JUDGMENT OF THE COURT (Grand Chamber)

14 December 2004 *

In Case C-309/02,

REFERENCE for a preliminary ruling under Article 234 EC

from the Verwaltungsgericht Stuttgart (Germany), made by order of 21 August 2002, received at the Court on 29 August 2002, in the proceedings

Radlberger Getränkegesellschaft mbH & Co.,

S. Spitz KG

v

Land Baden-Württemberg,

* Language of the case: German.

THE COURT (Grand Chamber),

composed of: V. Skouris, President, P. Jann and K. Lenaerts (Rapporteur), Presidents of Chambers, C. Gulmann, J.-P. Puissochet, R. Schintgen, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 March 2004,

after considering the observations submitted on behalf of:

— Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG, by R. Karpenstein, Rechtsanwalt,

— Land Baden-Württemberg, by L.-A. Versteyl, Rechtsanwalt,

— the German Government, by W.-D. Plessing and A. Tiemann, acting as Agents, assisted by D. Sellner, Rechtsanwalt,

— the Austrian Government, by E. Riedl, acting as Agent,

— the French Government, by G. de Bergues and D. Petrausch, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato,

— the Netherlands Government, by S. Terstal and C. Wissels, acting as Agents,

— the Commission of the European Communities, by J. Grunwald and M. Konstantinidis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 May 2004,

gives the following

Judgment

1 The reference for a preliminary ruling relates to the interpretation of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10) and Article 28 EC.

2 The reference was submitted in proceedings brought by Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG, which are Austrian drinks producers, against Land Baden-Württemberg.

Legal context

Directive 94/62

3 According to Article 1(1), Directive 94/62 aims to harmonise national measures concerning the management of packaging and packaging waste in order, on the one hand, to prevent any impact thereof on the environment of all Member States as well as of third countries or to reduce such impact, 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.

4 As stated in Article 1(2), the directive lays down 'measures aimed, as a first priority, at preventing the production of packaging waste and, as additional fundamental principles, at reusing packaging, at recycling and other forms of recovering packaging waste and, hence, at reducing the final disposal of such waste'.

5 Article 5 of the directive provides:

'Member States may encourage reuse systems of packaging, which can be reused in an environmentally sound manner, in conformity with the Treaty.'

6 Article 7 provides:

'1. Member States shall take the necessary measures to ensure that systems are set up to provide for:

(a) the return and/or collection of used packaging and/or packaging waste from the consumer, other final user, or from the waste stream in order to channel it to the most appropriate waste management alternatives;

(b) the reuse or recovery including recycling of the packaging and/or packaging waste collected,

in order to meet the objectives laid down in this Directive.

These systems shall be open to the participation of the economic operators of the sectors concerned and to the participation of the competent public authorities. They shall also apply to imported products under non-discriminatory conditions, including the detailed arrangements and any tariffs imposed for access to the systems, and shall be designed so as to avoid barriers to trade or distortions of competition in conformity with the Treaty.

2. The measures referred to in paragraph 1 shall form part of a policy covering all packaging and packaging waste and shall take into account, in particular, requirements regarding the protection of environmental and consumer health, safety and hygiene; the protection of the quality, the authenticity and the technical characteristics of the packed goods and materials used; and the protection of industrial and commercial property rights.'

7 Article 18 is worded as follows:

'Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive.'

National legislation

8 The Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen (Regulation on the Avoidance and Recovery of Packaging Waste) of 21 August 1998 (BGBl. 1998 I, p. 2379; 'the VerpackV') prescribes various measures to avoid and reduce the environmental impact of packaging waste. The VerpackV was intended, in particular, to transpose Directive 94/62 and replaced the Verordnung über die Vermeidung von Verpackungsabfällen (Regulation on the Avoidance of Packaging Waste) of 12 June 1991 (BGBl. 1991 I, p. 1234).

9 Paragraph 6(1) and (2) of the VerpackV lays down the following obligations:

'1. Distributors shall accept the return of used empty sales packaging from final consumers, free of charge, at, or in the immediate vicinity of, the actual point of delivery, recover the packaging in accordance with the requirements of point 1 of Annex I and fulfil the requirements of point 2 of Annex I. The recovery requirements may also be satisfied by reusing the packaging or passing it on to distributors or producers under subparagraph 2. The distributor must draw the attention of the private final consumer, by means of clearly visible, legible notices, to the fact that the packaging may be returned in accordance with the first sentence. The obligation under the first sentence applies only to packaging of the type, form and size and to packaging of goods that the distributor carries in his range. For distributors with a sales area of less than 200 square metres, the obligation to take back returned packaging applies only to packaging for brands which the distributor puts into circulation. In the case of a mail order business, the taking back of returned packaging shall be ensured by means of suitable return facilities within reasonable distance of the final consumer. The possibility of returning the packaging is to be referred to in the consignment and in catalogues. Where sales packaging does not come from private final consumers, the parties may make other arrangements regarding the place of return and the allocation of costs. Where distributors do not fulfil the obligations under the first sentence by accepting the return of packaging at the point of delivery, they shall ensure compliance with them by means of a system as provided for by subparagraph 3. In derogation from the first sentence, the recovery requirements in Paragraph 4(2) shall apply *mutatis mutandis* to distributors of packaging who cannot participate in a system under subparagraph 3.

2. Producers and distributors shall accept free of charge at the place of actual delivery packaging returned to distributors under subparagraph 1, recover the packaging in accordance with the requirements of point 1 of Annex I and fulfil the requirements of point 2 of Annex I. The recovery requirements may also be satisfied

by reusing the packaging. The obligations under the first sentence apply only to packaging of the type, form and size and to packaging of goods that the particular producer or distributor puts into circulation. The eighth, ninth and tenth sentences of subparagraph 1 shall apply *mutatis mutandis*.'

10 Under Paragraph 6(3), those obligations to take back and recover packaging may in principle also be met by participation of the producer or distributor in a global system for the collection of used sales packaging. The competent *Land* authority has the task of determining that the system fulfils the conditions imposed by the VerpackV with regard to its coverage rate.

11 By virtue of Paragraph 8(1) of the VerpackV, distributors who put liquids for consumption into circulation in non-reusable drinks packaging are required to charge the purchaser a deposit of at least EUR 0.25 including value added tax per item of packaging. Where the net volume exceeds 1.5 litres, the deposit is to be at least EUR 0.50 including value added tax. The deposit is to be charged by each further distributor at every stage in the chain of distribution until sale to the final consumer. The deposit is to be repaid when the packaging is returned under Paragraph 6(1) and (2) of the VerpackV.

12 In accordance with Paragraph 9(1) of the VerpackV, this mandatory deposit is not to apply where the producer or distributor is exempt from the obligation to accept return of the packaging because he participates in a global collection system as referred to in Paragraph 6(3).

13 However, Paragraph 9(2) of the VerpackV prescribes circumstances in which, for certain drinks, recourse to Paragraph 6(3) ceases to be possible. Paragraph 9(2) states as follows:

'If, for beer, mineral water (including spring water, table water and spa water), carbonated soft drinks, fruit juices ... and wine ... the combined proportion of drinks in reusable packaging falls below 72% in the calendar year in the geographical area to which this regulation applies, a new survey of the relevant proportions of reusable packaging shall be carried out for the 12 months following publication of the failure to achieve the required proportions. If this shows that the proportion of reusable packaging in Federal territory is below the proportion laid down under the first sentence, the decision under Paragraph 6(3) shall be deemed to be revoked throughout Federal territory in respect of the drinks categories for which the reusable proportion determined in 1991 is not achieved, with effect from the first day of the sixth calendar month following publication in accordance with subparagraph 3. ...'

14 In accordance with Paragraph 9(3) of the VerpackV, the German Government is to publish each year the relevant proportions, as referred to in Paragraph 9(2), of drinks packaged in ecologically sound drinks packaging. Under Paragraph 9(4) the competent authority, following an application or on its own initiative, is to make a new determination pursuant to Paragraph 6(3) where the relevant proportion of drinks in such packaging is again achieved following a revocation.

The main proceedings and the questions referred for a preliminary ruling

15 The claimants in the main proceedings export carbonated soft drinks, fruit juices, other non-carbonated drinks and table water to Germany, in non-reusable

recoverable packaging. With a view to recovery of that packaging, they joined the global waste-collection system operated by the company Der Grüne Punkt — Duales System Deutschland AG and on that basis were exempted from the obligation to charge the deposit laid down in Paragraph 8(1) of the VerpackV for drinks distributed in Germany in non-reusable packaging.

16 The German Government announced on 28 January 1999 that in 1997 the proportion of reusable drinks packaging fell below 72% for the first time, namely to 71.33%. Since over two consecutive periods, namely between February 1999 and January 2000 and between May 2000 and April 2001, this proportion remained below 72% throughout Federal territory, on 2 July 2002 the Government announced pursuant to Paragraph 9(3) of the VerpackV that from 1 January 2003 a mandatory deposit would be charged on mineral water, beer and soft drinks. Under the VerpackV, the claimants in the main proceedings would therefore be required from that date to charge the deposit prescribed in Paragraph 8(1) thereof on most of their packaging for drinks distributed in Germany and then to accept the return of, and recover, the empty packaging.

17 On 23 May 2002 the claimants in the main proceedings brought an action against Land Baden-Württemberg before the Verwaltungsgericht Stuttgart (Administrative Court, Stuttgart) in which they submit that the rules laid down in the VerpackV on quotas for reusable packaging and the related deposit and return obligations are contrary to Articles 1(1) and (2), 5, 7 and 18 of Directive 94/62 and Article 28 EC. The Federal Republic of Germany was joined as a party to the proceedings.

18 The national court states that, if one proceeds on the basis of the interpretation put forward by the claimants according to which Article 1(2) of Directive 94/62 presumes that the reuse of packaging and its recovery rank equally, the question arises as to whether the system laid down in the VerpackV is compatible with the

directive inasmuch as that system makes it more difficult to put non-reusable packaging into circulation when the proportion of reusable packaging falls below a certain threshold. The national court observes that producers established in another Member State are exposed to higher costs than German producers if they decide to market their drinks in reusable packaging. It points out that, in the claimants' submission, even when the obligation to charge a deposit is suspended the German legislation affects the situation of producers established in another Member State because German distributors tend to exclude products with non-reusable packaging from their range of drinks in order that the proportion of reusable packaging does not fall below 72%.

19 In those circumstances, the Verwaltungsgericht Stuttgart decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. On a proper construction of Article 1(2) of ... Directive 94/62 ... are Member States prohibited from favouring systems for reusing drinks packaging over recoverable non-reusable packaging by removing, where a Federal target for reusable packaging of 72% is not reached, the possibility of exemption from a return, management and deposit obligation laid down in respect of empty non-reusable drinks packaging by participation in a return and management system, so far as concerns drinks sectors in which the proportion of reusable packaging has fallen below the level determined in 1991?

2. On a proper construction of Article 18 of ... Directive 94/62 ... are Member States prohibited from impeding the placing of drinks in recoverable non-reusable packaging on the market by removing, where a Federal target for reusable packaging of 72% is not reached, the possibility of exemption from a

return, management and deposit obligation laid down in respect of empty non-reusable drinks packaging by participation in a return and management system, so far as concerns drinks sectors in which the proportion of reusable packaging has fallen below the level determined in 1991?

3. On a proper construction of Article 7 of ... Directive 94/62 ... do producers and distributors of drinks in recoverable non-reusable packaging have a right to participate in an existing return and management system for used drinks packaging, in order to meet a statutory obligation to charge a deposit on non-reusable drinks packaging and accept the return of used drinks packaging?

4. On a proper construction of Article 28 EC are the Member States prohibited from adopting rules providing that where a Federal target for reusable drinks packaging of 72% is not reached, the possibility of exemption from a return, management and deposit obligation laid down in respect of empty non-reusable drinks packaging by participation in a return and management system is removed so far as concerns drinks sectors in which the proportion of reusable packaging has fallen below the level determined in 1991?'

The requests to reopen the oral procedure

20 By letters received at the Court Registry on 14 and 17 June 2004 respectively, the German Government and the defendant in the main proceedings requested the Court to order the reopening of the oral procedure pursuant to Article 61 of the Rules of Procedure.

21 The German Government submits in support of its request that the Opinion delivered by the Advocate General on 6 May 2004 contains a series of matters which were not covered in the written or oral procedure and reveal a misappraisal of the arguments relied on by it before the Court. In its request, the defendant in the main proceedings likewise maintains that the Opinion broaches certain matters which were not debated and upon which the Court has therefore not been sufficiently informed.

22 The Court may of its own motion, on a proposal from the Advocate General or at the request of the parties order the reopening of the oral procedure, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see Joined Cases C-270/97 and C-271/97 *Deutsche Post* [2000] ECR I-929, paragraph 30, Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 42, Case C-299/99 *Philips* [2002] ECR I-5475, paragraph 20, and Case C-273/00 *Sieckmann* [2002] ECR I-11737, paragraph 22).

23 In the circumstances of this case, however, the Court, after hearing the Advocate General, considers that it is in possession of all the facts necessary for it to answer the questions referred and that those facts have been the subject of argument presented before it.

24 The requests of the German Government and the defendant in the main proceedings seeking the reopening of the oral procedure must therefore be rejected.

Consideration of the questions referred for a preliminary ruling

Admissibility of the questions referred

25 The defendant in the main proceedings submits that the Court must reject the questions referred for a preliminary ruling as inadmissible, given that the main action is inadmissible as it has been brought against Land Baden-Württemberg: the latter has no power of its own to adopt primary or secondary legislation in the matter and merely implements Federal rules. In the defendant's submission, the action should have been brought against the Federal State before the court with jurisdiction in this regard, namely the Verwaltungsgericht Berlin. In parallel proceedings a number of German administrative courts have already found similar actions inadmissible.

26 As to those submissions, it is not for the Court of Justice, given the allocation of functions between itself and the national courts, to determine whether the decision to refer has been taken in accordance with the rules of national law governing the organisation of courts and their procedure (see Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraph 13, Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 33, and Case C-371/97 *Gozza and Others* [2000] ECR I-7881, paragraph 30). The Court must abide by the decision from a court of a Member State requesting a preliminary ruling in so far as it has not been overturned in any appeal procedures provided for by national law (Case 65/81 *Reina* [1982] ECR 33, paragraph 7).

27 In the present case, it is apparent from the order for reference that the Verwaltungsgericht Stuttgart considers that the main action is at least partially admissible.

28 Nor is it in dispute that there is a direct connection between, first, the four questions referred for a preliminary ruling, which relate to the interpretation of Articles 1, 7 and 18 of Directive 94/62 and Article 28 EC and have been asked in order to enable the national court to assess whether the German legislation at issue is compatible with those provisions, and second, the subject-matter of the main proceedings, which seek a declaration that the claimants are not required to comply with the obligations to charge a deposit on their non-reusable packaging and accept its return.

29 It follows that the reference for a preliminary ruling is admissible.

Question 1

30 By its first question, the national court essentially asks whether Article 1(2) of Directive 94/62 precludes a Member State from promoting systems for the reuse of packaging, by application of a system such as that laid down in Paragraphs 8(1) and 9(2) of the VerpackV.

31 While Article 1(2) of Directive 94/62 envisages as a 'first priority' measures aimed at preventing the production of packaging waste, it lists, as 'additional fundamental principles', reusing packaging, recycling and other forms of recovering packaging waste.

32 The eighth recital in the preamble to the directive states that, 'until scientific and technological progress is made with regard to recovery processes, reuse and recycling should be considered preferable in terms of environmental impact; ... this

requires the setting up in the Member States of systems guaranteeing the return of used packaging and/or packaging waste; life-cycle assessments should be completed as soon as possible to justify a clear hierarchy between reusable, recyclable and recoverable packaging'.

33 It follows from the foregoing that Directive 96/42 does not establish a hierarchy between the reuse of packaging and the recovery of packaging waste.

34 However, Article 5 of Directive 94/62 allows the Member States to take measures designed to encourage systems for the reuse of packaging that can be reused in an environmentally sound manner.

35 It is clear from the very wording of Article 5 that such a policy of promoting the reuse of packaging is permitted only in so far as it is consistent with the Treaty.

36 Thus, measures taken by a Member State pursuant to Article 5 must comply not only with requirements that flow from the directive's other provisions, in particular Article 7 to which the third question referred for a preliminary ruling relates, but also with obligations resulting from the provisions of the Treaty, in particular Article 28 EC to which the fourth question referred for a preliminary ruling relates.

37 The answer to the first question must therefore be that Article 1(2) of Directive 94/62 does not preclude the Member States from introducing measures designed to promote systems for the reuse of packaging.

38 In view of the foregoing, it is appropriate to answer first the third and fourth questions referred for a preliminary ruling.

Question 3

39 By its third question, the national court essentially asks whether Article 7 of Directive 94/62 confers on producers and distributors of drinks in recoverable non-reusable packaging who are permitted to fulfil their deposit and return obligations by participating in a global packaging-collection system the right to continue to participate in a global system of that kind in order to meet their legal obligations.

40 Directive 94/62 requires the Member States, in Article 7(1), to take the necessary measures to ensure that systems are set up to provide for, first, the return and/or collection of used packaging and/or packaging waste and, second, the reuse or recovery of the packaging or packaging waste collected. Article 7(1) also states that those systems must be open to the participation of the economic operators of the sectors concerned and to the participation of the competent public authorities, apply to imported products under non-discriminatory conditions, and be designed so as to avoid barriers to trade or distortions of competition in conformity with the Treaty.

41 Article 7(2) of the directive requires the measures referred to in Article 7(1) to form part of a policy covering all packaging and packaging waste and states that those measures are to take into account, in particular, requirements regarding the protection of environmental and consumer health, safety and hygiene, the

protection of the quality, the authenticity and the technical characteristics of the packed goods and materials used, and the protection of industrial and commercial property rights.

42 Article 7 leaves it to the Member States to choose, as regards non-reusable packaging, between a deposit and return system, on the one hand, and a global packaging-collection system, on the other, or to opt for a combination of the two systems depending on the type of product, provided that the systems chosen are designed to channel packaging to the most appropriate waste management alternatives and form part of a policy covering all packaging and packaging waste.

43 That provision does not confer on the producers and distributors concerned any right to continue to participate in a given packaging-waste management system.

44 Directive 94/62 does not prevent a Member State from providing that amendments are to be made to packaging-waste management systems set up in its territory so as to ensure that the most appropriate waste management alternative is adopted.

45 While Directive 94/62 thus allows a Member State to require the replacement, in the light of the circumstances, of a system for the collection of packaging near the homes of consumers or points of sale with a deposit and return system, such replacement must however comply with certain conditions.

46 First, the new system must be equally appropriate for the purpose of attaining the objectives of Directive 94/62. In particular, where the new system is, as in the present case, a deposit and return system, the Member State concerned must ensure that there are a sufficient number of return points so that consumers who have been charged a deposit when buying goods in non-reusable packaging can recover the deposit even if they do not go back to the initial place of purchase.

47 It should be noted in this connection that the first sentence of Paragraph 6(1) of the VerpackV provides that distributors are to accept the return of sales packaging free of charge at, or in the immediate vicinity of, the actual point of delivery ('am Ort der tatsächlichen Übergabe oder in dessen unmittelbarer Nähe'). While it is true that the following sentences of Paragraph 6(1) add certain details, in particular as regards the limitations on that obligation on the basis of the characteristics of the packaging concerned and on the basis of the sales area of the distributor concerned, the fact remains that the extent of the obligation to accept return does not appear to be unambiguous.

48 Second, the changeover to the new system must take place without a break and without jeopardising the ability of economic operators in the sectors concerned actually to participate in the new system as soon as it enters into force. Article 7(1) of Directive 94/62 obliges each Member State to ensure that the producers and distributors concerned have access to a packaging-waste management system at all times and without discrimination.

49 Therefore, a Member State which replaces the existing packaging-waste management system with another has the task of ensuring that the producers and distributors concerned have a reasonable period for the transition to the new system so that they can adapt their production methods and chains of distribution to the requirements of the new system.

50 The answer to the third question must therefore be that while Article 7 of Directive 94/62 does not confer on the producers and distributors concerned any right to continue to participate in a given packaging-waste management system, it precludes the replacement of a global system for the collection of packaging waste with a deposit and return system where the new system is not equally appropriate for the purpose of attaining the objectives of that directive or where the changeover to the new system does not take place without a break and without jeopardising the ability of economic operators in the sectors concerned actually to participate in the new system as soon as it enters into force.

Question 4

51 By its fourth question, the national court essentially asks whether Article 28 EC precludes national rules, such as those laid down in Paragraphs 8(1) and 9(2) of the VerpackV, under which the proportion of reusable packaging in the sector concerned determines whether producers and distributors using non-reusable packaging may fulfil their deposit, return and recovery obligations by participation in a global collection system.

The applicability of Article 28 EC

52 In the German Government's submission, there cannot be a conflict between Article 28 EC and the national rules at issue given that, as regards the reuse of packaging, Directive 94/62, in particular Articles 5, 9 and 18, has the aim and effect of harmonising completely the subject in question.

53 In view of the fact that, where a sphere has been the subject of exhaustive harmonisation at Community level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty (Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9, Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32, and Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64), it must be determined whether the harmonisation brought about by Directive 94/62 precludes the compatibility of the national rules in question with Article 28 EC from being examined.

54 As regards the reuse of packaging, Article 5 of Directive 94/62 does no more than allow the Member States to encourage, in conformity with the Treaty, systems for the reuse of packaging that can be reused in an environmentally sound manner.

55 Apart from the definition of the concept of 'reuse' of packaging, certain general provisions on measures to avoid packaging waste and the provisions relating to return, collection and recovery systems, set out in Articles 3(5), 4 and 7 respectively, Directive 94/62 does not regulate, as regards Member States which are disposed to exercise the power granted by Article 5, the organisation of systems encouraging reusable packaging.

56 In contrast to the position in respect of the marking and identification of packaging and the requirements on the composition of packaging and its capacity to be reused or recovered, governed by Articles 8 and 11 of Directive 94/62 and Annex II thereto, the organisation of national systems intended to encourage the reuse of packaging is therefore not the subject of complete harmonisation.

57 Such systems can consequently be assessed on the basis of the Treaty provisions relating to the free movement of goods.

58 Furthermore, Article 5 of Directive 94/62 allows the Member States to encourage systems for the reuse of packaging only 'in conformity with the Treaty'.

59 Inasmuch as Article 18 of Directive 94/62 does no more than guarantee the free movement, in the territory of the Member States, of packaging which complies with the requirements relating to its marking, composition and capacity to be reused or recovered, that provision likewise does not preclude national packaging-waste management systems from being assessed in the light of Article 28 EC if they are liable to affect the conditions for marketing the products concerned.

The existence of a barrier to trade

60 It must therefore be assessed whether Article 28 EC precludes national rules, such as those at issue in the main proceedings, under which the ability of producers and distributors using non-reusable packaging to fulfil their deposit and return obligations by participation in a global collection system depends on changes in the overall proportion of drinks in non-reusable packaging on the German market and the proportion of the particular drinks concerned that are placed on the same market in such packaging.

61 It should be noted, first, that such rules apply without distinction to national products and products from other Member States and lay down the same deposit and return requirements for producers established in other Member States as for national producers.

62 Second, in contrast to the maximum level of drinks capable of being marketed in non-approved containers which was at issue in Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, in the main proceedings the proportions do not limit the quantity of products which may be imported in a certain type of packaging. The VerpackV does not prohibit the marketing of products in non-reusable packaging beyond the proportions indicated, but provides merely that the exceeding of those proportions will result in a change in the management system for non-reusable packaging.

63 However, the fact remains that while Paragraphs 8(1) and 9(2) of the VerpackV admittedly apply to all producers and distributors operating in national territory, they do not affect the marketing of drinks produced in Germany and that of drinks from other Member States in the same manner.

64 While a changeover from one packaging management system to another results, generally, in costs so far as concerns the marking or labelling of packaging, rules, such as those at issue in the main proceedings, which oblige producers and distributors using non-reusable packaging to replace their participation in a global

collection system with a deposit and return system cause every producer and distributor using such packaging to incur additional costs connected with organisation of the taking back of packaging, the refunding of sums paid by way of deposit and any balancing of those sums between distributors.

65 It is not in dispute that producers established outside Germany use considerably more non-reusable packaging than German producers.

66 The national court observes that recourse to reusable packaging normally causes a drinks producer established in another Member State to incur costs higher than those borne by a German producer, given that costs linked to organisation of a deposit system and to transport are greater if the producer is established at a certain distance from the points of sale.

67 It follows that the replacement, as regards non-reusable packaging, of a global packaging collection system with a deposit and return system is such as to hinder the placing on the German market of drinks imported from other Member States (see to this effect, as regards reusable drinks packaging, *Commission* v *Denmark*, cited above, paragraph 13).

68 It is immaterial in this regard that the provisions in question envisage deposit and return obligations for non-reusable packaging and do not prohibit imports of drinks

in such packaging and that it is, moreover, possible for producers to resort to reusable packaging. A measure capable of hindering imports must be classified as a measure having equivalent effect to a quantitative restriction even though the hindrance is slight and even though it is possible for the products to be marketed in other ways (Joined Cases 177/82 and 178/82 *Van de Haar and Kaveka de Meern* [1984] ECR 1797, paragraph 14).

69 In this context, it is not relevant to assert, as the German Government does, that the increase of imports into Germany of natural mineral water in non-reusable packaging in respect of the period preceding the introduction of the deposit and return obligations demonstrates that there is no discrimination against drinks producers established in other Member States. Even if that trend is observed on the German market, it cannot take away the fact that, for drinks producers established in other Member States, Paragraphs 8 and 9 of the VerpackV constitute an obstacle to the marketing of their products in Germany.

70 Contrary to the submissions of the defendant in the main proceedings and the German Government, Paragraphs 8 and 9 of the VerpackV cannot be treated as national provisions which restrict or prohibit certain 'selling arrangements' within the meaning of the judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16 et seq.).

71 The Court has held that the need, resulting from the measures at issue, to alter the packaging or the labelling of imported products prevents those measures from

concerning selling arrangements for the products within the meaning of the judgment in *Keck and Mithouard* (see Case C-33/97 *Colim* [1999] ECR I-3175, paragraph 37, Case C-12/00 *Commission* v *Spain* [2003] ECR I-459, paragraph 76, and Case C-416/00 *Morellato* [2003] ECR I-9343, paragraph 29).

72 As noted in paragraph 64 of the present judgment, the replacement of participation in a global collection system by the establishment of a deposit and return system obliges the producers concerned to alter certain information on their packaging.

73 In any event, given that the provisions of the VerpackV do not affect the marketing of drinks produced in Germany and that of drinks from other Member States in the same manner, they cannot fall outside the scope of Article 28 EC (*Keck and Mithouard*, paragraphs 16 and 17).

Justifications relating to protection of the environment

74 It must be examined next whether, as the defendant in the main proceedings and the German Government assert, rules such as those laid down in Paragraphs 8(1) and 9(2) of the VerpackV can be justified by reasons relating to protection of the environment.

75 In accordance with settled case-law, national measures capable of hindering intra-Community trade may be justified by overriding requirements relating to protection of the environment provided that the measures in question are proportionate to the aim pursued (*Commission* v *Denmark*, paragraphs 6 and 9, and Case C-389/96 *Aher-Waggon* [1998] ECR I-4473, paragraph 20).

76 The obligation to establish a deposit and return system for empty packaging is an indispensable element of a system intended to ensure that packaging is reused (*Commission* v *Denmark*, paragraph 13).

77 With regard to non-reusable packaging, as the defendant in the main proceedings and the German Government state, the establishment of a deposit and return system is liable to increase the proportion of empty packaging returned and results in more precise sorting of packaging waste, thus helping to improve its recovery. In addition, the charging of a deposit contributes to the reduction of waste in the natural environment since it encourages consumers to return empty packaging to the points of sale.

78 Furthermore, in so far as the rules at issue in the main proceedings make the entry into force of a new packaging-waste management system conditional on the proportion of reusable packaging on the German market, they create a situation where any increase in sales of drinks in non-reusable packaging on that market makes it more likely that there will be a change of system. Inasmuch as those rules

thus encourage the producers and distributors concerned to have recourse to reusable packaging, they contribute towards reducing the amount of waste to be disposed of, which constitutes one of the general objectives of environmental protection policy.

79 However, in order for such rules to comply with the principle of proportionality, it must be ascertained not only whether the means which they employ are suitable for the purpose of attaining the desired objectives but also whether those means do not go beyond what is necessary for that purpose (see Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, paragraph 57).

80 In order for national rules to satisfy the latter test, they must allow the producers and distributors concerned, before the deposit and return system enters into force, to adapt their production methods and the management of non-reusable packaging waste to the requirements of the new system. While it is true that a Member State may leave to those producers and distributors the task of setting up that system by organising the taking back of packaging, the refunding of sums paid by way of deposit and any balancing of those sums between distributors, the Member State in question must still ensure that, at the time when the packaging-waste management system changes, every producer or distributor concerned can actually participate in an operational system.

81 Legislation, such as the VerpackV, that makes the establishment of a deposit and return system dependent on a packaging reuse rate, which is certainly advantageous from an ecological point of view, complies with the principle of proportionality only if, while encouraging the reuse of packaging, it gives the producers and distributors

concerned a reasonable transitional period to adapt thereto and ensures that, at the time when the packaging-waste management system changes, every producer or distributor concerned can actually participate in an operational system.

82 It is for national courts to determine whether the change of packaging-waste management system, such as the change provided for in Paragraphs 8(1) and 9(2) of the VerpackV, allows the producers and distributors concerned to participate in an operational system under the abovementioned conditions.

83 Consequently, the answer to the fourth question must be that Article 28 EC precludes national rules, such as those laid down in Paragraphs 8(1) and 9(2) of the VerpackV, when they announce that a global packaging-waste collection system is to be replaced by a deposit and return system without the producers and distributors concerned having a reasonable transitional period to adapt thereto and being assured that, at the time when the packaging-waste management system changes, they can actually participate in an operational system.

Question 2

84 In light of the answer given to the fourth question, it is no longer necessary to answer the second question.

Costs

85 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) rules as follows:

1. **Article 1(2) of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste does not preclude the Member States from introducing measures designed to promote systems for the reuse of packaging.**

2. **While Article 7 of Directive 94/62 does not confer on the producers and distributors concerned any right to continue to participate in a given packaging-waste management system, it precludes the replacement of a global system for the collection of packaging waste with a deposit and return system where the new system is not equally appropriate for the purpose of attaining the objectives of that directive or where the changeover to the new system does not take place without a break and without jeopardising the ability of economic operators in the sectors concerned actually to participate in the new system as soon as it enters into force.**

3. **Article 28 EC precludes national rules, such as those laid down in Paragraphs 8(1) and 9(2) of the Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen (Regulation on the Avoidance and Recovery of Packaging Waste), when they announce that a global packaging-waste collection system is to be replaced by a deposit and return system without the producers and distributors concerned having a reasonable transitional period to adapt thereto and being assured that, at the time when the packaging-waste management system changes, they can actually participate in an operational system.**

Signatures.