of the notice in the Official Journal, and recitals 71 and 134 of the contested decision).

18 Following the publication of that notice in the Official Journal, the Commission received observations from interested third parties concerning different aspects of the application of the Service Agreement. Those third parties submitted that, in practice, and contrary to the commitments referred to above, DSD did not allow them unimpeded access to the collection facilities used by DSD's contractual partners (recitals 76 and 77 of the contested decision). In the contested decision, the Commission thus states that DSD had requested that its contractual partners be permitted to use those facilities only with its authorisation. This formed one of the grounds for complaint lodged under Article 82 EC by the Vereinigung für Wertstoffrecycling ('VfW'), and was also the subject-matter of an action brought before the Landgericht Köln (Cologne Regional Court, Germany) (recitals 57 and 136 of the contested decision).

19 In that case DSD brought an action, on the basis of the German law on unfair competition, against a self-management solution, namely VfW, which was trying to use, free of charge, the collection facilities used by the DSD system in certain German hospitals. That case gave rise to the judgment of the Landgericht Köln of 18 March 1997 in which DSD was successful in so far as the German court found

unlawful the free, shared use of the collection facilities belonging to the DSD system. In that judgment, the Landgericht Köln also stated that, in the light of the circumstances of the case, adequate compensation for such shared use could be determined only if VfW paid directly to DSD a sort of royalty in return for such use of those collection facilities.

20 In that context, the Commission pointed out to DSD by letter of 21 August 1997 that conduct consisting of preventing third parties from using the collection facilities of its contractual partners could fall within the scope of Article 82 EC and it stressed the importance that such conduct could have in respect of the exemption procedure, in so far as, in accordance with the fourth condition laid down in Article 81(3) EC, an agreement notified for exemption purposes cannot afford the possibility of eliminating competition in respect of a substantial part of the products in question.

21 After the Commission had put forward its view, DSD gave the following commitment in order to address the preliminary concerns expressed by that institution in its letter of 21 August 1997 (recitals 58, 72 and 137 of the contested decision):

'DSD is prepared to refrain from seeking to restrict use in the manner referred to in the judgment of the [Landgericht Köln] of 18 March 1997 in [the] particular case of VfW and in comparable cases. DSD may however pursue claims for information and settlement against collectors in a contractual relationship with DSD.'

The contested decision

22 On 17 September 2001 the Commission adopted 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; 'the contested decision' or 'the decision').

23 The assessment made by the Commission in the contested decision commences with the application made by DSD to obtain negative clearance or, failing that, a decision granting exemption in respect of the Service Agreement.

A — *The contractual relations between DSD and the collection undertakings*

24 DSD does not itself collect packaging but employs collection undertakings with which it concludes a Service Agreement. Pursuant to Paragraph 1 of that standard agreement, DSD entrusts each collection undertaking with the exclusive task of collecting and sorting packaging in a certain district in accordance with an exemption system and this for a duration of around 15 years ('the exclusivity clause in favour of the collection undertaking' or 'the exclusivity clause').

25 The packaging is either collected in containers placed close to the households of the consumers concerned or removed or emptied from plastic bags or bins which are provided to consumers by the collection undertaking. That undertaking owns the containers and the packaging deposited therein or which it has collected. The

sorting of the collected material is the responsibility of the collection undertakings and is generally done in a specialised sorting centre. Each collection undertaking is remunerated by DSD according to the weight of each type of material, the cost of treatment of the sorted waste and the success rate of the collection (recitals 32, 45 and 51 of the contested decision).

26 The contested decision incidentally observes that collection undertakings usually also collect printed matter (newspapers and magazines) at the same time as packaging made of paper and card. However, since that printed matter, which accounts for about 75% of that type of material, does not form part of the DSD system, DSD does not pay for its collection (recital 32 of the contested decision).

B — *Assessment relating to Article 81(1) EC*

27 In the context of that assessment, the contested decision concerns two aspects of the Service Agreement.

1. *The exclusivity clause in favour of the collection undertaking*

28 First, the contested decision states that the effect of the exclusivity clause in favour of the collection undertaking, which is inserted into all Service Agreements concluded between DSD and its contractual partners, is to prevent other collection undertakings from offering their services to DSD (recitals 122 to 124 of the contested decision).

29 In order to analyse that clause in the light of Article 81(1) EC the Commission examines, first of all, the situation of the demand on the German market for collecting and sorting packaging from consumers ('the market for collection from consumers'). In that regard, the contested decision states that DSD deals with approximately 70% of packaging capable of being collected in Germany and at least 80% of the demand in the market for collection from consumers. DSD's influence is therefore decisive both at national level, where it constitutes the only available exemption system, and in the 500 areas covered by Service Agreements (recitals 126 and 127 of the contested decision).

30 On the supply side, the contested decision points out, next, that numerous actors offer collection services. The contested decision also states that 'primarily for reasons of spatial organisation and collection logistics, it is unlikely at present that an additional collection system for private final consumers will be set up alongside that already established by DSD'. The decision states, on the contrary, that 'given the infrastructure bottleneck at the point of collection from households, it is surely more realistic to suppose that a potentially competing exemption system or self-management arrangement would cooperate with those collectors who already provided collection services for DSD under a Service Agreement'. Thus, for the Commission, it is only at certain collection points deemed equivalent to private households, such as hospitals or canteens, subject to certain conditions relating to collection logistics and types of packaging, that collection undertakings other than the contractual partners of DSD might be able to conceive installing additional collection containers to those used by the DSD system. It is considered in the decision, however, that such opportunities are of relatively limited economic importance and that it is unlikely, therefore, that any appreciable new opportunities for excluded undertakings will arise during the lifetime of the Agreement in the contracting areas covered by the DSD Service Agreement (recitals 127 and 128 of the contested decision).

31 In addition, the decision states that, in an assessment of the effect of these exclusivity obligations on competition, a decisive factor is their duration, given that

the longer that duration, the more that clause has the long-lasting effect of excluding other collection undertakings which are not contractual partners of DSD from the possibility of offering their services to meet the demand of the most important German exemption system (recitals 129 and 130 of the contested decision).

32 Following that analysis, the Commission notes that the access of collection undertakings to the market for collection from consumers is greatly obstructed; this goes a considerable way towards partitioning off a substantial part of the common market. Consequently, the exclusivity clause in favour of the collection undertaking constitutes a restriction of competition for the purposes of Article 81(1) EC (recital 132 of the contested decision). When questioned on that point at the hearing, DSD stated that it did not dispute that analysis.

2. *Access to the facilities of collection undertakings*

33 Second, the contested decision examines the extent to which competitors with DSD may have access to the facilities of collection undertakings. In that regard, the Commission points out that, in its view, there would be a restriction of competition for the purposes of Article 81(1) EC 'if the Service Agreement was so designed that it excluded competitors with DSD from access to the collection infrastructure' (recital 133 of the contested decision).

34 In support of that claim, the decision states, first, that 'the infrastructure for collection in the vicinity of households forms a bottleneck, so that [the facilities of the collection undertakings are] especially important in terms of competition law'. Thus, the decision states that that type of collection is carried out, in general, directly at all households in the local authority's area (collection systems), with the

exception of a few cases where waste is brought voluntarily by the public (waste collection centres). The decision also states that, for logistical reasons collection points at households, if they are to be served at optimum cost, have usually to be served by only a limited number of collectors. In addition, the decision points out that only one container can be placed at each collection point for each type of material (such as glass, paper or lightweight packaging), for reasons of space and the established habits of final consumers in respect of collection. Such facts constitute the main reason why there is usually only one household refuse and reusable materials collection from households, which is carried out by just one collector (recital 133 of the contested decision, read in conjunction with recitals 92 and 93 thereof). Second, the decision draws attention to the fact that objections were put forward on competition grounds following the publication of the notice in the Official Journal. The Commission refers here to the fact that, on that occasion, several interested third parties stated that, contrary to a first series of commitments given by DSD (see paragraph 17), that undertaking did not allow third parties to access the collection facilities of its contractual partners freely by requiring them to agree to share the use of those facilities (recital 133 of the contested decision, read in conjunction with recitals 76 and 77 of that decision).

35 In that context, the contested decision draws attention, first, to the fact that DSD had claimed that joint use of the collection facilities of DSD's contractual partners by third parties should be possible only if DSD had authorised it. The decision states, however, that, following the Commission's letter of 21 August 1997, which pointed out to DSD that such conduct could fall within the scope of Article 82 EC, DSD had decided no longer to insist that third parties obtain its authorisation in order to be able to use the collection facilities of its contractual partners (see paragraphs 20 and 21). That decision also states that 'there would also be a difficulty if DSD were to demand payment for such use directly from third parties, or to claim that it ought to have a say in the negotiation by collectors and third parties of an appropriate payment for the joint use of collection containers'. Nonetheless, the decision takes

care to point out that, in the case of the shared use of the facilities of its contractual partners, DSD remains free to negotiate a reduction of the royalty paid to those undertakings and it may also ensure that it is not charged for any service provided for a third party (recitals 136 to 138 of the contested decision).

36 In the light of those commitments and that information, the Commission considers that the Service Agreement does not confer any exclusivity on DSD, and that collection undertakings are free to offer their services to competitors with DSD. The decision also points out that 'it does not, therefore, follow from the Service Agreement that competitors with DSD are denied access to the collection infrastructure, so that there is no restriction of competition here within the meaning of Article 81(1) [EC]' (recitals 134 and 139 of the contested decision).

C — *Assessment relating to Article 81(3) EC*

37 In order to declare the provisions of Article 81(1) EC inapplicable to the Service Agreement, the contested decision examines the exclusivity clause in favour of the collection undertaking in the light of the conditions laid down in Article 81(3) EC.

38 In that context, the contested decision considers that that clause contributes to improving the production of goods and to promoting technical or economic progress because it enables environmental objectives to be met (recitals 142 to 146 of the contested decision), while reserving a fair share of the resulting benefit to consumers (recitals 147 to 149 of the contested decision).

39 Similarly, as regards whether or not the exclusivity clause laid down in the Service Agreement is indispensable, the contested decision points out that the putting in place of the DSD system requires considerable investments from the collection undertakings, which need to be able to obtain certain guarantees from DSD as regards the duration of the agreement in order to be able to recoup and obtain a profit from those investments. After examination, the Commission considers it necessary, however, to reduce the initial duration laid down for the exclusivity clause by setting it a termination date of 31 December 2003 (recitals 150 to 157 of the contested decision).

40 Finally, the contested decision examines the question whether the exclusivity clause is not likely to eliminate competition on the market for collection from consumers. In that regard, the Commission starts by pointing out that collection undertakings excluded from the DSD system remain free to offer their services to firms wishing to manage their own waste. Such arrangements are possible at least in respect of certain combinations of sales packaging and collection points on the margins of the market for collection from consumers (recital 159 of the contested decision).

41 In addition, the Commission notes that the market for collection from consumers is characterised by the fact that it is economically more advantageous to entrust the whole of a designated area to just one collection undertaking and that it is, in many cases, rather less profitable to have several collection facilities for household collection for reasons of spatial economics, collection logistics and traditions of waste collection established among consumers. For the Commission, the containers used for collecting, which are situated close to households, thus form a bottleneck. It thus considers it realistic to expect that exemption schemes competing with the DSD system and some self-management solutions will often work together with the collection undertakings which work for DSD. That analysis enables the Commission to draw attention to the need for the contracting parties of DSD to share the use of the collection facilities, given that 'free and unimpeded access to the collection infrastructure set up by collectors contracted to DSD under a Service Agreement is therefore a vital condition of more intense demand-side competition for collection and sorting services for [household packaging] and more intense competition on the upstream market in the organisation of the take-back and recovery of [packaging from consumers]' (recital 162 of the contested decision). The decision observes, in

that regard, that the Service Agreement does not tie the collection undertakings exclusively to DSD and that DSD has given several commitments, including one to refrain from requiring collection undertakings to use collection facilities solely for the purposes of the Service Agreement and not to seek to restrain third parties from using those collection facilities in the case of shared use (recitals 158 to 163 of the contested decision).

D — *Obligations imposed by the Commission to be attached to the decision granting exemption*

42 In order to ensure that the anticipated effects on competition do in fact take place and that the tests for exemption in Article 81(3) EC are accordingly satisfied, the Commission considers it necessary to attach obligations to its decision to exempt the Service Agreement under Article 8 of Regulation No 17 (recital 164 of the contested decision).

43 The first obligation is imposed on DSD in Article 3(a) of the contested decision, according to which 'DSD shall not impede collectors wishing to conclude and apply agreements with organisations competing with DSD for the joint use of containers or other facilities for the collection and sorting of used sales packaging'.

44 The second obligation is defined in Article 3(b) of the decision and states that 'where collectors conclude agreements with competitors with DSD providing for the joint use of containers or other facilities for the collection and sorting of used sales packaging, DSD may not require that they inform DSD of volumes of packaging not collected for the DSD system'.

45 In order to explain in what respect such obligations have to be imposed notwithstanding DSD's commitment to authorise its competitors to use the collection facilities, the contested decision refers to the vital importance of unimpeded access to those facilities for the existence of competition and the qualifications made by DSD in relation to the implementation of one of the commitments set out in recital 71 (recital 164 of the contested decision).

E — *Conclusions*

46 On the basis of the commitments given by DSD and the obligations attached to the decision, the contested decision concludes by stating that free and unimpeded access to the collection infrastructures is possible in practice. According to the decision, there is realistic scope for entry to the market for collection from consumers both for exemption systems competing with the DSD system and for individual collection systems. That scope will also allow the conditions to be established which are necessary for the intensification of competition on the upstream market in the organisation of the take-back and recovery of packaging from consumers (recitals 176 to 178 of the contested decision).

47 Consequently, the contested decision states that the exclusivity clause in favour of the collection undertaking, contained in the Service Agreement, satisfies the test for the application of Article 81(3) EC (recital 179 of the contested decision). In Article 2 of the contested decision, the Commission thus states that 'acting under Article 81(3) [EC] ..., the Commission declares Article 81(1) [EC] ... inapplicable to individual Service Agreements containing an exclusivity clause running no further than the end of 2003' and that 'this exemption shall run from 1 January 1996 to 31 December 2003'.

48 The two obligations mentioned above (see paragraphs 43 and 44) are attached to that exemption, as laid down in Article 3 of the decision, in order, first, to ensure

access to the collection infrastructures of DSD's partners in the Service Agreement, and to prevent the elimination of competition on the relevant markets and, second, to enable DSD's competitors to make unrestricted use of the quantities of packaging collected for them in the context of that shared use of the collection facilities. These obligations are indispensable in order to prevent the elimination of competition on the relevant markets, and constitute a clarification of the commitments given by DSD which helps to increase their legal certainty (recital 182 of the contested decision).

49 Finally, the contested decision states that, if it proves from a decision of a German court of last resort that, contrary to the Commission's view, the use by third parties of the collection facilities of Service Contract collection undertakings is not compatible with the Packaging Ordinance, there would then have been a major change in the facts basic to the making of the decision, and the Commission would reconsider the requirements for the applicability of Article 81(3) EC to the Service Agreement, and would if necessary revoke the declaration of exemption (recital 183 of the contested decision).

F — *Operative part*

50 Article 1 of the operative part sets out the Commission's position on DSD's constitution and the Guarantee Agreements which had been notified by DSD at the same time as the Service Agreement:

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

51 Article 2 of the contested decision exempts the Service Agreement:

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

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

52 In Article 3 of the decision, the Commission attaches two obligations to that exemption:

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

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

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

Procedure and forms of order sought

53 By application lodged at the Registry of the Court of First Instance on 27 November 2001, the applicant brought an action seeking annulment of the contested decision, under the fourth paragraph of Article 230 EC.

54 By application registered at the Registry of the Court of First Instance on 26 February 2002, Landbell AG für Rückhol-Systeme ('Landbell'), an exemption system in competition with DSD, sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. That application for leave to intervene was notified to the parties, which submitted their observations within the prescribed period.

55 By order of 17 June 2002, the Court of First Instance (Fifth Chamber) granted Landbell leave to intervene and it submitted its observations on 9 October 2002.

56 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.

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

58 The applicant claims that the Court should:

— annul Article 3(a) and (b) of the contested decision;

— in the alternative, annul the contested decision in its entirety;

— annul DSD's commitment reproduced in recital 72 of the contested decision;

— order the Commission to pay the costs.

59 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

60 Landbell claims that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

61 The applicant raises four pleas in law in support of its action. The first plea alleges that the obligation laid down in Article 3(a) of the contested decision infringes Article 81(3) EC and the principle of proportionality. The second plea alleges that that obligation infringes Article 86(2) EC. The third plea alleges that the obligation laid down in Article 3(b) of the contested decision infringes Article 81(3) and Article 86(2) EC. The fourth plea, linked to the application for annulment of the applicant's commitment referred to in recital 72 of the contested decision, alleges infringement of the fundamental right of access to justice.

A — *The first plea, alleging that the obligation laid down in Article 3(a) of the contested decision infringes Article 81(3) EC and the principle of proportionality*

62 The applicant claims that the obligation laid down in Article 3(a) of the contested decision ('the first obligation'), according to which 'DSD shall not impede collectors wishing to conclude and apply agreements with organisations competing with DSD for the joint use of containers or other facilities for the collection and sorting of used sales packaging', infringes Article 81(3) EC and the principle of proportionality. That plea is essentially divided into three parts.

63 First, the applicant claims that the first obligation is not objectively necessary in the light of Article 81(3) EC since the shared use of the collection and sorting facilities ('the collection facilities') is not indispensable for the activity of DSD's competitors. At the very least, the applicant submits that the contested decision does not provide sufficient reasoning on that point.

64 Second, the applicant claims, in response to the arguments raised in the statement in defence, that the alleged threat of infringement of Article 81(1) EC or Article 82 EC claimed by the Commission is speculative and cannot justify the first obligation, which — in any case — can only seek to prevent the elimination of competition on the market in which a restriction of competition has been found beforehand.

65 Third, the applicant submits that the first obligation is disproportionate and alleges (i) that the shared use of the collection facilities imposed by that obligation is contrary to the Packaging Ordinance; (ii) that the first obligation leads to a distortion of competition to its detriment; (iii) that the obligation at issue adversely affects the specific subject-matter of the mark Der Grüne Punkt; and (iv) that it infringes its fundamental right of access to justice.

66 Before expounding those arguments the applicant first states why it is necessary to obtain its agreement in the case of shared use of the collection facilities.

67 Those reasons need to be examined before assessing the three parts of the first plea.

1. *The need to obtain DSD's agreement to share the use of the collection facilities*

(a) Arguments of the parties

68 The applicant submits that, even though it is not the legal owner of the collection facilities referred to in the first obligation, those facilities must nevertheless be

considered to be facilities which belong to DSD given that (i) it finances them; (ii) they are an integral part of the DSD system and; (iii) they bear the mark Der Grüne Punkt. Consequently, any shared use of the facilities by collection undertakings which have concluded a service agreement with DSD should be subject to the applicant's agreement.

69 In order to establish the need to obtain that agreement, the applicant puts forward, first, the fact that it financed the collection facilities used by the DSD system. In that regard, the applicant bases its arguments, inter alia, on Article 7(1) of the Service Agreement, according to which the remuneration paid by DSD to the collection undertaking constitutes the consideration for all the services supplied by that undertaking as regards, inter alia, the provision of collection containers, the transport and the sorting of packaging and the availability of the waste. The applicant also relies on a judgment of the Landgericht Köln of 18 March 1997, stating that a competitor of DSD benefits from the DSD system in the case of shared use of the collection facilities and that such use is possible only after 'obtaining [DSD's] agreement (in return for payment)'. The applicant also cites the principle laid down in Article 242 of the Bürgerliches Gesetzbuch (German Civil Code; 'the BGB') that contractual obligations should be performed in good faith imposing on contractors the obligation to take particular precaution in long-term contractual relations involving close economic cooperation.

70 Similarly, it is necessary to obtain the applicant's agreement in the case of shared use of the collection facilities in order to enable it to respect its obligations under the Packaging Ordinance, both in terms of the need to ensure that the whole territory is covered and the need to comply with the recovery rates and to prove the volume flows for each *Land* (second sentence of Paragraph 10 of the Service Agreement; points 1.1 and 1.5.1 of the fourth agreement amending the Service Agreement and the judgment of the Verwaltungsgericht Gießen (Administrative Court, Gießen, Germany) of 31 January 2001). That agreement is also required to ensure that the packaging forming part of the DSD system and bearing the logo Der Grüne Punkt is actually brought by the consumer to the corresponding system, namely to the collection facilities bearing that logo.

71 The Commission and Landbell point out that the financing of the collection facilities is a logical consequence of the Service Agreement, which determines the services requested and the remuneration paid in consideration. In addition, the applicant did not invoke Article 242 BGB during the administrative proceedings and its current position is contrary to that which it adopted in that context. In addition, the obligations under the Ordinance apply to DSD in the same way as they apply to any other operator placed in the same position and the affixing of the mark Der Grüne Punkt to the collection facilities is of no importance to the consumer, who essentially associates those facilities with the type of material to be recovered. Landbell also claims that all the local authorities of the *Land* Hessen accepted that their exemption systems use the same collection facilities as those used under the DSD system.

(b) Findings of the Court

72 It is apparent from the contested decision that, during the administrative proceedings, DSD gave a commitment to the Commission not to require collection undertakings to work exclusively for the DSD system and to refrain from requiring those undertakings to use their own collection facilities exclusively for the performance of the Service Agreement (see paragraph 17). Similarly, DSD also gave a commitment to the Commission to refrain from making the use by third parties of the collection facilities of DSD's contractual partners subject to its agreement (see paragraph 21).

73 Those commitments concern, first, the collection undertakings, which are DSD's contractual partners and, second, the undertakings wishing to have access to the collection facilities of DSD's contractual partners. They address the concerns expressed by the Commission in the context of the administrative proceedings in respect of both the possible application of Article 81(1) EC to the Service Agreement, if it were found to contain an exclusivity clause in DSD's favour in

respect of third party access to the collection facilities (see paragraph 35), and the possible application of Article 82 EC, if it were established that DSD's wish to subject the shared use of the collection facilities to its agreement falls within Article 82 EC (see paragraph 20).

74 In order to address those concerns DSD proposed the abovementioned commitments. The commitment reproduced in recital 72 of the contested decision is particularly illustrative in that regard, since it was proposed in order to address the Commission's concern regarding DSD's initial demand that the shared use by third parties of the collection facilities of its contractual partners should be subject to its agreement (recitals 57, 58, 136 and 137 of the contested decision). That commitment was also intended to reassure the Commission by showing it that DSD had waived its right to bring actions to restrict use of the type described in the judgment of the Landgericht Köln of 18 March 1997, which had been brought by DSD on the basis of the German law on unfair competition against a competitor which was seeking to use certain collection facilities of the DSD system free of charge.

75 It should be pointed out that the commitments proposed by DSD were taken into account by the Commission in assessing the Service Agreement notified by DSD. That is true both in the examination of any restriction of competition under Article 81(1) EC concerning the access of collection undertakings to the facilities (see paragraphs 33 to 36, recitals 133 to 140 of the contested decision), and in the analysis under Article 81(3) EC in respect of assessing the possibility of maintaining competition (see paragraph 41; recitals 158 to 163 of the contested decision). In the contested decision the Commission refers expressly, by way of example, to the commitments in concluding that the Service Agreement does not tie the collection undertakings exclusively to DSD and that the collection undertakings may therefore propose their services to DSD's competitors both freely and without unnecessary obstacles (see paragraph 46, and recital 176 of the contested decision).

76 After the administrative proceedings, the applicant has nevertheless submitted, before the Court, that any shared use of the collection facilities of its contractual partners requires its agreement.

77 First, the applicant claims that that requirement results from the fact that it participated in the financing of the collection facilities used by the DSD system through the remuneration paid under the Service Agreement. It must be pointed out, in that regard, that the DSD system is the first approved exemption system in the whole of Germany and that its importance is considerable in that country, in so far as it represents approximately 70% of packaging capable of being collected in Germany and at least 80% of the demand in the German market for collection from consumers (see paragraph 29). It thus goes without saying that DSD is the first and primary, if not only, source of revenue for collection undertakings in respect of the collection and sorting of packaging.

78 However, the applicant does not dispute that it is the task of the collection undertakings and not of DSD to make the necessary investments for the collection and sorting of packaging (recital 151 of the contested decision). Similarly, it does not dispute that the sorting facilities which did not exist until then required considerable investments from the collection undertakings (recital 53 of the contested decision). It is also to enable those undertakings to redeem their investments, which have been estimated at ten billion German marks (DEM) during the lifetime of the Service Agreement, that the Commission accepted that the DSD exclusivity clause in favour of the collection undertakings should be quite substantial in duration (see paragraph 39). That duration thus seeks to ensure the profitability of investments made by collection undertakings and not to enable DSD to assert a right to monitor the use of those investments.

79 In addition, examination of the Service Agreement shows that DSD does not bear the risks related to the investments necessary to implement the DSD system by

means other than the abovementioned exclusivity clause. Thus, DSD is not responsible for the risks incurred by collection undertakings in using the system (Paragraph 5(1) of the Service Agreement). Similarly, in the event of termination of the Service Agreement, DSD neither repays the investment of the collection undertakings nor pays damages for it (Paragraph 9(3) and (4) of the Service Agreement). In addition, it is apparent from Paragraph 7(1) of the Service Agreement that the fee paid by DSD to its contractual parties is proportional to the weight of the packaging collected, which means that, if a collection undertaking stops collecting packaging for DSD, the latter does not have to remunerate that undertaking for investments made.

80 Furthermore, DSD does not take into account the fact that, in the case of shared use, the Commission expressly recognised, in the contested decision, that it had the right to ensure that it is not charged for any service provided by the collection undertakings for a third party and, consequently, authorises DSD to reduce the remuneration payable to its contractual partners (see paragraph 35). That makes it possible to guarantee DSD that shared use will not be at its cost in terms of remuneration paid to the collection undertakings. There can thus be no 'free usage' of the collection facilities, as was the case in the judgment of the Landgericht Köln, at a time when the German Packaging Ordinance had not yet been revised and when DSD was not in a position to reduce its payments to the collection undertakings in proportion to the shared use of the collection facilities.

81 Finally, as regards the argument based on Article 242 BGB, which in the applicant's view imposes obligations on contractual partners to take particular precaution — although it is difficult to perceive in what way they could show the need for DSD to agree to shared use — the Court can only find that, since that argument based on German law was not raised during the administrative proceedings, the Commission cannot be criticised for not having taken it into account when adopting the contested decision.

82 Consequently, the fact that DSD was the first exemption system to call on the services of collection undertakings and that it is the primary, if not the only, source of revenue for those undertakings is not sufficient to establish DSD's right to give its agreement in the case of shared use.

83 Second, the applicant submits that its agreement is necessary in the case of shared use of the collection facilities in order to enable it to comply with the obligations resulting from the Packaging Ordinance and to ensure that packaging which forms part of the DSD system is effectively put back into that system by the consumer.

84 In that regard, it should be pointed out that the obligations resulting from the Ordinance apply to DSD as they do to any other exemption system operator. In addition, the provisions of the Service Agreement relied on by DSD do not establish DSD's right to make the shared use of the collection facilities of its contractual partners subject to its agreement. Thus, the second sentence of Paragraph 10 of the Service Agreement does not concern the case of shared use of the collection facilities but that of an amendment to the organisation of the DSD system and that provision merely states that a different organisation of that system requires the agreement of the contracting parties and the local authority concerned. As will be explained below, shared use does not prevent the DSD system from satisfying its obligations under the Ordinance (see paragraphs 161 to 170). Equally, points 1.1 and 1.5.1 of the fourth amending agreement do not concern packaging, which is the only relevant item in the present case, but 'additional materials which are not packaging'. In addition, in the judgment of 31 January 2001 the Verwaltungsgericht Gießen did not examine the need for DSD to agree to shared use of the collection facilities but merely found that the Lahn-Dill-Kreis (Lahn-Dill district) had to come to an agreement with the applicant on a collection and recovery system that they had set up and which did not constitute a system consistent with Paragraph 6(3) of the Packaging Ordinance.

85 Moreover, in respect of the alleged need to preserve the role played by the mark Der Grüne Punkt at the stage of collecting the packaging, it should be noted that it is apparent from the documents before the Court that numerous collection facilities do not bear that mark (see paragraph 189). In addition, consumers do not associate the bins with that mark but with the type of packaging (sales packaging) and, in particular, the type of material (lightweight materials, paper/card, glass etc.) to be placed in the different types of collection facilities. The example of the joint collection of printed matter (newspapers and magazines) and packaging made of paper and card, given in the contested decision, illustrates the possibility of a shared use of the collection facilities without the need to take account of any affixing of the mark Der Grüne Punkt to those facilities (see paragraph 26).

86 Therefore, the fact that DSD was the first exemption system to integrate the collection facilities in its system or the first system to use the mark Der Grüne Punkt to identify its system is not sufficient to establish its right to make shared use subject to its approval.

87 In any event, even supposing that the applicant could rely on a right to give its approval for the shared use by third parties of the collection facilities of its contractual partners — which, as is apparent from the preceding paragraphs, is in no way established — the Court cannot but find that, during the administrative proceedings, the applicant stated that it had waived its claim to such a right. Subject to a specific argument relating to the commitment reproduced in recital 72 of the decision — which will subsequently be examined (see paragraph 218 et seq.) — the applicant does not challenge the validity or the legality of the different commitments put forward during the administrative proceedings to address the concerns voiced by the Commission.

88 Those commitments had the effect of clarifying the content of the Service Agreement notified by DSD, for the purposes of obtaining negative clearance or an exemption, by showing the Commission the way in which DSD intended to act in

the future. The Commission thus legitimately took account of those commitments in its assessment in such a way that DSD obtained the decision granting exemption which it sought. Therefore, the Commission was not obliged to take a stance on whether or not DSD has the right to make the shared use of the collection facilities subject to its agreement, given that, in its commitments, that undertaking had agreed to refrain from opposing such shared use.

89 Consequently, the Commission rightly adopted the contested decision without taking into account DSD's alleged right to oppose shared use, because commitments had been given to that effect by DSD to address the problems identified by the Commission. Therefore, it is not the task of the Court to examine the legality of that decision in the light of a right which the applicant had waived.

2. *The first part, alleging the lack of need to share the use of the collection facilities*

(a) Arguments of the parties

90 By analogy with the case-law on essential facilities (Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* (*'Magill'*) [1995] ECR I-743, paragraphs 53 and 54; Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 41; Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141), the applicant claims that the shared use, imposed by the first obligation, must be indispensable for the activity of DSD's competitors, which is not so in the present case.

91 In relation to exemption systems, the applicant submits that those systems can access approximately 70% of the market without resorting to shared use. It states that approximately 70% of the packaging treated under its system (packaging made of glass, most packaging made of paper and card, and lightweight packaging in the South of Germany) is collected by voluntary collection systems, namely either by means of containers placed at designated sites to that effect or by means of waste collection centres. Those systems are the rule and not an 'ad hoc' solution, as pointed out in the decision (see paragraph 34). It is therefore sufficient that competitor collection systems install their own containers to avoid having to resort to shared use. The applicant also gives the example of the 'blue bag', used in April 1998 by Landbell to collect certain types of packaging in the Lahn-Dill-Kreis, to illustrate that a separate collection system from the DSD system may be put in place without difficulty. In addition, it is apparent from the Order of the Verwaltungsgerichtshof Kassel (Higher Administrative Court, Kassel, Germany) of 20 August 1999 that competing collection systems could be used 'alongside each other', which means that they could use their own collection facilities.

92 In relation to self-management solutions, the applicant points out that such systems cannot, generally speaking, collect packaging in collection facilities situated close to private households, as would however be possible as a result of the first obligation. That prohibition is decisive in terms of respecting the recovery rates laid down in the Ordinance. By way of exception, the applicant acknowledges that self-management solutions may collect packaging from, or close to, private households in marginal cases, namely from small craft undertakings, small businesses and industrialists and mail-order companies (see the observations of the German authorities, p. 7). However, in those two periphery fields, self-management solutions already use their own collection facilities and shared use is thus not necessary.

93 Finally, the applicant submits that the decision infringes Article 253 EC by not stating why shared use is indispensable for the activity of DSD's competitors. As regards collection facilities, the decision should contain studies on the structure of

the market and on the alleged restrictions of competition in order to establish how shared use is indispensable. In that regard, the applicant points out, in recital 160 of the contested decision, which concerns the spatial economics, collection logistics and traditions of waste collection established among consumers (see paragraph 41), that the Commission does not base its findings on variable facts. Similarly, merely stating in that same recital that the duplication of collection facilities is 'economically difficult in many cases' is not sufficient. In respect of sorting facilities, the applicant notes that the decision does not contain any reasons explaining why their use needs to be shared, unless that reason is the general indication, in recital 182 of the contested decision, that such use is necessary to prevent the elimination of competition.

94 The Commission considers that the reference made to the case-law on essential facilities is inappropriate given that the collection facilities do not belong to DSD and that third parties must be able to use them without its agreement. In the present case, it should be considered, rather, that the decision grants an exemption under Article 81(3) EC to a restriction of competition by attaching to that exemption an obligation aimed at ensuring that competition is maintained. In that regard, the decision states, in recitals 133 to 139 (see paragraphs 33 to 36), the reasons why the access of DSD's competitors to collection facilities is essential. Equally, the exclusivity clause linking DSD to the collection undertakings, examined in recitals 128, 160 and 162 of the contested decision, would restrict the arrival of competitors on the market considerably (see paragraphs 30 and 40). The Commission claims, essentially, that if the first obligation was not imposed, the exclusivity clause uniting the applicant and the collection undertakings would have the effect of preventing the entry of DSD's competitors into the market for collection from consumers. Consequently, the contested decision is sufficiently reasoned in that regard.

95 As regards the criticism concerning the shared use of the collection facilities for exemption systems, the Commission and Landbell submit that such use is necessary to enable effective competition. Landbell also states that, from the beginning, the

DSD system has shared the communal collection facilities which existed for collecting packaging made of paper, card and glass.

96 As regards the criticism in relation to the shared use of collection facilities for self-management solutions, the Commission observes that such use is envisageable only where there is an overlap between the collection points of the self-management solutions and those of the DSD system under national law. Therefore, the Commission observes that the first obligation applies to situations where self-management solutions are authorised to collect from consumers. In such a case, the Commission states that shared use will occur only where the collection points may be equipped with one facility only. Furthermore, the Commission notes that, in respect of packaging arising from the mail-order trade, self-management solutions will only need to share use where the turnover of their customers is so low that it would not be economically viable to install collection containers at a 'reasonable distance' from the place of establishment of those customers.

97 As regards the criticism of the lack of reasoning as to why shared use of the sorting facilities is necessary, the Commission raises the point that the applicant does not take into account the fact that, in the case of shared use of the collection facilities, it is obviously necessary to sort packaging together.

(b) Findings of the Court

98 By way of a reference to the *Magill* case-law, which concerns a situation in which the party concerned had an incontestable power of disposal over the facilities at issue — which is not the case here (see paragraphs 87 to 89) — the applicant submits, in

essence, that the first obligation must be annulled in so far as it imposes the shared use of the collection facilities, including the sorting facilities, even though it is not necessary to enable the activity of exemption systems and self-management solutions and without sufficient reasons under Article 253 EC.

99 In order to examine those arguments, it should first be noted that, in recital 182 of the contested decision, the Commission states clearly that the purpose of the first obligation, under which DSD may not prohibit collection undertakings from concluding contracts with DSD's competitors authorising those competitors to use their containers and other collection and sorting facilities, is to 'prevent the elimination of competition on the relevant markets', namely the market for collecting packaging from consumers and the upstream market in the organisation of the take-back and recovery of packaging from consumers (see paragraph 48, recital 182 of the contested decision, in conjunction with paragraph 46 and recital 176 of the contested decision for identification of the relevant markets).

100 In addition, as regards the meaning of the term 'organisations competing with DSD' in the first obligation, a distinction must be made between the situation of exemption systems, which indisputably compete with DSD on the two markets referred to, and self-management solutions, which have only a marginal impact on those markets, given that they must, in principle, collect packaging at the point of sale or in the vicinity of that point and not from final consumers (see paragraphs 5 and 6).

(i) The need for shared use in respect of competing exemption systems

101 In essence, it is considered in the contested decision that the different types of facilities used by the DSD system throughout Germany form a bottleneck to which

access is necessary to enable other exemption systems to compete with DSD on the market for collection of packaging from consumers and, consequently, to be active on the upstream market in the organisation of the take-back and recovery of packaging from consumers.

102 For that purpose, the facilities covered by the first obligation are more precisely defined as the 'containers or other facilities for the collection and sorting of packaging' of the collection undertakings which have concluded a service agreement with DSD. Those facilities are also referred to in the contested decision as 'collection infrastructures' (recitals 162, 164, 171 and 176 of the contested decision) or under the general term 'collection facilities' (recitals 164 and 182 of the contested decision). According to that decision, at issue are containers placed close to the households of the consumers on a site provided for that purpose and the infrastructures necessary to collect the plastic bags or to empty the bins which have been distributed to consumers by the collection undertaking (recital 32 of the contested decision).

103 Similarly, in so far as the sorting of the material is the responsibility of the collection undertakings, the notion of collection facilities also includes specialised centres in which that sorting is generally carried out. That explanation, set out in recital 32 of the decision, makes it possible to understand why the shared use of collection facilities also concerns sorting facilities. The collection phase is only the first stage in the process of recovering packaging. The sorting stage is logically the next stage in that process and the necessary corollary. Therefore, as of the moment when the collection undertakings may collect the packaging belonging to the DSD system and the packaging belonging to other exemption systems, those undertakings may also sort the quantities collected on behalf of those different systems. The applicant is well aware of that since the Service Agreement envisages both the collection and sorting of packaging. It is also for that reason that the Commission considers that the market for collection of packaging from consumers includes both the collection

of packaging and the sorting of it according to its use, which are two different activities requiring different infrastructures, but which constitute a single market as a result of the fact that DSD requires both of those services together (recital 87 of the contested decision).

104 It can thus not be claimed that the contested decision does not contain sufficient reasons for the inclusion of sorting facilities in the general term collection facilities and the complaint put forward in that regard by the applicant must be rejected.

105 In order to establish the need to provide for shared use of the collection facilities to enable exemption schemes competing with DSD to gain access to, and to remain on, the markets for collection and the organisation of the take back and recovery from consumers, the decision examines the role played by the collection undertakings in the context of an exemption system and the characteristics specific to collection facilities.

106 As regards collection undertakings, the decision rightly points out that it is economically advantageous to entrust the task to one collector in each designated area since the collection services from consumers are characterised by marked network effects and effects of scale and scope (recital 160 of the contested decision). Thus, the fact that DSD contracts a single collection undertaking for a specific area makes it easier to obtain the authorisation and information necessary to satisfy the applicable legislation and enables the collection of packaging in the whole of the area concerned without the need to contract several companies.

107 The decision also rightly points out that for reasons of spatial organisation and collection logistics it is quite unlikely that another collection system will target the

collection undertakings which do not participate in the DSD system, which represents 80% of the demand on the market for collection from consumers (recital 128 of the contested decision). The fact that 80% of packaging capable of being collected from consumers is already covered by a network of collection undertakings authorised by the local authorities makes it much more difficult to put another network in place alongside DSD. It is on that basis that the Commission considers that the duplication of the network put in place by the collection undertakings forming part of the DSD system seems quite unlikely.

108 As regards the collection facilities as such, the contested decision rightly points out that there are considerations of spatial economics, collection logistics and traditions of waste collection established among consumers which make it economically difficult in many cases to duplicate the arrangements for collection from consumers (recital 160 of the contested decision). That is understandable inasmuch as the duplication of facilities is neither in the interests of the public authorities, which issue the necessary approval and authorisation, nor in the interests of the consumers, whose cooperation is required in order for exemption systems to work, since they are the ones who place the packaging in the bag to be collected, in the bin to be emptied or in the relevant container.

109 From that point of view, asking consumers to fill two or more bags with packaging not depending on the material but on the exemption system used, or asking them to store in their homes two or more different containers to be emptied depending on the system used would be counterproductive, or even incompatible with the way in which competition is organised when the manufacturer or distributor of packaging decides to engage several exemption systems to be sure that the packaging is taken back and recovered (see Case T-151/01 *DSD* v *Commission* [2007] ECR II-1607, paragraphs 129 to 139, in which the Court sets out the content of the explanations given at the hearing in respect of the functional workings of systems combining several exemption systems to ensure that packaging is taken back and recovered). It

is in that way that the term 'traditions of waste collection established among consumers' (recitals 93 and 160 of the contested decision) needs to be understood. Those consumers wish to contribute to improving the environment but in a way which produces the least possible inconvenience for them.

110 Similarly, the multiplication of systems for collecting bags and emptying containers, just as the multiplication of containers or of sites provided to enable consumers to dispose of packaging close to their homes, is not economically rational in so far as available space is limited (recital 93 of the contested decision) and in so far as those same containers may be used by two or more exemption systems in the same way as is currently practised as regards, first, packaging made of paper and card which is collected under the DSD system and, second, printed matter (newspapers and magazines) which is collected by the municipal areas (recital 32 of the contested decision). The Commission was therefore entitled to take spatial economics and the nature of collection facilities into consideration when assessing under what conditions it was possible to enable exemption systems to gain access to consumers.

111 DSD is perfectly aware of those sociological and economic considerations and took account of them when setting up its system. From the outset, DSD decided to use the pre-existing communal collection facilities to collect packaging made of paper, card and glass. Those pre-existing facilities thus enabled the DSD system to be able to be set up quickly and efficiently in order to reach easily the consumers who were already used to using the sites provided for handing in that type of packaging.

112 It is apparent from the above that the contested decision sets out, to the requisite legal standard, the reasons why the facilities of the collection undertakings which have concluded a Service Agreement with DSD form a bottleneck for the exemption systems in competition with DSD, including Landbell in particular.

113 In those circumstances, allowing DSD to prevent collection undertakings from concluding and applying agreements with DSD's competitors would effectively deprive those competitors of any real opportunity of entering, and remaining on, the market for collection from consumers and the Commission may legitimately conclude that shared use is necessary to prevent the elimination of competition on that market.

114 That conclusion is not called into question in the arguments raised by the applicant to criticise the need for exemption systems to share use.

115 Thus, the fact that 70% of the weight of the packaging collected by the applicant is collected by means of packaging being taken voluntarily to a container or a waste collection centre and not by bag collection or bin emptying systems does not call the above reasoning into question, namely that both collection facilities used by the voluntary collection systems and the collection infrastructures used by the take-back system constitute a bottleneck which the exemption systems in competition with DSD must be able to access in order to penetrate the market for collection from consumers.

116 Similarly, the example of the 'blue bag' set up by Landbell in the Lahn-Dill-Kreis, submitted by the applicant as an example of how an independent take-back system may be set up, cannot hide the fact that that example did not concern a *Land* but merely a district and thus prevented authorisation as an exemption system of any kind, that it was a pilot project put in place with the support of the local authorities and that DSD brought an action against that system. In addition, with effect from the decision, Landbell was in fact able to enter the market for collection from consumers as an exemption system for the *Land* Hessen, where Landbell uses, with the agreement of the undertakings at issue and the local authorities concerned, the same collection facilities as those which are used by the DSD system.

117 Finally, the quotation of a passage from the Order of the Verwaltungsgerichtshof Kassel of 20 August 1999, which envisages the setting-up of exemption systems 'alongside each other', does not lead to the conclusion that separate collection facilities must be used by competing exemption systems.

118 It follows from the above that the contested decision establishes, to the requisite legal standard, as regards the Commission's obligations under Article 81 EC and the duty to give reasons, why shared use of the collection facilities, including the sorting facilities, of undertakings which have concluded an agreement with DSD is necessary to enable competing exemption systems to penetrate the market for collection from consumers, and consequently to be active on the upstream market in the organisation of the take-back and recovery of packaging from consumers.

119 Consequently, the applicant's arguments alleging the erroneous or insufficient reasoning of the contested decision as regards the need to guarantee shared use to maintain competition between exemption systems must be rejected.

(ii) The alleged need for shared use in respect of self-management solutions

120 As DSD is an authorised exemption system in all of the German *Länder*, it is clear that the term 'organisations competing with DSD' referred to in the first obligation refers, primarily, to all competing exemption systems, that is to say all the systems authorised by the German authorities to take back and recover packaging from consumers. The question does arise, however, as to whether that term also includes

self-management solutions. In that regard, the applicant submits that shared use is not necessary for self-management solutions, although the Commission states in its submissions that the first obligation applies to self-management solutions where they are authorised to collect directly from consumers.

121 The Court considers that, for the following reasons, the first obligation must be interpreted as meaning that the term 'organisations competing with DSD' includes only exemption systems and not self-management solutions.

122 First of all, it is incontestable that self-management solutions must, in principle, collect packaging at, or in the vicinity of, the point of sale and not from consumers. Such an interpretation is based on the wording of the Packaging Ordinance (see paragraphs 5 and 6). It is also based on the observations of the German authorities submitted to the Commission during the administrative proceedings, from which it is apparent that the 'quotas which have to be met are to be met exclusively by taking back sales packaging at, or in the immediate vicinity of, the actual point of sale and that any additional collections organised near private dwellings may not count towards these quotas' (observations of the German authorities, pages 3 to 6, and recital 15 of the contested decision). In that regard, it cannot be claimed that self-management solutions and exemption systems are in direct competition as regards collection from consumers.

123 Next, it should be noted that the parties no longer challenge that, by way of exception from that principle, self-management solutions may play a role on the margins of the market for collection of packaging from consumers and, consequently, on the upstream market in the organisation of the take-back and recovery of packaging from consumers. Thus, in the context of the definition of the market for collection, the Commission states that, if the view set out by the German authorities should prevail (see paragraph 122), 'self-management arrangements will exert demand only on the margin of this market, particularly in respect of collection points deemed equivalent to private households, or in the case of delivery to the final

consumer' (recital 87 of the contested decision, read in conjunction with recital 15 of that decision, see also recital 159 of the contested decision). Similarly, the Commission states, in response to DSD's submission that collection from consumers was not possible in the context of self-management solutions, that 'it is not disputed, however, that even self-managers must collect packaging from the vicinity of the final consumer if the goods are delivered to the final consumer's address, as is the case for example with mail order or deliveries by small traders' (recital 167 of the contested decision).

124 In addition, in their pleadings, the parties agree that the intervention possibilities of a self-management solution on the market for collection from consumers are restricted to two cases of overlap defined in the Packaging Ordinance. The first of those cases concerns mail-order companies which use a self-management solution. Under the sixth sentence of Paragraph 6(1) of the Packaging Ordinance, in the case of mail-order 'measures shall be put in place to ensure the taking back of packaging at an acceptable distance from the final consumer'. That means that the notion of taking back from the point of sale, which, in principle, characterises the self-management solution, must be able to be applied here in the vicinity of the consumer. The second case concerns the situation where the addressee of the packaging is treated as a consumer in the Ordinance. It is thus apparent from the second sentence of Paragraph 3(10) of the Ordinance that 'cafes, hotels, canteens, government offices, barracks, hospitals, educational establishments, charitable organisations, the offices of professional people, agricultural undertakings and craft enterprises, excluding print shops and other paper-using businesses, which can have their packaging material disposed of at the rate normally associated with private households by way of traditional means of collection for paper, card, board and other lightweight packaging and containers no greater than 1 100 litres for each group of material' are considered to be consumers.

125 Finally, by contrast with the exemption systems competing with DSD, in respect of which the decision states why the collection undertakings which are contractual partners of DSD and their collection facilities constitute a bottleneck, the

Commission does not explain why it is necessary for self-management solutions to have access to those undertakings and to their facilities in order to maintain the competition on the relevant markets.

126 On the contrary, in its analysis of the condition concerning the maintenance of competition (see paragraph 40), the Commission states that 'collection undertakings excluded from the DSD system remain free to offer their services to firms wishing to manage their own waste' and explains that 'such arrangements are possible at least in respect of certain combinations of sales packaging and collection points on the margins of the market for collection from consumers' (recital 159 of the contested decision, with a reference to recital 87 thereof). That explanation supports the conclusion that the Commission was not concerned, or in any case had ceased to be in view of the commitments given by DSD (recital 163 of the contested decision), with the possibility for self-management solutions to find a collection undertaking to take back and recover packaging from consumers in the cases of overlap laid down in the Ordinance.

127 Such an analysis is confirmed by the fact that the Commission points out, in the context of the assessment of the sensitivity for competition of the exclusivity clause in favour of the collection undertakings (see paragraph 30), that 'there are only a few particular collection points deemed equivalent to private households, such as hospitals or canteens, which subject to certain conditions relating to collection logistics and types of packaging might conceivably be able to entrust the work to other collectors, which would involve installing additional containers for the purpose' (recital 128 of the contested decision). That means that it appears possible, in those cases, for two collection systems to coexist.

128 By contrast with exemption systems, which have to meet strict conditions in respect of territorial coverage, self-management solutions may confine themselves to taking back packaging from where it is marketed. Thus, although it appears difficult, for the reasons given above (see paragraphs 105 to 113), to duplicate all of the facilities

necessary for an exemption system, it is easier for a self-management solution to ensure that a second facility is put in a given place to enable it to collect the packaging which belongs to its system.

129 Consequently, in the absence of explanations as to why shared use could be necessary for self-management solutions in order 'to prevent the elimination of competition on the relevant markets', it is apparent from the above that the term 'organisations competing with DSD' used in the first obligation must be interpreted as meaning that self-management solutions are not included, but only exemption systems competing with DSD.

130 Such an interpretation of the term 'organisations competing with DSD' is also confirmed in a passage in the decision in which it is expressly stated that shared use of collection facilities by 'competing systems' does not concern self-management solutions. To dismiss an argument raised by DSD against the sharing of the containers by competing systems, the Commission states that that argument relates 'only to the question whether self-managers are entitled to collect or buy in packaging from the vicinity of the final customer, and does not concern the question of the joint use of receptacles by competing systems' (see footnote 16 in recital 169 of the contested decision). That quotation, which contrasts self-management solutions and competing systems, clearly excludes self-management solutions from the shared use of collection facilities, which is thus restricted to competing systems, namely exemption systems competing with DSD.

131 In that context, it is not necessary to respond to the applicant's arguments concerning the unlawfulness of the contested decision in so far as the first obligation relates to self-management solutions.

132 Similarly, the Court cannot take into account certain arguments raised by the Commission at the rejoinder stage, according to which shared use could be necessary in the case of low turnover, in so far as concerns self-management solutions which deal with packaging supplied in the course of mail-order, and where a single collection facility may be installed, in a hospital for example, in so far as concerns collection points treated as consumers. Those arguments do not appear in the contested decision (the turnover) or contradict it (the hospital) and the arguments raised by the Commission in the course of the proceedings cannot remedy the insufficiency of the reasoning in the contested decision in that regard (see, to that effect, Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraphs 47 and 48, and Case T-93/02 *Confédération nationale du Crédit mutuel* v *Commission* [2005] ECR II-143, paragraph 126).

3. *The second part, alleging that it is impossible to impose an obligation to remedy a possible infringement of Article 81(1) EC and Article 82 EC*

(a) Arguments of the parties

133 In response to the argument raised in the statement in defence (see paragraph 94), the applicant submits that the possible infringement of Article 81(1) EC or Article 82 EC alleged by the Commission is purely speculative and cannot justify the first obligation which — in any event — can seek only to prevent the elimination of competition on the market on which a restriction of competition has been found, namely the market for collection from consumers.

134 First, the applicant observes that the only restriction of competition identified in the decision, within the meaning of Article 81(1) EC, is to be found in the exclusivity clause concluded by DSD in favour of the collection undertaking (see paragraphs 28 to 32). That restriction concerns the market for collection from consumers and prevents other collection companies from offering their services to DSD, which has the effect of appreciably reducing competition between the collection undertakings in the designated area (recitals 123, 124 and 140 of the contested decision). That restriction has, however, been exempted by the Commission under Article 81(3) EC (see paragraphs 37 to 41), in particular inasmuch as it was not likely to eliminate competition on the market for collection from consumers (recitals 158 and 178 of the contested decision). In those circumstances, the applicant submits that the first obligation, whose stated objective is to enable competitors to access the upstream market in the organisation of collection from consumers (recitals 162 and 177 of the contested decision), is not related to the abovementioned restriction of competition, which does not concern DSD's competitors on the organisation market, but those of the collection undertakings which are contractual partners with DSD. The first obligation is thus not likely to intensify the competition on the market for collection from consumers.

135 Second, the applicant states that the Commission cannot impose an obligation in order to prevent an alleged threat of restriction of competition or abuse on a secondary market, namely the market in the organisation of the collection from consumers, on which no restriction of competition within the meaning of Article 81(1) EC has been found or, a fortiori, exempted under Article 81(3) EC. In that regard, the applicant points out that, in the decision, the Commission states clearly that the Service Agreement does not confer any exclusivity in DSD's favour in respect of access to the collection facilities of its contractual partners (see paragraph 36). Similarly, the Commission states that there is no restriction of competition as regards the organisation market (recital 86 of the contested decision). The applicant also submits that there is no evidence to suggest that DSD is likely to enter into such a commitment of exclusivity with its contractual partners or to impose that exclusivity unilaterally. In those circumstances, the market which needs to be taken into account for the application of Article 81(3) EC must be identical to that examined in relation to Article 81(1) EC. In addition, just like the object of the examination under Article 81(3) EC, the possibility of imposing an obligation under

Article 8(1) of Regulation No 17 is also limited by the restriction of competition found on the basis of Article 81(1) EC. Article 8 of Regulation No 17 can thus not serve as a legal basis for the imposition of an obligation for the purpose of dealing with an alleged problem of competition.

136 Third, the applicant considers that, even if the Commission could impose an obligation in a decision granting exemption in order to prevent a restriction of fictitious competition on a secondary market, it was not entitled to do so in the form of an obligation, which is a wholly separate measure (Article 15(2)(b) of Regulation No 17), but only in the form of a condition making that agreement 'eligible for exemption' (Joined Cases T-79/95 and T-80/95 *SNCF and British Railways* v *Commission* [1996] ECR II-1491, paragraph 63 et seq.). That is confirmed by the previous practice of the Commission (quoted in the reply, footnotes 20 and 21), which has almost always coupled its decisions granting exemption with conditions and not obligations, if, and in so far as, it considers a particular form of action to be necessary to prevent the elimination of competition for the purposes of Article 81(3) EC.

137 The Commission submits, as a preliminary point, that the above line of argument is inadmissible in that it is a new plea in law produced out of time for the purpose of Article 48(2) of the Rules of Procedure of the Court of First Instance. In addition, the Commission states that the purpose of the first obligation is to guarantee the commitments given by DSD in order to remedy certain problems identified during the administrative proceedings and certain ambiguities inherent in those commitments. What is important is thus whether the conduct from which DSD agreed to refrain was capable of being examined in the light of Article 81(1) EC. In the decision, the Commission voices its concerns in that regard, which not only relate to the exclusivity clause in favour of the collection undertakings but also the question of the access of competitors to the facilities of the collection undertakings which are contractual partners with DSD. In addition, the Commission notes that its assessment, in the context of Article 81 EC, must not be restricted only to the market for collection from consumers, which in any case has two aspects — the

offering of services by collection undertakings on the one hand, and the demand for services by DSD and the other exemption systems on the other — but may also concern the possible repercussions of the Service Agreement on the upstream market in organisation.

(b) Findings of the Court

(i) Admissibility

138 In response to the Commission's application that DSD's line of argument stated above be declared inadmissible since it constitutes a new plea in law produced out of time for the purposes of Article 48(2) of the Rules of Procedure, it should be pointed out that, although that provision does prohibit new pleas in law from being produced in the course of proceedings, 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. The same applies to a submission made in support of a plea in law (see, inter alia, Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraph 156).

139 In the present case, the line of argument put forward by DSD in the reply merely continues the arguments raised in the application in support of the plea of the unlawfulness of the first obligation in the light of Article 81 EC. In addition, those arguments merely respond to those raised by the Commission in the defence in order to relocate the aim of the action around the finding that the contested decision grants an exemption under Article 81(3) EC to a restriction of competition by attaching to that exemption an obligation based on the need to protect competition. It should be pointed out, in particular, that the applicant's contention that the first obligation infringes Article 8 of Regulation No 17, submitted for the first time in the

reply, is closely linked to that of the infringement of Article 81(3) EC presented in the first plea, given that that plea challenges the legality of the first obligation in the light of the applicable law and that it is precisely Article 8 of Regulation No 17 which enables the Commission to couple a decision granting exemption under Article 81(3) EC with an obligation.

140 In any event, the Commission had the opportunity, in the rejoinder and at the hearing, to submit its comments on what it considers to be a new plea.

141 It follows from the above that the Court must reject the Commission's application for a declaration of inadmissibility of the arguments raised by the applicant as regards the possibility of imposing an obligation to eliminate a possible threat of infringement of Article 81(1) EC and Article 82 EC.

(ii) Substance

142 It is thus necessary to examine the arguments raised by the applicant alleging that the Commission was not able, in the present case, to attach to the decision granting exemption, which was adopted on the basis of Article 81(3) EC, an obligation imposed under Article 8 of Regulation No 17.

143 Under Article 81(3) EC, the provisions of Article 81(1) EC may be declared inapplicable in the case of any agreement between undertakings which contributes to improving the production or distribution of goods or to promoting technical or economic progress (first condition), while allowing consumers a fair share of the

resulting benefit (second condition), which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives (third condition) and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question (fourth condition).

144 In addition, Article 8(1) of Regulation No 17 enables the Commission to couple a decision granting exemption under Article 81(3) EC with conditions and obligations.

145 In that context, it should be pointed out, first, that the way in which the applicant presents the contested decision is incorrect. At all the stages of the Commission's assessment under Article 81 EC, the contested decision also considered the question of access to the facilities of the collection undertakings and was not restricted to examining solely the effects on competition of the exclusivity clause for collection undertakings.

146 That is true both of the assessment relating to Article 81(1) EC (recitals 28 to 32 and 33 to 36 of the contested decision), and the assessment relating to Article 81(3) EC (see recitals 37 to 39 in relation to the first three conditions of applicability of that provision of the Treaty, where the analysis focuses on the collection undertakings, and recitals 40 and 41, in which the condition relating to maintaining competition is examined not only in respect of the collection undertakings, but also, and especially, in respect of the exemption systems competing with DSD).

147 It is only in the explanations given by the Commission to justify the obligations attached to the decision granting exemption pursuant to Article 8 of Regulation No 17 that the decision merely refers to the need to guarantee the access of DSD's

competitors to the facilities of the collection undertakings which had concluded a service agreement with DSD, and it does so in order to counter the applicant's reservations in respect of one of the commitments reproduced in recital 71 and to avoid the elimination of competition on the market for collection from consumers and on the upstream market in the organisation of the take-back and recovery of packaging from consumers (see paragraphs 42 and 45).

148 In addition, in its arguments, the applicant makes an artificial distinction between the market for collection from consumers, which it seeks to restrict to the collection undertakings whose services are used by DSD and to collection undertakings which have not concluded a Service Agreement with DSD, and the market in the organisation of the take-back and recovery of packaging from consumers, which concerns DSD and its competitors. In reality, as stated in the contested decision (see paragraph 41), what is important is rather the question whether or not the exemption systems competing with DSD must have access to the collection facilities of DSD's contractual partners in order to be able to enter the market for collection of packaging from consumers and, consequently, to be active on the upstream market in the organisation of the take-back and recovery of packaging from consumers.

149 Therefore, it cannot be alleged that the decision granting exemption concerns only the restriction of competition identified in the assessment relating to Article 81(1) EC, namely the exclusivity clause in favour of the collection undertakings. That decision concerns the whole of the Service Agreement notified by DSD whose conditions of application were clarified by the various commitments given by that undertaking.

150 It is therefore necessary to take account of the fact that the Commission agreed to exempt the Service Agreement because DSD assured it, inter alia, that no provision of that agreement was capable of binding the collection undertakings to DSD and that it would not bring any actions against third parties to restrict use in the case of shared use. Those assurances are decisive since they enable the Commission to find

that the exemption condition linked to the maintenance of competition is, in the present case, satisfied. In that regard, it should be pointed out that, in the absence of such assurances, the Commission clearly stated during the administrative proceedings that it had no intention of authorising or exempting the Service Agreement, but was considering either finding that the existence of a possible barrier to the access of competitors with DSD to the collection facilities of DSD's contractual partners constituted a restriction of competition as such (see paragraph 33), or considering whether DSD's conduct seeking to prevent its competitors from accessing those facilities might fall under Article 82 EC (see paragraph 35).

151 Consequently, since the Commission adopted the decision granting exemption on the basis of both its assessment of the exclusivity clause in favour of the collection undertakings and in the light of the need to maintain competition in such a way that the exemption systems in competition with DSD have the possibility of gaining access to the collection facilities of DSD's contractual partners (see paragraphs 118 and 128), the Commission did not infringe Article 81(3) EC and Article 8 of Regulation No 17 by adopting the first obligation.

152 Finally, the applicant submits that, even if the Commission could impose a duty on DSD in the contested decision, it could do so only in the form of a condition and not as an obligation, on the ground that the legal consequences attached to an obligation are more severe than those attached to a condition. Pursuant to Article 8(3)(b) of Regulation No 17, the Commission may revoke or amend its decision or prohibit specified acts by the parties where they commit a breach of any obligation attached to the decision, and pursuant to Article 15(2)(b) of that regulation the Commission could impose a fine if the applicant committed a breach of any obligation.

153 However, it is necessary to point out that Article 8(1) of Regulation No 17 provides that conditions and obligations may be attached to decisions granting exemption without stipulating under what conditions the Commission must choose a particular

one of those possibilities. In addition, since Article 81(3) constitutes, for the benefit of undertakings, an exception to the general prohibition contained in Article 81(1) EC, the Commission enjoys a large measure of discretion in relation to the detailed rules to which it may subject the exemption, while at the same time having to act within the limits imposed upon its competence by Article 81 EC (Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, paragraph 16).

154 The fact that the Commission preferred to impose conditions rather than obligations in other cases is not sufficient, in itself, to call into question the possibility provided for in Regulation No 17 of coupling a decision granting exemption with obligations rather than conditions.

155 It follows from the above that the Commission did not infringe Article 81(3) EC and Article 8 of Regulation No 17 by attaching to the decision granting exemption an obligation concerning the need to guarantee the shared use by exemption systems competing with DSD of the collection facilities of the undertakings used by the DSD system.

4. *The third part, alleging infringement of the principle of proportionality*

156 Even supposing that the shared use of the collection facilities is necessary to enable competition to be maintained, the applicant submits, however, that the first obligation is none the less disproportionate because, first, it infringes the Packaging Ordinance, second, it leads to a distortion of competition to the detriment of DSD, third, it unduly impairs the mark Der Grüne Punkt and, fourth, it infringes DSD's fundamental right of access to justice.

(a) The alleged infringement of the Packaging Ordinance

Arguments of the parties

157 The applicant submits that the first obligation is disproportionate because the shared use of DSD's collection facilities is incompatible with the principle of responsibility for the product laid down in the Packaging Ordinance. That principle requires manufacturers and distributors of packaging to achieve the recovery rates 'in respect of the packaging which they have put on the market' (first sentence of point 1(1) of Annex I to Paragraph 6 of the Ordinance). In addition, in the case of participation in an exemption system, the manufacturer's or distributor's responsibility for that packaging is transferred to the operator of that system which is required to 'recover the packaging fed into the system' (second sentence of Paragraph 6(3) of the Ordinance) and to achieve the recovery rates 'in respect of packaging for which manufacturers and distributors participate in [its] system' (second sentence of point 1(1) of Annex I to Paragraph 6 of the Ordinance). As a result of that approach, which is based on specific packaging, it is unlawful to buy packaging from other systems to achieve the recovery rates laid down in the Ordinance. In that respect, the applicant submits that the systems in competition with its own should, in principle, meet their obligations to take back and recover with their own collection facilities, termed 'collection facilities of the system' (see the seventh indent of point 3(3) of Annex I to the Ordinance).

158 Thus, in the case of shared use of collection facilities by two competing systems, the allocation to one or the other of those systems of a specific type of packaging is not, as a general rule, possible. In that regard, the applicant states that the allocation of 'the volumes of packaging ... to different systems on a polluter-pays basis if they are shared by means of quotas', mentioned in the contested decision (recital 170), requires expensive and complicated sorting analysis. In addition, the example of

paper and card used by the Commission gave rise to unfair results, in so far as the share of the volume collected, constituted by packaging attributed to DSD and determined by the sorting analysis, was initially 25%, although the share of the packaging actually licensed by DSD was significantly lower than that quota. In DSD's view, such a general solution for all packaging is unacceptable.

159 In addition, the applicant submits that the Ordinance makes any shared use of collection facilities by self-management solutions unlawful. As a general rule, they cannot collect packaging in the vicinity of consumers. Therefore, in submitting that DSD cannot rely on the Packaging Ordinance with regard to its contractual partners (recital 167 of the contested decision), the Commission failed to have regard to the fact that the Ordinance also pursues the objective of protecting the applicant from distortions of competition.

160 The Commission submits that the way in which the applicant presents the Ordinance is inaccurate given that the recovery rates are not based on specific types of packaging or on the total volume of packaging put on the market, but on the quantity of packaging collected by the relevant system. Landbell submits that the shared use of the collection facilities is, in any event, compatible with the Packaging Ordinance, the amendment of which in 1998 sought to increase competition between exemption systems.

Findings of the Court

161 The applicant submits, in essence, that the shared use of the collection facilities of undertakings which have concluded a Service Agreement with DSD has the effect of preventing it from taking back and recovering the packaging which has been attributed to it specifically by the manufacturer or the distributor of the packaging

concerned in accordance with the principle of responsibility for the product laid down in the Packaging Ordinance. Therefore, by preventing DSD from opposing shared use, the first obligation disproportionately infringes the rights and obligations which DSD derives from that ordinance.

162 At the hearing, the parties were questioned about the ways in which the exemption systems and self-management solutions function, in order to enlighten the Court as to the part played by the packaging as such, which the applicant refers to as 'specific packaging', in meeting the obligations to take back and recover imposed by the Ordinance. Their explanations enabled the Court to make the following findings.

163 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. 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 marketed 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 marketed 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 21 of the contested decision).

164 Moreover, it is apparent from the fourth and fifth sentences of Paragraph 6(1) of the Ordinance that the take-back and recovery obligations on distributors with a sales area greater than 200 m^2 include product packaging bearing marks which they do

not sell in so far as that packaging is the same type, shape and size as that in their range. Thus, the recovery rate of those distributors is not calculated in relation to packaging actually put on the market, but on the basis of packaging which is similar in terms of type, shape and size.

165 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 to DSD the take back and recovery of half of the plastic packaging which it markets 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 entrusted 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 its obligation to take back and recover in respect of half of the quantity of plastic marketed, the manufacturer must also prove that it took back and recovered the remaining quantity of the material, corresponding to the other half, by means of a self-management solution or another exemption system.

166 In addition, it should be pointed out that it is perfectly possible, as stated in recital 170 of the decision, to divide up, by means of quotas, the quantities collected by collection facilities between different systems. The applicant's own example in respect of packaging made of paper and card, which is collected by the DSD system at the same time as printed matter (newspapers and magazines), shows that collection facilities may be shared without any problems. The applicant can thus not seek to prohibit its competitors from using a technique which it uses itself. In addition, at the hearing, Landbell referred to the existence of a compensation agreement, adopted following the decision, which allows different system operators to share the quantities of material recovered by the collection undertakings to which

they have recourse depending on the quantities of the material which they are responsible for under the contracts signed with manufacturers and distributors of packaging.

167 In any case, DSD's claim that the division of the quantities collected of packaging made of paper, card and printed matter (newspapers and magazines) would be complicated and expensive is not sufficient to call into question the proportionality of the first obligation in light of the Packaging Ordinance. Even supposing that to be the case, it should be noted that complexity and cost are not criteria which make it possible to establish an infringement of the Ordinance and that such criteria cannot, as such, justify conduct which is likely to lead to the elimination of competition on the relevant markets. In addition, in the present case, the decision states expressly that the first obligation does not prevent DSD from reducing the fees paid to the collection undertakings in the case of shared use of collection facilities in order to ensure that it is not charged for any service provided for a third party (see paragraph 35). Therefore, in the case of shared use, DSD could make sure that the fee payable to the collection undertaking takes account only of the take-back and recovery service supplied for the benefit of the DSD system and that the fee does not finance a service supplied for the benefit of another system.

168 Similarly, no reliable evidence has been adduced in support of DSD's assertion that the quota technique used for packaging made of paper, card and printed matter led to unfair results for it. In any case, the shared use advocated in the decision is not likely to undermine DSD's interests, for the very reason that the objective of such a provision is to guarantee each exemption system the possibility of collecting the packaging attributed to it by the relevant manufacturers and distributors. It is also to guarantee that objective that the Commission imposes the second obligation on DSD (see paragraphs 213 to 217).

169 Consequently, since the competition between systems does not take place on the basis of the attribution of specific packaging but on the basis of an allocation of totals of material corresponding to that packaging, the first obligation cannot be considered to be disproportionate, contrary to the applicant's claim.

170 It follows from the above that the first obligation cannot be considered to be disproportionate because it is contrary to the Packaging Ordinance.

171 Finally, as regards the applicant's claim that it could, on the basis of the Ordinance, oppose the sharing with self-management solutions of the collection facilities used by the DSD system, it should be pointed out that the Court has held that the term 'organisations competing with DSD', used to define the field of application of the first obligation, should be interpreted as including only systems in respect of which the contested decision considered that it was necessary to guarantee the shared use of the collection facilities, namely exemption systems competing with DSD (see paragraph 129). In those circumstances, the first obligation has no bearing on DSD's possible ability to rely on the Ordinance to oppose such shared use with self-management solutions.

(b) The likelihood of distortion of competition to the detriment of DSD

Arguments of the parties

172 The applicant submits that the first obligation is disproportionate because it enables its competitors to target the most profitable collection facilities by leaving it with the most expensive ones. Such free-riding is also open, without restriction, to self-management solutions, which do not have any obligations as regards the territory to be covered, in respect of the areas of overlap with exemption systems, namely collection points treated as households and packaging sold by mail order. Other exemption schemes could also lead to free-riding to the detriment of the applicant and conflicts of interest might arise in the case of shared use of collection facilities, given that DSD could no longer regulate in detail the organisation of its system as it does at present. In addition, the applicant relies on the observations of the German

authorities, which refer to the risk of exemption systems becoming less efficient and distortions of competition arising within the meaning of Article 7(1) of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10) if 'self-management solutions ... could, independently of the region of distribution of the packaging, choose the place where, possibly restricted regionally to important collection points, they collect or buy waste packaging'.

173 The Commission, supported by Landbell, challenges the alleged threat which the first obligation constitutes for the DSD system. As the Packaging Ordinance applies in the same way to all exemption systems, none of those systems may restrict itself to the allegedly more lucrative sectors. Equally, self-management solutions must, in principle, collect their packaging from where it is delivered to the consumer and the structure of their collection points differs, for that reason, from that of exemption systems.

Findings of the Court

174 Contrary to the applicant's submission, the shared use of collection facilities does not have the effect of enabling exemption systems competing with DSD to favour, within the same *Land*, the most profitable zones to the detriment of others which remain the responsibility of the DSD system. All exemption systems are subject to the same obligations, whether it be the obligation of territorial coverage, the obligation to comply with recovery rates or the obligation to prove volume flows.

175 In any case, the decision states expressly that the first obligation does not prevent DSD from reducing, in consequence, the fees paid to collection undertakings (see paragraph 35).

176 In addition, as regards the alleged incompatibility of the shared use of the collection facilities with Article 7(1) of Directive 94/62, which provides that the systems aimed at assuring the return and collection of packaging are to be designed so as to avoid barriers to trade or distortions of competition, it should be pointed out that the contested decision seeks precisely to guarantee the conditions of competition on the relevant markets and in conformity with the objectives of the Ordinance, the amendment of which in 1998 sought to enable the development of competition between exemption systems (recital 169 of the contested decision).

177 It follows from the above that the first obligation cannot be regarded as disproportionate in that it could entail a risk of distortion of competition to the detriment of the applicant.

178 In addition, as regards the alleged competition risk that the first obligation could represent in the case of shared use of collection facilities between the contractual partners of DSD and self-management solutions, it should be recalled that the Court has found above that the term 'organisations competing with DSD', used to define the field of application of the first obligation, should be interpreted as including only systems in respect of which the contested decision considered that it was necessary to guarantee the shared use of the collection facilities, namely exemption systems competing with DSD. In those circumstances, the first obligation cannot have any bearing on the relations between DSD and the self-management solutions.

(c) The alleged adverse effect on the function of the mark Der Grüne Punkt

— Arguments of the parties

179 The applicant submits that the first obligation is disproportionate because it adversely affects the indication-of-origin of the mark Der Grüne Punkt, which is to

identify the take-back and recovery service of the DSD system and not that of another system. The applicant points out that its mark is registered in Germany as a collective mark affixed to the packaging of the manufacturers and distributors which participate in the DSD system and as an individual mark affixed to the collection facilities used by the DSD system. In particular, the indication-of-origin of the collective mark Der Grüne Punkt has been recognised by several German courts (judgment of the Bundespatentgericht (Federal Patent Court, Germany) of 18 September 1996, which considers that the mark indicates the ecological commitment of the manufacturer; judgment of the Landgericht Hamburg (Hamburg Regional Court, Germany), of 23 December 1996, and the judgment of the Kammergericht Berlin (Court of Appeal, Berlin, Germany) of 14 June 1994, which consider that the mark makes people aware of participation in the DSD system; judgment of the Oberlandesgericht Köln (Higher Regional Court, Cologne, Germany) of 8 May 1998, which refers to the vital importance of the mark as a result of its dissemination and the fact that it is well known; and the judgment of the Bundesgerichtshof (Federal Court of Justice, Germany) of 15 March 2001, which takes the view that the manufacturers and distributors indicate their participation in the DSD system by affixing the mark to their packaging). In the present case, the applicant submits that the shared use of collection facilities adversely affects both the collective and individual marks Der Grüne Punkt, in so far as the consumer knows, because of advertising, that packaging which bears that mark is part of the DSD system and not part of a rival system and that it is to be returned to the collection facilities of the DSD system which, generally speaking, also bear the mark Der Grüne Punkt. However, in the case of shared use of collection facilities, the organisation of the take-back and recovery of packaging collected by the DSD system is, in part, carried out — contrary to the consumer's expectations — by organisations competing with DSD. The shared use of collection facilities forming part of the DSD system thus has the effect of misleading consumers.

180 The applicant adds that the first obligation forces it to encourage competition by granting its competitors a free, compulsory licence to affix the mark Der Grüne Punkt on collection facilities. It claims that such a licence is unlawful since it infringes the principles applicable in that context (Article 21 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994 (Annex 1C of the Agreement Establishing the World Trade Organisation), approved 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 and 214), and the Opinion 1/94 of the Court of Justice ([1994] ECR I-5267).

181 As a preliminary point, the Commission submits that certain complaints raised by the applicant do not concern the Service Agreement, which is the subject-matter of the contested decision, but the Trade Mark Agreement, which is the subject-matter of Decision 2001/463 and thus does not have to be examined in the context of the present case. The Commission states that the applicant appears to want to claim an exclusive right over the use of the collection facilities due to the fact that it authorises their owners to affix the logo Der Grüne Punkt on their facilities. That cannot be accepted. That would mean that a collection undertaking which affixes the Der Grüne Punkt logo on a packaging collection van could use that van only when transporting packaging for the DSD system and not for other waste. Not only does the Service Agreement not contain a provision capable of supporting that reasoning, but the answers given by collection undertakings to requests for information sent by the Commission show, in particular, that those undertakings use their vehicles for other orders. The applicant can thus not rely on the exclusive right which it claims to have. In addition, the Commission states that the consumer is not misled when he puts packaging bearing the Der Grüne Punkt logo in a collection facility which is part of the DSD system since the question of shared use has no bearing on his conduct. Furthermore, the final user of the take- back and recovery service offered by the DSD system is not the consumer but the manufacturer or distributor of the packaging. Therefore, there is no proof that the deception alleged by the applicant adversely affects the mark Der Grüne Punkt.

182 As regards the compulsory licence, the Commission claims that the applicant fails to stipulate who exactly the decision forces to grant a licence. The applicant remains free to authorise collection undertakings to use its mark by affixing it to their containers, or to recommend it to them and, also, to withdraw such authorisation from them.

Findings of the Court

183 In essence, the applicant alleges that the first obligation infringes the principle of proportionality because shared use adversely affects the mark Der Grüne Punk, by which its services may be distinguished from those offered by other undertakings. By allowing for access to the collection facilities put in place by the collection undertakings, which are already used by the DSD system, the exemption systems competing with DSD also benefit from the fact that the mark is well known to consumers, who would be mistaken if they were to place their packaging into facilities which they believed to be part of the DSD system and not part of a system of one of its competitors.

184 It must be found, however, that that line of argument cannot succeed.

185 First, the Service Agreement does not prevent a collection undertaking which is a contractual partner of DSD from offering its collection facilities to a competitor system of the DSD system. Under the Service Agreement, it is stated only that 'when promoting the system, collection undertakings shall display, in an appropriate and visible manner, the Der Grüne Punk logo conferred by DSD, for example by printing it on writing paper, on its advertisements and on collection bins and on vehicles and equipment used in the running of the system' (the fourth sentence of the first subparagraph of Paragraph 2(5)) and that 'use of the Der Grüne Punkt logo is free for collection undertakings' (third subparagraph of Paragraph 2(5)). The fact that DSD authorises collection undertakings to affix, free of charge, the mark Der Grüne Punkt to their collection facilities is not sufficient for DSD to claim that it has exclusive use of those facilities. On the contrary, it is apparent from the Service Agreement that the affixing of that logo serves no other purpose than to state 'for promotional purposes' that the facility concerned is part of the DSD system.

186 The provisions of the Service Agreement concerning the mark Der Grüne Punkt do not prove that the affixing of that mark to a collection facility has the effect of preventing that facility from serving other purposes.

187 Second, no provision of the Packaging Ordinance imposes an obligation to make the system used visible on collection facilities. A fortiori, no provision of the Ordinance establishes that collection facilities which are identified is such a way must be reserved to a single system in order to prevent consumers from mistaking the system responsible for taking back and recovering the packaging deposited there. In addition, as regards the importance to be given to the affixing of the Der Grüne Punkt logo on packaging — one of the possibilities laid down in the second sentence of point 4(2) of Annex I to Paragraph 6 of the Ordinance to inform consumers that the packaging at issue is part of an exemption system (see paragraph 6) — the Court held in the judgment in Case T-151/01 *DSD* v *Commission*, paragraph 133, that, as of the moment when 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 markets 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 and comply with the conditions for identification laid down in the Ordinance without worrying about a specific definition of the conduct of the final consumer as claimed by the applicant.

188 In that regard, the provisions of the Ordinance do not establish that the affixing of the mark Der Grüne Punkt to a collection facility or to packaging intended to be recovered by the DSD system has the effect of preventing the shared use of collection facilities.

189 Third, it is also apparent from the documents before the Court that not all of the collection facilities used by the DSD system bear the Der Grüne Punkt logo. It is thus legitimate to think that, when depositing packaging in the collection facilities, consumers do not associate those installations with the mark Der Grüne Punkt, but with the type of packaging (sales packaging) and especially with the type of material which it is made of (lightweight materials, paper/card, glass etc.) to be deposited in the different kinds of collection facilities. In that regard, the applicant does not show that the consumer attaches importance to the fact that DSD and not another exemption system is in charge of the taking back and disposal of the packaging. Admittedly, consumers may have concerns about the environment, but, in so far as all exemption systems are subject to the same obligations, the question as to which system will actually deal with the taking back and recovery does not appear to be decisive. None of those obligations is affected by the shared use of existing collection facilities. Similarly, the applicant does not dispute that packaging made of paper and card is collected in the same facilities as printed matter (newspapers and magazines), which is the responsibility of the local authorities and not the DSD system. The applicant does not claim, in that regard, that, as a result of the possible affixing of the mark Der Grüne Punkt to those installations, consumers would think that the DSD system assumes responsibility for the collection and recovery of printed matter.

190 Consequently, it may be sufficient, to avoid any risk of confusion for consumers, to indicate on shared collection facilities that packaging is recuperated for both the DSD system and for one or more other competing exemption systems and not be necessary to prohibit any shared use of those collection facilities as claimed by the applicant.

191 Finally, neither the first obligation nor the technical constraints of the shared use of collection facilities requires that the organisations competing with DSD be authorised by it to use the mark Der Grüne Punkt. It is thus conceivable that shared collection facilities have no logo or indication at all or, on the other hand,

that every system be equipped with a means of identifying itself with that mark. Therefore, it cannot be claimed that the first obligation requires DSD to grant, free of charge, a compulsory licence to use the mark Der Grüne Punkt.

192 It follows from the above that the first obligation cannot be regarded as disproportionate by excessively impairing the role played by the mark Der Grüne Punkt in the context of the DSD system.

(d) The effect of the first obligation on the right of access to the national courts

Arguments of the parties

193 The applicant states that the first obligation prohibits it from 'preventing' collection undertakings from concluding shared-use agreements with its competitors. Such an obstacle in their way could be constituted by the bringing of an action by DSD against those collection undertakings before the national authorities or courts in order to claim that the shared use of collection facilities is incompatible with the Ordinance. In that case, the first obligation would thus be incompatible with the fundamental right of access to justice laid down in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 17 and 18, and Case T-111/96 *ITT Promedia* v *Commission* [1998] ECR II-2937, paragraph 60).

194 The Commission states that the first obligation in no way prevents the applicant from referring to a German administrative court the question of the compatibility of the shared use of the collection facilities with the Packaging Ordinance (see, to that effect, the judgments of the Verwaltungsgerichtshof Kassel of 20 August 1999 and of the Verwaltungsgericht Gießen of 31 January 2001). It is, however, the task of the Community judicature to examine the legality of the commitment and of the obligations.

Findings of the Court

195 In essence, the applicant alleges that the first obligation prevents it from claiming before the German national courts and authorities that the shared use of the collection facilities is contrary to the Ordinance.

196 The first obligation cannot be interpreted in that way. It requires DSD not to prevent the shared use of the collection facilities by competitor exemption systems. The Court has found above that that obligation was consistent with Article 81(3) EC and Article 8 of Regulation No 17 (see paragraph 151) because it was necessary to enable competition to be maintained on the market for collection from consumers and the market for the organisation of the taking back and recovery of packaging from consumers.

197 However, the first obligation does not prevent DSD from bringing an action before a national court or authority to oppose the shared use of collection facilities imposed on it in the context of the decision granting exemption. DSD thus retains the right to oppose the shared use of the collection facilities of its contractual partners by alleging infringement of the German Packaging Ordinance or other national provisions. However, although DSD has that possibility, it cannot disregard the fact that the Commission might then consider that such action infringes the obligation

imposed on it in order to secure the decision granting exemption and in accordance with the applicable provisions of Community law. In addition, when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance (Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, paragraph 52).

198 The fundamental right of access to justice claimed by DSD can thus not authorise it to disregard a decision adopted on the basis of Community law.

199 It follows from the above that the first obligation cannot be considered to be disproportionate by allegedly depriving DSD of the right to bring an action before the national courts and authorities.

5. *Conclusions on the first plea in law*

200 It is apparent from the above that the first obligation prevents the applicant from impeding the access of competing exemption systems to the collection facilities of its contractual partners. That obligation is based on the Commission's intention to guarantee systems competing with DSD access to the market for collection from consumers and, consequently, to the market for the organisation of the taking back and recovery from consumers. None of the arguments submitted by the applicant in the context of the first plea is capable of calling that conclusion into question.

201 Consequently, the first plea must be dismissed in its entirety in respect of exemption systems.

202 In addition, in order to respond to DSD's arguments in that regard, the Court considers it necessary to recall (see paragraph 121) that the term 'organisations competing with DSD' used to define the field of application of the first obligation does not include self-management solutions, since it is apparent from the contested decision that those systems only play a peripheral role on the relevant markets and that they have, in those cases of overlap, sufficient possibilities at their disposal for gaining access to collection undertakings or collection facilities other than those used by the DSD system.

203 Consequently, since the first obligation does not concern self-management solutions, it is not necessary to rule any further on the arguments raised by the applicant in that regard.

B — *The second plea in law, alleging that the obligation laid down in Article 3(a) of the contested decision infringes Article 86(2) EC*

1. *Arguments of the parties*

204 The applicant states that it collects and recovers packaging all over Germany, including unattractive rural regions, and does so as a means of protecting the environment. It also points out that the DSD system was approved by the competent authorities in all of the *Länder*. According to the applicant, such approval has the effect of entrusting it with a service of general economic interest within the meaning of Article 86(2) EC. In that regard, the applicant states that the fact that any operator of an exemption system may be approved by the authorities of a *Land* is irrelevant,

since Article 86(2) EC refers only to the assumption of a service of general economic interest and not to the existence of special or exclusive rights within the meaning of Article 86(1) EC. In that respect, the applicant submits that the attainment of the guarantee obligations to which DSD is subject (regular collection throughout the country, recovery rates and proof of volume flows) would be threatened by the shared use of collection facilities laid down in the first obligation, since that obligation is likely to call into question the approval of the DSD system. In addition, such shared use would lead to distortions of competition to the detriment of DSD by enabling organisations competing with DSD to free-ride on its system. Consequently, the rules on competition laid down in Article 81 EC should not apply to the present case in so far as they impede the accomplishment of the specific task entrusted to DSD.

205 The Commission and Landbell state that the applicant does not adduce any evidence of the threat represented by shared use to its activity or an alleged task covered by a service of general economic interest, since that shared use does not bother the collection undertakings used by DSD in any way. Landbell also states that serving unattractive rural regions forms an integral part of the service sought by the clients of exemption systems. They want to be able to benefit from a collection throughout the whole of the territory concerned in order to be freed of their own obligations under the Ordinance.

2. *Findings of the Court*

206 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.

207 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.

208 Contrary to the applicant's claim in the context of the present plea in law, the obligation imposed on DSD not to impede collection undertakings from concluding with DSD's competitors contracts authorising them to use their bins and other collection and sorting facilities for packaging and to apply those agreements in no way proves that the contested decision threatens the attainment, on economically acceptable conditions, of the take back and recovery service entrusted in the DSD system.

209 In particular, none of the documents before the Court leads to the conclusion that as a result of the contested decision DSD will no longer be able to collect packaging on a regular basis throughout Germany, to achieve the recovery rates imposed by the Ordinance, or to furnish proof of the quantities required under that ordinance. Similarly, the Court has already found, in the context of the first plea, that the applicant had not shown that the implementation of the first obligation was likely to lead to distortions of competition to its detriment.

210 Consequently, the second plea in law must be dismissed.

C — *The third plea, alleging that the obligation laid down in Article 3(b) of the contested decision infringes Article 81(3) EC and Article 86(2) EC*

211 The applicant submits that the obligation laid down in Article 3(b) of the contested decision ('the second obligation'), according to which, 'where collectors conclude agreements with competitors with DSD providing for the joint use of containers or other facilities for the collection and sorting of used sales packaging, DSD may not require that they inform DSD of volumes of packaging not collected for the DSD system', infringes Article 81(3) EC and Article 86(2) EC. It refers, in that respect, to the arguments previously raised in the context of the first and second pleas.

212 In addition, the applicant observes that, in the Packaging Ordinance, the German authorities require it to recover the 'quantity of packaging actually collected' (see part 1(5) of Annex I to Paragraph 6 of the Ordinance), and that, to furnish the proof of that quantity, it requests collection undertakings to inform it on a monthly basis of the 'quantities collected'. However, the second obligation calls for DSD not to require those collection undertakings to provide it with proof relating to 'volumes of packaging not collected for the DSD system' in the case of shared use of collection facilities. According to the contested decision, that obligation is necessary 'in order to ensure that ... where there is joint use of collection facilities, competitors with DSD should be able to make unrestricted use of packaging collected for them' (recital 182 of the contested decision). In that regard, the applicant states that the purpose of the second obligation is to ensure that, in the case of shared use, the quantities collected are not used to establish the proof of volume flows treated by DSD but are, on the contrary, attributed to competitors. However, that obligation should not exclude the possibility for DSD to request collection undertakings to provide it with information relating to the whole of the packaging collected in the collection facilities in order to be able to furnish the proof of the quantities collected.

213 The Court points out, first, that the applicant does not set out, in its third plea, any new or specific arguments which are capable of showing how the second obligation infringes Article 81(3) EC and Article 86(2) EC. In those circumstances, the third plea must be dismissed for the same reasons as those given in the context of the first and second pleas.

214 In addition, the Court notes that, at the hearing, the Commission and DSD agreed on the interpretation to be given to the content of the second obligation defined by Article 3(b) of the contested decision.

215 Thus, in the light of the pleadings and the answers given by the parties to the questions asked at the hearing, the Court considers that although, under the second obligation, DSD cannot request collection undertakings to provide it with information on the quantities of packaging which have been collected in the context of a competitor exemption system, DSD is, however, still able to request those undertakings to provide it with the information required for it to be able to furnish the proof of the quantities collected by the DSD system. That right to information is also laid down explicitly in recital 175 of the contested decision.

216 When questioned on that point at the hearing, the Commission stated that the second obligation did not prevent the applicant from knowing the total quantity of packaging collected by the collection undertakings or the part of that packaging attributable to DSD; what is important is that DSD does not seek to attribute to itself quantities of packaging collected by those collection undertakings for a competitor system. The Commission's stance in that regard is in line with that of the applicant (see paragraph 212).

217 In those circumstances, the second obligation must be interpreted as meaning, first, that DSD cannot require that collection undertakings which are its contractual partners under the Service Agreement attribute to it quantities of packaging collected for a competitor system and, second, that that obligation does not prevent DSD from knowing the total quantity of packaging collected by collection undertakings and the part of that packaging which is attributable to DSD.

D — *The fourth plea in law, linked to the application for annulment of the commitment laid down in recital 72 of the contested decision and alleging infringement of the fundamental right of access to justice*

1. *Arguments of the parties*

218 The applicant observes that, at the Commission's request, it gave the commitment to 'refrain from seeking to restrict use in the manner referred to in the judgment of the Cologne Regional Court of 18 March 1997 in [the] particular case of VfW' (recital 72 of the contested decision), following an action brought by DSD to oppose the free use of the collection facilities of the DSD system by VfW. According to the applicant, that commitment is incompatible with the fundamental right of free access to justice (*ITT Promedia* v *Commission*, paragraph 60). That infringement is all the more serious because an action for an injunction brought by DSD against one of its contractual partners is not 'manifestly unfounded' and thus abusive under German law (*ITT Promedia* v *Commission*, paragraph 56). It is apparent from the judgment of the Landgericht Köln that DSD could legitimately bring proceedings, on the basis of the German law on unfair competition, to prevent VfW from using, free of charge, the collection facilities financed by DSD. According to that judgment, the shared use of those collection facilities requires DSD's approval and payment of a 'sort of royalty' directly to DSD.

219 The Commission, supported by Landbell, states that the applicant criticises a commitment given in response to the observations addressed to the Commission by several third parties, according to which DSD, contrary to the commitment reproduced in recital 71 of the contested decision, did not allow free access to the collection facilities of its contractual partners. The Commission thus states that if the applicant cannot prevent collection undertakings from authorising the shared use of their facilities, it can not have the right to prohibit a competitor from that shared use.

2. *Findings of the Court*

220 Following the publication of the notice in the Official Journal announcing the Commission's intention to declare itself in favour of the various agreements relating to the DSD system, several interested third parties made comments to the Commission stating that, contrary to the commitments given by DSD during the administrative proceedings in relation to the opportunity for third parties to gain free access to the collection facilities of its contractual partners, DSD brought proceedings challenging the shared use of those facilities. Thus, the judgment of the Landgericht Köln of 18 March 1997 showed clearly DSD's intention to oppose a self-management system, namely VfW, wishing to gain free access to the collection facilities used by the DSD system in certain German hospitals.

221 In that regard, the Commission informed DSD, by letter of 21 August 1997, that conduct consisting of preventing third parties from using the collection facilities of its contractual partners could fall within the ambit of Article 82 EC and it stressed the significance of such conduct for the exemption procedure in so far as, under the fourth condition laid down in Article 81(3) EC, an agreement notified for the purpose of exemption must not afford the possibility of eliminating competition in respect of a substantial part of the products in question.

222 Following that statement of position, DSD gave the following commitment — set out in recital 72 of the contested decision — in order to address the concerns raised by the Commission in its letter of 21 August 1997:

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

223 It cannot be alleged that such a commitment constitutes an infringement of DSD's right of access to justice. DSD proposed that commitment to the Commission without any constraint in order to prevent it from taking further action following its letter of 21 August 1997. Therefore, in accordance with the principle that it is possible to waive a right, and with full knowledge of the facts, DSD essentially informed the Commission, of its own volition, that it was waiving its right to bring an action before the German courts to the agreements likely to take effect between the collection undertakings which have concluded a Service Agreement with DSD and the various systems which might be interested in the shared use of their collection facilities.

224 Moreover, DSD's waiver in the commitment set out in recital 72 was not made without anything in return from the Commission.

225 Thus, it is incontestable that the Commission did not initiate proceedings under Article 82 EC following the commitment given by DSD, unlike in the case of the

Trade Mark Agreement where the Commission initiated such proceedings following the observations on the notice in the Official Journal submitted by interested third parties.

226 Similarly, it is not disputed that the Commission took account of the commitment given by DSD in refraining from examining in further detail the existence of a possible competition problem as regards, for example, the access of self-management solutions to the collection facilities in hospitals in Germany or in other market sectors. Such an analysis could have been necessary to enable the Commission to examine the effect which DSD's conduct could have had in the context of the case which gave rise to the judgment of the Landgericht Köln of 18 March 1997 on its analysis of the Service Agreement under Article 81(1) and (3) EC. In the present case, the Commission's analysis, in that regard, remained vague, even though the decision states that it appears conceivable for a hospital to have several collection facilities on its premises (recital 128 of the contested decision). That assertion cannot be presumed from the results that a detailed analysis of the conditions of competition in the field of the collection of packaging delivered to hospitals might have produced.

227 In those circumstances, the Commission was rightly able to find, in the light of Article 81(3) EC and Article 8 of Regulation No 17, that it could not be content with just the commitment given by DSD in relation to the access of exemption systems to the collection facilities of DSD's contractual partners but that it had to go further and couple the decision granting exemption with an obligation making it possible to guarantee that the Service Agreement was not going to enable DSD to eliminate the competition on the relevant markets.

228 In that regard, the fact that the first obligation does not concern self-management solutions because it is not necessary to guarantee the access of those systems to the collection facilities of DSD's contractual partners on account of the alternative solutions offered by the collection undertakings which have not concluded a Service Agreement with DSD (see paragraphs 120 to 129 and recital 159 of the contested

decision) cannot lead to the conclusion that the commitment set out in recital 72 of the contested decision is unlawful because it does not respond to a competition problem identified in the contested decision. That commitment responds to different reasoning from that which led the Commission to adopt the first obligation. Although that obligation seeks to guarantee the attainment of the fourth condition laid down in Article 81(3) EC, namely to ensure that the Service Agreement does not eliminate competition on the relevant markets, the commitment seeks merely to facilitate the Commission's task when it issues a negative clearance or an exemption. As is pointed out in paragraphs 225 and 226 above, the commitment given by DSD enabled the Commission to avoid analysing questions which could, as such, have called into question the contested decision or have given rise to the initiation of a proceeding under Article 82 EC.

229 If follows from the above that the commitment given by the applicant reproduced in recital 72 of the contested decision does not adversely affect its right of access to justice in so far as it was adopted by DSD in full knowledge of the facts in order to cause the Commission to stop examining questions which might give rise to a proceeding under Article 82 EC or call into question its analysis in the context of Article 81 EC.

230 Consequently, the fourth plea in law must be dismissed.

231 It follows from all the above that the action must be dismissed in its entirety both in so far as it concerns the first and second obligations and in so far as it concerns the contested decision as a whole or merely the commitment reproduced in recital 72 of the contested decision.

Costs

232 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. However, Article 87(3) of the Rules of Procedure provides that where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. In the present case, the Court considers that the interpretation of the first obligation, to the effect that it concerns only exemption systems competing with DSD and not self-management solutions, and of the second obligation partially upholds the claims made by that applicant on those points. Consequently, the Court will make an equitable assessment of the case in holding that the Commission is to bear a quarter of the applicant's costs and a quarter of its own costs. The applicant is to bear three quarters of its own costs, three quarters of the costs incurred by the Commission, and the costs incurred by Landbell.

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 three quarters of its own costs, three quarters of the costs incurred by the Commission, and the costs incurred by Landbell AG Rückhol-Systeme;**

3. **Orders the Commission to bear a quarter of its own costs and a quarter of the costs incurred by the applicant.**

García-Valdecasas Cooke Labucka

Delivered in open court in Luxembourg on 24 May 2007.

E. Coulon J.D. Cooke

Registrar President

Table of contents