ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)

16 February 2005 *

In Case T-142/03,

Fost Plus VZW, established in Brussels (Belgium), represented by P. Wytinck and H. Viaene, lawyers,

applicant,

v

Commission of the European Communities, represented by M. van Beek and M. Konstantinidis, acting as Agents, with an address for service in Luxembourg,

defendant,

ACTION for annulment of Article 1 of Commission Decision 2003/82/EC of 29 January 2003 confirming measures notified by Belgium pursuant to Article 6(6) of Directive 94/62/EC of the European Parliament and the Council on packaging and packaging waste (OJ 2003 L 31, p. 32),

* Language of the case: Dutch.

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

composed, in the deliberations, of J. Azizi, President, M. Jaeger and F. Dehousse, Judges,

Registrar: H. Jung,

makes the following

Order

Legal and factual background to the dispute

1 European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10) aims to harmonise the various national measures relating to the management of packaging and packaging waste so as, on the one hand, to avoid or reduce their effects on the environment, thus providing a high level of environmental protection, and, on the other hand, to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the Community (Article 1).

2 For that purpose, Article 6(1) of Directive 94/62 provides:

'... Member States shall take the necessary measures to attain the following targets covering the whole of their territory:

(a) no later than five years from the date by which this Directive must be implemented in national law, between 50% as a minimum and 65% as a maximum by weight of the packaging waste will be recovered;

(b) within this general target, and with the same time-limit, between 25% as a minimum and 45% as a maximum by weight of the totality of packaging materials contained in packaging waste will be recycled with a minimum of 15% by weight for each packaging material;

...'

3 That directive permits, however, the Member States to go further than those targets. Thus, Article 6(6) states:

'Member States which have, or will, set programmes going beyond the targets of paragraph 1(a) and (b) and which provide to this effect appropriate capacities for recycling and recovery, are permitted to pursue those targets in the interest of a high level of environmental protection, on condition that these measures avoid distortions of the internal market and do not hinder compliance by other Member States with the Directive. Member States shall inform the Commission thereof. The

Commission shall confirm these measures, after having verified, in cooperation with the Member States, that they are consistent with the considerations above and do not constitute an arbitrary means of discrimination or a disguised restriction on trade between Member States.'

4 Finally, Articles 16(1) and 21 of Directive 94/62 respectively require the Member States to notify the Commission of the measures which they intend to adopt to comply with that directive and provide for the establishment of a committee of representatives of the Member States, which is chaired by a representative of the Commission and delivers opinions on drafts of measures proposed by the Commission.

5 In the Belgian federal system the fixing of the targets for recovery and recycling of packaging materials and packaging waste as laid down in Article 6 of Directive 94/62 comes within the exclusive competence of the Région flamande (Flemish Region), the Région wallonne (Walloon Region) and the Région Bruxelles-Capitale (Brussels-Capital Region).

6 In order to ensure the coherent and consistent transposition and implementation of Directive 94/62, the three Belgian Regions concluded, on 30 May 1996, a cooperation agreement on the prevention and management of packaging waste ('the Cooperation Agreement'). That agreement was approved in each of the three regions by appropriate legislation, namely, by a decree of the Walloon Region of 16 January 1997, by a decree of the Flemish Region of 21 January 1997 and by a regulation of the Brussels-Capital Region of 24 January 1997.

7 The Cooperation Agreement requires economic operators, that is packaging fillers and users, including importers if the packaging was filled outside Belgium, to take back and recycle or recover the packaging materials contained in the packaging waste put on the market (Article 6), either themselves or by recourse to a third party (Article 7(1)). The Cooperation Agreement also provides for the establishment of an

Interregional Packaging Commission which approves bodies that undertake to fulfil the requirements of the Cooperation Agreement in place of enterprises which put packaged products on the market (Chapter V of the Cooperation Agreement).

8 Article 3(2) of the Cooperation Agreement establishes minimum targets for the recycling and recovery of packaging waste expressed as percentages by weight. Those percentages must be achieved in each of the three Regions by the economic operators, for both household and industrial packaging waste. They are generally higher than those laid down by Directive 94/62.

9 Article 30(2) of the Cooperation Agreement provides that, if a person responsible for packaging or an approved body does not achieve within the time-limit the required recycling and recovery percentages, the members of the secretariat of the Interregional Packaging Commission may impose an administrative fine of BEF 20 000 (EUR 500) per tonne of packaging waste not recovered or of BEF 30 000 (EUR 750) per tonne of packaging waste not recycled.

10 Point 3 of Article 25(1) of the Cooperation Agreement provides that the decision-making organ of the Interregional Packaging Commission may 'grant, suspend or withdraw a body's approval or at any time amend, on grounds of public interest, after hearing the approved body's representatives, the conditions for carrying on the activity contained in the approval'.

11 The Cooperation Agreement was notified to the Commission on 13 July 1996 by the Belgian authorities pursuant to Article 6(6) of Directive 94/62 and was approved by Commission Decision 1999/652/EEC of 15 September 1999 confirming the measures notified by Belgium pursuant to Article 6(6) of Directive 94/62 (OJ 1999 L 257, p. 20).

12 On 1 August 2001, the Belgian authorities notified the Commission of a draft revision of the Cooperation Agreement (hereinafter 'the Revised Cooperation Agreement').

13 That draft's purpose was to increase, for the period from 2000 to 2003, the recycling and recovery percentages laid down by Article 3 of the Cooperation Agreement.

14 In the light of the information provided by Belgium and of the outcome of the consultation of the Member States through the Committee established by Article 21 of Directive 94/62, the Commission concluded, by Decision 2003/82/EC of 29 January 2003 confirming measures notified by Belgium pursuant to Article 6(6) of Directive 94/62/EC of the European Parliament and the Council on packaging and packaging waste (OJ 2003 L 31, p. 32, hereinafter 'the contested decision'), that the measure notified should be confirmed given that:

— appropriate capacities for recovery and recycling of the material collected under the targets fixed by the Kingdom of Belgium were available,

— the measure did not lead to distortions of the internal market,

— the measure did not hinder compliance by other Member States with the directive,

— the measure did not constitute an arbitrary means of discrimination, and

— the measure did not constitute a disguised restriction on trade between Member States (Chapter III of the contested decision).

15 The Commission noted, however, that signs of saturation of the market for collected cullet had been reported. Belgium was therefore encouraged by it to observe the glass market with particular care and to make sure that the levels of collection in Belgium did not exceed the capacities of the glass market.

16 The applicant is a non-profit-making association formed under Belgian law which was approved, pursuant to the Cooperation Agreement, for the collection, recycling and recovery of household waste, by Decision S-C-99/31116 of the Interregional Packaging Commission of 23 December 1998 concerning the approval of the non-profit-making association FOST Plus as a packaging waste body (*Moniteur belge* of 27 March 1999, p. 10048) ('the approval decision'). It fulfils, for its members, the obligation to take back packaging materials imposed on persons responsible for household-waste packaging and, for that purpose, undertakes all measures to attain the recovery percentages required by the Cooperation Agreement.

Procedure and forms of order sought

17 By application lodged at the Court Registry on 28 April 2003, the applicant brought this action.

18 By separate document lodged at the Court Registry on 10 July 2003, the defendant raised, pursuant to Article 114 of the Rules of Procedure of the Court of First Instance, an objection to the action's admissibility. The applicant submitted its observations on that objection on 6 October 2003. The Court invited the parties to

provide certain documents and to reply to questions as to the objection of inadmissibility raised by the defendant. The parties provided those documents and replied to those questions within the period laid down.

19 The applicant claims that the Court should:

— annul Article 1 of the contested decision;

— order the defendant to pay the costs of the proceedings.

20 The defendant claims that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs of the proceedings.

Law

21 Under Article 114(1) of the Rules of Procedure, if a party applies to the Court for a decision on inadmissibility, the Court may give a decision without considering the substance of the case. Pursuant to Article 114(3), the remainder of the proceedings is to be oral, unless the Court otherwise decides. In the present case, the material in the case-file, together with the documents submitted and the answers given by the parties in response to the questions put to them, provide the Court with sufficient information to rule upon the defendant's application without opening the oral procedure.

Arguments of the parties

22 The defendant submits that the action is inadmissible because the contested decision is not of individual concern to the applicant.

23 The applicant contends that its action is admissible because the contested decision is of direct and individual concern to it (Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others* v *Council* [1962] ECR 471 and Case 25/62 *Plaumann* v *Commission* [1963] ECR 95) and in the alternative because it has no other effective legal remedy against the contested decision.

24 As regards the question whether the contested decision is of direct concern to it, the applicant maintains that there is no doubt that the Belgian authorities intend to implement the Revised Cooperation Agreement which has been approved by the Commission. The Belgian authorities' intention in that respect is apparent, according to the applicant, from the implementation of the Cooperation Agreement approved by Decision 1999/652, the preparatory documents for the contested decision and the agreements in principle reached by the Walloon Region and the Flemish Region.

25 As regards the question whether the contested decision is of individual concern to it, the applicant relies, in essence, on five arguments demonstrating certain attributes which are peculiar to it and a factual situation which differentiates it from all other persons.

26 First, the applicant submits that it is the only organisation to have obtained an approval for the collection, recycling and processing of household packaging waste on behalf of other persons responsible for packaging. In addition, that approval imposes on it, and on it alone and not any other person responsible for packaging, first, various obligations among which are those of accounting for expenses, collection and use of the tender procedure, and, second, terms of membership, mandatory insurance cover and a requirement to establish guarantees. The applicant submits, therefore, that that approval and the specific obligations connected with it demonstrate an attribute peculiar to it as against any other persons responsible for packaging.

27 The applicant points out in that regard that, even if the contested decision possesses a general nature that extends to any other persons responsible for packaging, that fact does not preclude it from having a different significance as regards the applicant (see Case T-13/99 *Pfizer Animal Health* v *Council* [2002] ECR II-3305, paragraph 84, and the case-law there cited).

28 Secondly, the applicant claims to be the only undertaking which will, in fact, have to pay fines for non-compliance with the new standards set by the Kingdom of Belgium as a result of the adoption of the contested decision.

29 It points out in that regard that, under Article 30(2) of the Cooperation Agreement, an administrative fine of BEF 20 000 (EUR 500) or of BEF 30 000 (EUR 750) may be imposed upon it for each tonne of packaging waste not recovered or not recycled respectively within the time-limit fixed by the Cooperation Agreement.

30 Given that, according to the applicant, the recovery capacities available in Belgium do not enable the new percentages imposed by the legislature to be attained and that

its market share is 93% for household waste, it submits that it is much easier for the competent authorities to look to it for almost all the fines which it could impose than to seek out the undertakings which are trying to comply with the recovery and recycling obligations on their own initiative. Therefore, the applicant submits that it is the only undertaking which, as a matter of fact, will be fined, which, by itself, differentiates it sufficiently.

31 In addition, the applicant maintains that, unlike any undertakings which themselves assume responsibility for managing packaging waste and for which that activity is ancillary, the recovery of packaging waste is its principal activity. Therefore, the applicant takes the view that the economic and financial impact which it will have to bear because of the contested decision will be much greater than that of any other person responsible for household packaging. That particular economic and financial situation also distinguishes it from any other person responsible for household packaging waste and is a factor taken into account by the case-law, particularly in the Court's judgments in Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339 and Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853.

32 Thirdly, the applicant submits that the contested decision was adopted taking account of its obligations and information concerning it, a fact which distinguishes it individually.

33 The applicant points out in that regard that one of the essential and decisive reasons which led to the contested decision is the organisation of public procurement procedures for the recycling of glass (Chapter II(b) of the contested decision). Those public procurement procedures are and must be carried out only by it, as is clear from the Belgian authorities' replies to the Commission's questions in the course of the contested decision's adoption. In addition, the applicant submits that, even if there already were other persons responsible for household packaging waste, they

would be individuals or businesses which, given that they do not come within the definition of 'contracting entity' for the purposes of the European public procurement directives, do not have to organise such procurement procedures, unless otherwise so required, as is the case under the applicant's approval.

34 The applicant submits also that it was specifically envisaged when the contested decision was adopted. It relies in that regard on several extracts from documents from which it appears that the various Belgian legislatures took the applicant alone into account so far as household packaging waste is concerned. Furthermore, an analysis of all the documents to which it has had access in the Commission's file demonstrates, in the applicant's submission, that the Commission collected information only in its regard.

35 Fourthly, the applicant contends that, as the Commission was aware of its particular situation, it should have involved it in the process of adopting the contested decision. According to the applicant, when the Commission acts under Article 6(6) of Directive 94/62, it may not rely exclusively on the materials communicated by the Member States. The Commission is obliged, within the general framework of the principle of sound administration — even if it is not expressly required to by Directive 94/62 — to request, in certain circumstances, at least the view of the principal undertakings covered in order to determine whether the information on which it is relying is accurate. In this case, the applicant states that that was not done, although it was the exclusive source of the information collected by the Commission, a fact which shows, in its submission, that it is well and truly a specific undertaking for the Commission and that the procedure is of individual concern to it.

36 Furthermore, it is clear from the first page and, in particular, from the first footnote in the Kingdom of Belgium's reply to the Commission's letter of 15 May 2002 that certain information relating to household packaging waste provided by the Kingdom of Belgium in support of the notification of the draft Revised Cooperation Agreement emanated from the applicant.

37 Thus, in the applicant's submission, the Commission knew that it was a 'key player' in a position to provide it with essential information, but the Commission none the less did not consult it. As a result, the applicant submits that it must be provided with the possibility of bringing an action.

38 Fifth and finally, the applicant also considers itself to be concerned individually by the contested decision because of its complaint of 10 June 2003 to the Commission against that decision. In that complaint, the applicant claims that the Member States and the Commission made several errors rendering that decision, in particular, contrary to Directive 94/62.

39 As regards the lack of an effective remedy, the applicant submits that the availability of an effective remedy must constitute a criterion for deciding on the application of the fourth paragraph of Article 230 EC and that, in this case, it has no effective remedy.

40 In support of the necessity of taking account of the availability of an effective remedy, the applicant cites Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365, and is surprised at the ground upon which the Court of Justice dismissed the appeal in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, in the light of past radical reversals of the Court of Justice's case-law (Case C-10/89 *HAG GF* [1990] ECR I-3711 and Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097). It relies also on the draft Treaty Establishing a Constitution for Europe which, in its submission, is evidence of the will of the European political leaders to extend the scope of the fourth paragraph of Article 230 EC and constitutes a guideline for the Court of First Instance in its interpretation thereof.

41 The lack of an effective remedy in this case arises, according to the applicant, because, in the Belgian legal system, the legislative measures, of the Regions approving the Cooperation Agreement can be litigated only before the Belgian Cour d'arbitrage (Administrative Jurisdiction and Procedure Court), and therefore solely on the basis of a breach of the principle of equal treatment, of the rules relating to the division of powers or of the provisions of Title II of the Belgian Constitution.

42 Consequently, the applicant submits that it has, under Belgian law, no legal remedy enabling it to obtain the annulment of any breach of European law by the Regions' legislative measures transposing the Cooperation Agreement, or by the contested decision. The validity of the contested decision could, therefore, be challenged only if proceedings were brought against the applicant as a result of its contesting a fine imposed for breach of the regional legislative provisions imposing the new recovery rates for packaging waste. Also, only the Belgian Cour de cassation (Court of Cassation), the highest court in this instance, would be obliged to make a reference to the Court of Justice for a preliminary ruling. That would involve the passage of at least five years during which the applicant would continue to be exposed to such fines and to legal uncertainty as regards the validity of the recovery rates. The applicant submits therefore that that situation is incompatible with the requirement of effective judicial protection.

Findings of the Court

43 Under the fourth paragraph of Article 230 EC, '[a]ny natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

44 The applicant seeks the annulment of Article 1 of the contested decision which confirms the measure notified by the Kingdom of Belgium seeking to impose recycling and recovery standards for packaging waste going beyond the targets referred to in Article 6(1)(a) and (b) of Directive 94/62.

45 Directive 94/62, which aims to harmonise national measures concerning the management of packaging and packaging waste, is addressed to all the Member States with a view to the adoption, by their competent bodies, of measures of general application for all the economic operators concerned. It requires of the Member States, in Article 6(1)(a) and (b), that between 50% as a minimum and 65% as a maximum by weight of packaging waste be recovered by 30 June 2001 and that, within this general target and the same time-limit, between 25% as a minimum and 45% as a maximum by weight of the totality of packaging materials contained in packaging waste be recycled, with a minimum of 15% by weight for each packaging material. That directive therefore establishes, in abstract and objective terms, a general regime for the recovery of packaging and packaging waste.

46 Under Article 6(6) of that directive, the Commission may confirm the pursuit by a Member State of a higher level of environmental protection, on condition that the measures adopted for that purpose by the Member State avoid distortions of the internal market, do not hinder compliance by other Member States with that directive, do not constitute an arbitrary means of discrimination and are not a disguised restriction on trade between Member States.

47 These derogations from the general regime which are constituted by confirmatory decisions adopted by the Commission under Article 6(6) of Directive 94/62 partake of the general nature of directives, given that they are addressed in abstract terms to undefined classes of persons and apply to objectively defined situations (see, to that effect, Case C-213/91 *Abertal and Others* v *Commission* [1993] ECR I-3177, paragraph 19; the order in Case T-268/99 *Fédération nationale d'agriculture biologique des régions de France and Others* v *Council* [2000] ECR II-2893,

paragraphs 37 and 38, upheld by order in Case C-345/00 P *Fédération nationale d'agriculture biologique des régions de France and Others* v *Council* [2001] ECR I-3811; and the order in Case T-264/03 R *Schmoldt and Others* v *Commission* [2003] ECR II-5089, paragraph 64). Therefore, the contested decision must be regarded as an act of general application.

48 It is, however, necessary to consider whether, notwithstanding the contested decision's general application, the provision challenged may nevertheless be regarded as being of direct and individual concern to the applicant. According to settled case-law, the fact that a provision is of general application does not prevent it from being of direct and individual concern to some of the economic operators whom it affects (see, to that effect, Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraphs 13 and 14; *Codorniu* v *Council*, paragraph 19; Case C-451/98 *Antillean Rice Mills* v *Council* [2001] ECR I-8949, paragraph 46; and Case T-43/98 *Emesa Sugar* v *Council* [2001] ECR II-3519, paragraph 47).

49 As regards the question whether the applicant is individually concerned within the meaning of the fourth paragraph of Article 230 EC, it should be recalled that, according to settled-case law dating back to *Plaumann* v *Commission*, for natural and legal persons to be regarded as individually concerned by a measure not addressed to them, it must affect them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee (Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425, paragraph 45).

50 The applicant claims, in that regard, first, to be the only body approved for the recovery of household packaging waste and that, by virtue of that approval, it alone is subject to various obligations.

51 That fact, however, is not such as to distinguish the applicant individually within the meaning of the case-law cited in paragraph 49 above. Given that the contested decision confirms the Kingdom of Belgium's exceeding of the recovery and recycling targets referred to in Article 6(1)(a) and (b) of Directive 94/62, which are imposed on all packaging materials and packaging waste, that decision does not affect in particular undertakings handling household packaging waste which have obtained prior approval from the Belgian authorities.

52 The contested decision is of concern to the applicant only in its objective capacity as an economic operator in the packaging sector, in the same way as any other economic operator actually or potentially in the same situation (see, to that effect, *Abertal and Others* v *Commission*, paragraph 20, and the order in Case T-45/02 *DOW AgroSciences* v *Parliament and Council* [2003] II-1973, paragraph 43).

53 Secondly, the applicant submits, in essence, that it will be the only undertaking which, as a result of the contested decision, will, in fact, have to pay a large fine.

54 In that regard, it is appropriate, first of all, to observe that Article 30(2) of the Cooperation Agreement provides only for the possibility of imposing an administrative fine and that that possibility applies to all persons responsible for packaging or approved bodies who do not attain, within the time-limit, the required percentages. The fine provided for by Article 30(2) of the Cooperation Agreement therefore does not apply only to the applicant, which it indeed indirectly admits when it submits that 'the effect of a fine for [itself] is completely different from that suffered by any other person responsible for packaging waste'.

55 Next, the applicant's significant share of the household packaging market, the fact that its principal activity is the collection and recovery of household packaging waste and the fact that, therefore, the amount and probability of any fine would be greater than for other operators do not establish that the contested decision is of individual concern to it. Under the case-law, the economic consequences which an applicant claims to suffer because of a contested provision, even if the author of the measure was aware of them, are not, in themselves, sufficient to distinguish the applicant individually with regard to a general rule (see, to that effect, the order in Case C-300/00 P(R) *Federación de Cofradías de Pescadores de Guipúzcoa and Others* v *Council* [2000] ECR I-8797, paragraphs 39 and 41). Furthermore, the case-law recognises that the fact that a measure of general application may have concrete effects which differ according to the individuals to whom it applies is not such as to differentiate them from all other operators concerned, inasmuch as that measure is applied by virtue of an objectively determined situation (see, to that effect, the orders in Case C-409/96 P *Sveriges Betodlares and Henrikson* v *Commission* [1997] ECR I-7531, paragraph 37, and in Case T-39/98 *Sadam Zuccherifici and Others* v *Council* [1998] ECR II-4207, paragraph 22, upheld in Case C-41/99 P *Sadam Zuccherifici and Others* v *Council* [2001] ECR I-4239). As was stated in paragraph 47 above, the contested decision is an act of general application, in that it is addressed in abstract terms to undefined classes of persons and applies to objectively defined situations.

56 Finally, with regard to the reliance placed upon *Les Verts* v *Parliament* and *Codorniu* v *Council,* as showing that the Court has adopted a financial and economic criterion to assess whether applicants were individually concerned, the different context of this case compared to the cases which gave rise to those judgments must be pointed out.

57 Thus, unlike *Codorniu* v *Council,* in which a provision of general application prevented the applicant company from using its registered trade mark which it had been employing for many years, the applicant's approval, in this case, confers on it only authorisation enabling it to fulfil, for persons responsible for household packaging, their obligations to recover packaging waste imposed by the Regions' legislation (Article 1(22) of the Cooperation Agreement). Furthermore, that authorisation, which was granted only for the period of five years from 1 January

1999 (Article 10(4) of the Cooperation Agreement and Article 24 of the approval decision) and falls within the framework of obligations imposed on both the applicant and the other persons responsible for packaging, does not confer a right to the application of a specific rate of recovery. Indeed, point 3 of Article 25(1) of the Cooperation Agreement states that the decision-making organ of the Interregional Packaging Commission can, at any time, amend, on grounds of public interest, the conditions for the carrying on of the activity contained in the approval. Therefore, the applicant's situation differs from that of the applicant in *Codorniu* v *Council*, and the applicant cannot avail itself of that case-law.

58 The facts of this case are different also from those in *Les Verts* v *Parliament*. Apart from the fundamental difference of context, connected to the parties and institutions in question, the Court notes the absence of any difference between the applicant's situation and that of the other persons responsible for packaging as regards the contested decision. In *Les Verts* v *Parliament* certain political groupings had participated in the adoption of a European Parliament decision which covered both their own treatment and that accorded to rival groupings which had no representatives in the Parliament. They were, necessarily, identifiable and therefore individually concerned and therefore would have enjoyed greater judicial protection than the unrepresented rival political groupings (*Les Verts* v *Parliament*, paragraph 36). By contrast, in this case, the other persons responsible for packaging, just like the applicant (see paragraph 63 et seq. below), did not participate in the adoption of the decision which covered both their own treatment and that of the applicant. Consequently, the other persons responsible for packaging do not enjoy in this case greater judicial protection than the applicant. Therefore, that judgment cannot support the applicant's case that the contested decision is of individual concern to it.

59 Thirdly, the applicant relies, in support of its argument that it is individually concerned, on the fact that the Commission based the contested decision on the existence of public procurement procedures which the applicant alone puts in place and information on household waste which emanates from the applicant and concerns it alone.

60 The Court observes in that regard, first of all, that, in the contested decision, the Commission did take into account, in determining the appropriateness of the measures notified, the existence of public procurement procedures (Chapter II(a) and (b) of the contested decision) and that, under the approval decision, the applicant must award recycling contracts through tender procedures (Articles 8 to 11 of the approval decision). Furthermore, it is apparent that the applicant's information was taken into account by the Commission for the adoption of the contested decision.

61 However, under the case-law, the fact that the Commission has based its decision on the existence of obligations specific to the applicant and on information relating to it is sufficient to distinguish it individually only if the regard had to its situation results from the relevant legislation. That would be the case, first, if the Commission, by virtue of specific provisions, had a duty to take account of the consequences of a measure it envisaged adopting on the situation of certain individuals, with the result that that fact may distinguish them individually (see, to that effect, Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraphs 21 and 28 to 31; Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 11; Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraphs 25 to 28; Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 67; and Case T-47/00 *Rica Foods* v *Commission* [2002] ECR II-113, paragraph 41). That would also be the case, secondly, if the relevant provisions provided for a right for the person concerned to participate in the pre-litigation procedure (see, to that effect, Joined Cases T-74/97 and T-75/97 *Büchel* v *Council and Commission* [2000] ECR II-3067, paragraph 58).

62 As regards the existence of a specific situation required to be taken into account when the contested decision was adopted, the Court observes that Article 6(6) of Directive 94/62 requires, first, the Member States which wish to pursue a higher level of environmental protection than that required by Article 6(1)(a) and (b) of that directive to inform the Commission, and second, the Commission to confirm those measures after having verified, in cooperation with all the Member States, that the applicant Member States provide to that effect appropriate capacities for recycling and recovery, and that those measures avoid distortions of the internal

market, do not hinder compliance by other Member States with the directive and constitute neither an arbitrary means of discrimination nor a disguised restriction on trade between Member States.

63 That obligation to verify owed by the Commission involves only the taking into account of a body of data relating to recycling and recovery of packaging waste at the State and inter-State level and not consideration of the particular situation of an undertaking operating in the field of recycling and recovery of household packaging waste. Article 6(6) of Directive 94/62 provides expressly moreover that such verification be carried out in cooperation with the Member States. That implies that it is not for the Commission to consult the economic operators directly, or even certain economic operators in particular.

64 It is therefore clear that Article 6(6) of Directive 94/62 does not require the Commission to take into account the particular situation of individual undertakings such as the applicant when it approves measures derogating from the targets set by Article 6(1)(a) and (b) of that directive.

65 In addition, neither Articles 16 and 21 of Directive 94/62 which provide respectively for a notification procedure and the intervention of a committee, by means of which the cooperation between the Commission and the Member States takes place, nor the other provisions of Directive 94/62 impose such a requirement on the Commission. Consequently, the applicant is not justified in maintaining that its particular situation should have been taken into account by the Commission in the adoption of the contested decision.

66 As regards the existence of a right to participate in the procedure, it follows from the foregoing that there a procedural rule relating to the participation of interested undertakings in the administrative procedure is not laid down. The applicant indeed

admits it incidentally, when it submits that, even though the directive does not expressly provide for an obligation to consult, such an obligation should exist by virtue of the duty of sound administration.

67 In addition, in any event, the applicant has not shown that it in fact participated directly in the procedure before the Commission. It follows that, even if such a right existed, based, as the case may be, on the duty of sound administration or on a specific provision as in antidumping matters, the applicant could not rely upon it, not having exercised it (Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, paragraphs 13 to 16, and Case T-161/94 *Sinochem Heilongjiang* v *Council* [1996] ECR II-695, paragraph 47).

68 Therefore, the taking into account by the Commission of information and obligations relating to the applicant, in the course of the adoption of the contested decision, is not such as to distinguish the applicant individually.

69 Fourthly, the applicant submits that, because it was one of the sources of the information made available to the Commission and because the Commission is obliged, by virtue of the principle of sound administration, to check the information provided by the Member States in the course of the procedure under Article 6(6) of Directive 94/62, the Commission should have requested its view in order to determine the accuracy of the information provided by the Member States. Accordingly, the applicant submits that the contested decision is of individual concern to it on that basis too.

70 It should be pointed out in that connection that, besides the absence of a right for the applicant to participate in the procedure in this instance (see paragraph 66 above), under the case-law, unless there is an express provision in that respect, neither the process of preparing acts of general application nor those acts themselves, as measures of general application, require, by virtue of the general

principles of Community law, the participation of the persons affected, their interests being deemed to be represented by the political bodies called upon to adopt those acts (see, to that effect, the orders in Case T-122/96 *Federolio* v *Commission* [1997] ECR II-1559, paragraph 75; in Case T-109/97 *Molkerei Großbraunshain and Bene Nahrungsmittel* v *Commission* [1998] ECR II-3533, paragraph 60, upheld by order in Case C-447/98 P *Molkerei Großbraunshain and Bene Nahrungsmittel* v *Commission* [2000] ECR I-9097; and in Case T-114/99 *CSR Pampryl* v *Commission* [1999] ECR II-3331, paragraph 50).

71 In this case, the contested decision is an act of general application (see paragraph 47 above) and the duty of sound administration relied upon is a general principle of law. Under the above-cited case-law, that principle does not require the participation of persons affected in the preparation of such an act. Therefore, in the absence of express legislative provision, the applicant cannot infer from the principle of sound administration a procedural right capable of giving rise to an entitlement to sue for annulment.

72 Finally, the applicant claims, fifthly, that the lodging of a complaint is a factor which demonstrates that it is individually concerned. The Court points out in that regard that the complaint was submitted on 10 June 2003, that is more than four months after the adoption of the contested decision and later even than any time-limit under the fifth paragraph of Article 230 EC for bringing proceedings. In addition, according to the logic of such an argument, such a complaint must be assessed on its own value, since it has no connection with the present legal proceedings. Apart from the fact that that complaint could not have interfered with the adoption of the contested decision, the lodging of a complaint with the Commission after the adoption of a decision in no way prejudges the complainant's standing under the fourth paragraph of Article 230 EC to bring an action for its annulment. In the absence of any provision envisaging such a complaint as part of the pre-litigation procedure, the admissibility requirements of the fourth paragraph of Article 230 EC are to be evaluated regardless of any complaint lodged by the applicant with the Commission after the adoption of the contested act. Therefore, that argument is completely irrelevant.

73 It follows from the foregoing that the applicant cannot be regarded as being individually concerned within the meaning of the fourth paragraph of Article 230 EC.

74 It has, however, still to be considered whether, as the applicant maintains, that conclusion must not be put in doubt by the requirement for effective judicial protection.

75 As the Court of Justice stated in *Unión de Pequeños Agricultores* v *Council*, paragraph 40, and *Commission* v *Jégo-Quéré*, paragraph 30, the EC Treaty, by Articles 230 and 241 on the one hand, and by Article 234 on the other, has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community judicature (see also, to that effect, *Les Verts* v *Parliament*, paragraph 23). Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, directly challenge Community measures of general application, they are able, depending on the case, either to plead the invalidity of such acts before the Community judicature indirectly under Article 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid (Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20), to make a reference to the Court of Justice for a preliminary ruling on their validity.

76 The Court of Justice has held, in addition to the fact that it is for the Member States to establish a complete system of legal remedies and procedures which ensure observance of the right to effective judicial protection (*Unión de Pequeños Agricultores* v *Council*, paragraph 41, and *Commission* v *Jégo-Quéré*, paragraph 31), that an interpretation of the rules on admissibility laid down in Article 230 EC, to the effect that an action for annulment should be declared admissible where it is shown, following an examination by the Community judicature of the particular national procedural rules, that those rules do not allow an individual to bring proceedings to contest the validity of the Community measure at issue, is not acceptable. A direct action for annulment cannot be brought before the Community

judicature even if it could be shown, following an examination by it of the particular national procedural rules, that those rules do not allow an individual to bring proceedings to contest the validity of the Community measure at issue (order in Case C-258/02 P *Bactria* v *Commission* [2003] ECR I-15105, paragraph 58). Such an approach would require the Community judicature in each individual case to examine and interpret national procedural law, which would go beyond its jurisdiction when reviewing the legality of Community measures (*Unión de Pequeños Agricultores* v *Council*, paragraph 43, and *Commission* v *Jégo-Quéré*, paragraphs 33 and 34).

77 Finally, in any event, the Court of Justice has clearly established (*Unión de Pequeños Agricultores* v *Council*, paragraph 44, and *Commission* v *Jégo-Quéré*, paragraph 36), that, although the condition under the fourth paragraph of Article 230 EC requiring an individual interest must be interpreted in the light of the principle of effective judicial protection (see, to that effect, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18) by taking account of the various circumstances that may distinguish an applicant individually, such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community judicature.

78 Moreover, while it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is, according to the Court of Justice, for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force (*Unión de Pequeños Agricultores* v *Council*, paragraph 45).

79 The applicant is surprised by the Court of Justice's finding of inadmissibility on the basis of such a ground in the light of the radical reversals of the Court's case-law in the past. It submits also that the draft Treaty Establishing a Constitution for Europe provides a guideline for the interpretation of the fourth paragraph of Article 230 EC.

80 As regards the existence of radical reversals of the Court's case-law in the past in certain areas, it is sufficient to state that, in this case, such a reversal did not occur and that, under Article 225 EC and the Statute of the Court of Justice, it is not for the Court of First Instance to rule on the soundness of a decision of the Court of Justice.

81 As regards the draft Treaty Establishing a Constitution for Europe, it is appropriate to note that that treaty has not yet entered into force. Therefore, the Court of First Instance cannot be bound by that treaty or by the wishes of the European political leaders which underlie it.

82 Therefore, the applicant cannot, having regard to the case-law of the Court of Justice, profitably rely on the argument that it would be deprived of any legal remedy if the action for annulment were to be declared inadmissible.

83 The requirement of effective judicial protection is therefore not, in view of that case-law of the Court of Justice, such as to call into question the conclusion that the applicant is not individually concerned within the meaning of the fourth paragraph of Article 230 EC. Since the applicant does not satisfy one of the conditions of admissibility under the fourth paragraph of Article 230 EC, this action must be dismissed as inadmissible.

Costs

84 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs of the proceedings as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. **The application is dismissed as inadmissible.**

2. **The applicant shall bear its own costs and pay those incurred by the defendant.**

Luxembourg, 16 February 2005.

H. Jung
Registrar

J. Azizi
President