

Official Journal

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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 April 2001

relating to a proceeding pursuant to Article 82 of the EC Treaty

(Case COMP D3/34493 — DSD)

(notified under document number C(2001) 1106)

(Only the German text is authentic)

(Text with EEA relevance)

(2001/463/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas:

Having regard to the Treaty establishing the European Community,

A. THE FACTS

Having regard to the Agreement on the European Economic Area, and in particular Article 54 thereof,

I. THE PROCEEDING, AND THE FIRMS CONCERNED

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by Regulation (EC) No 1216/1999 of 10 June 1999 ⁽²⁾, and in particular Article 3 thereof,

- (1) On 2 September 1992 Der Grüne Punkt — Duales System Deutschland AG (hereinafter: 'DSD'), in Cologne, notified a number of agreements with a view to obtaining negative clearance or a decision granting exemption from the prohibition on restrictive practices. DSD operates in Germany a countrywide system for the collection and recovery of sales packaging. The system is designed to meet the requirements of the German Packaging Ordinance. The notification concerns those agreements (the Statutes, the Service Agreement, the Trade Mark Agreement and the Guarantee Agreements) on which operation of the system is based.

Having regard to the Commission decision of 25 October 1996 to initiate proceedings in this case,

- (2) Following publication of the notification pursuant to Article 19(3) of Regulation No 17, in which the Commission announced its intention of taking a favourable view of the agreements in question, 13 sets of observations in all were received from interested third parties ⁽⁴⁾. Several of these sets of observations concerned various aspects of the application of the Trade Mark Agreement. It was thus objected that the

Having given the firm concerned the opportunity to make known its views on the objections raised by the Commission in accordance with Article 19 of Regulation No 17 and Article 2 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty ⁽³⁾,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions on 19 February 2001,

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ L 148, 15.6.1999, p. 5.

⁽³⁾ OJ L 354, 30.12.1998, p. 18.

⁽⁴⁾ OJ C 100, 27.3.1997, p. 4.

agreement restricted competition in that it led, in the event of alternative contractors being appointed in addition to DSD, to licensees being charged twice, thereby rendering such solutions financially not worthwhile.

- (3) On 19 November 1997, the Commission received comments from a competing waste disposal firm in which it was pointed out that, owing to the expected extra cost, the Trade Mark Agreement in its notified form did not allow an undertaking subject to the obligations arising out of the Packaging Ordinance ('obligated' undertaking) to work in partnership with a competing contractor in respect of partial quantities of sales packaging.
- (4) Following talks with officials from the Commission, DSD submitted, on 15 October 1998, a commitment aimed at avoiding double charging in the event of a contracting party taking part in a regionally active exemption system.
- (5) On 3 November 1999, the Commission sent DSD a letter informing it that the commitment it had so far given with a view to avoiding double charging under the Trade Mark Agreement was not sufficient. The commitment, which so far covered only exemption systems, needed to be extended to include self-management solutions for partial quantities of sales packaging.
- (6) On 15 November 1999, hair-care product manufacturers L'Oréal, Wella, Goldwell and Schwarzkopf, the hairdressing supplies industrial association (Industrieverband Friseurbedarf) and the waste disposal contractor Vfw, who wished to organise in Germany a self-management solution for the take-back and recovery of packaging for the hair-care products used by hairdressers, addressed a formal complaint to the Commission. The complainants referred to what were in their view abuses on the part of DSD under the Trade Mark Agreement which impeded the establishment of a self-management solution rivalling DSD. In the complainants' opinion, DSD was abusing its dominant position even where use of the trade mark and the exemption service actually and demonstrably rendered by DSD diverged.
- (7) Following talks with officials from the Commission, DSD submitted two further commitments by letter dated 13 March 2000. It stated, moreover, that it did not share the Commission's views regarding modification and clarification of the commitment submitted on 15 October 1998 (see recital 4) and that it could see no reason to amend it any further.
- (8) On 3 August 2000, the Commission sent a Statement of Objections to DSD. DSD replied by letter dated 9

October 2000, in which it indicated that it was prepared to submit a further commitment if this would meet the Commission's concerns. It subsequently failed to produce the promised commitment. In its letter of 9 October 2000, DSD did not request an oral hearing under Article 5 of Regulation (EC) No 2842/98. By letter dated 21 November 2000, DSD submitted a newly worded commitment and at the same time asked that a hearing be held. The Hearing Officer informed DSD by letter dated 28 November 2000 that, owing to the comparatively long period between the submission by DSD of its written comments on the Statement of Objections and the 21 November letter, its request could not be acceded to.

II. THE PACKAGING ORDINANCE AS LEGAL FRAMEWORK

- (9) On 12 June 1991, the 'Verordnung über die Vermeidung von Verpackungsabfällen' (Ordinance on the Avoidance of Packaging Waste, or 'Packaging Ordinance') was adopted in Germany. An amended version of the Ordinance entered into force on 28 August 1998. The Ordinance is intended to prevent or reduce the impact of packaging waste on the environment.
- (10) The Packaging Ordinance is binding mainly on packaging manufacturers and distributors. A distinction is made in Section 3(1) between sales packaging, transport packaging and secondary packaging. Sales packaging is packaging which is provided as a sales unit and is used by the final consumer. 'Sales packaging' within the meaning of the Ordinance may also be packaging used by the distributive trades, restaurants and other service providers which makes possible or supports (service packaging) both non-returnable crockery and non-returnable cutlery. Transport packaging is packaging which facilitates the transport of goods, which protects goods in transit between the manufacturer and the distributor against damage or which is used for reasons of safety of the transport and is used by the distributor. Secondary packaging is packaging which is used as an additional layer of packaging over sales packaging and which is not needed for reasons of hygiene, preservation or protection of the goods against damage or soiling for sale to the final consumer.
- (11) The terms 'manufacturer' and 'distributor' are defined in Section 3(7) and (8) of the Packaging Ordinance. A manufacturer within the meaning of the Ordinance is someone who manufactures packaging, packaging materials or products from which packaging is directly made, or who imports packaging into the territory covered by the Ordinance. A distributor within the

meaning of the Ordinance is someone who puts packaging, packaging materials or products from which packaging is made, or packaged goods, into circulation, regardless of the marketing stage. A distributor within the meaning of the Ordinance may also be the mail-order trade. Pursuant to the first sentence of Section 3(10) of the Packaging Ordinance, a final consumer is the purchaser who does not sell on the goods in the form in which they are delivered to him.

- (12) The rules on sales packaging, secondary packaging and transport packaging differ. As far as sales packaging is concerned, Section 6(1) of the Packaging Ordinance provides that the distributor of sales packaging is obliged to take back from final consumers, free of charge, used, empty sales packaging at, or in the immediate vicinity of, the actual point of sale and to recover it in accordance with the quantitative requirements of the Annex to the Ordinance (the 'self-management solution'). The distributor must draw the attention of the private final consumer by means of clearly visible, legible labelling to the fact that the packaging may be returned (third sentence of Section 6(1)). The distributor's take-back obligation is limited to packaging of the type, shape and size, and to packaging of those goods, which the distributor carries in his range (fourth sentence of Section 6(1)). 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 which the distributor puts into circulation (fifth sentence of Section 6(1)). A corresponding take-back obligation is also imposed on mail-order firms, which have, for example, to provide adequate facilities within a reasonable radius of the final consumer (sixth sentence of Section 6(1)).
- (13) Germany stated in answer to questions put by the Commission 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. The Cologne Regional Court has held, however, that the quota need not be met only via collections in the vicinity of a shop ⁽⁵⁾. Pursuant to Section 6(2) of the Packaging Ordinance, the packaging taken back by the distributor pursuant to subsection 1 must in turn be taken back by its manufacturer and (previous) distributors and must be reused or recycled outside the public waste-management system.
- (14) Pursuant to Section 11 of the Packaging Ordinance, manufacturers and distributors may delegate responsibility for fulfilling all take-back and recovery obligations to third parties.
- (15) Pursuant to the first sentence of Section 6(3) of the Packaging Ordinance, the take-back and recovery obligation does not apply to manufacturers and distributors participating in an extensive (countrywide) system which throughout the distributor's sales territory guarantees the regular collection of used sales packaging from the final consumer or in the vicinity of the final consumer. The system must likewise meet certain recovery quotas. There is no legal obligation to participate in such a system once it has been set up. Firms which do not participate continue to be subject to the individual take-back obligation. The scope of a system under Section 6(3) of the Packaging Ordinance is restricted to sales packaging collected from private final consumers ⁽⁶⁾. Private final consumers within the meaning of the Ordinance are, according to the second sentence of Section 3(10), private households and comparable sources of waste generation, in particular restaurants, hotels, canteens, government offices, barracks, hospitals, educational establishments, charitable organisations, the offices of professional people, agricultural holdings 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 using normal household containers for paper, cardboard, cartons and light packaging with a capacity no greater than 1 100 litres for each material.
- (16) Pursuant to paragraph 2 of point 4 of Annex I to the Packaging Ordinance, manufacturers and distributors have to make known their participation in a system pursuant to Section 6(3) of the Packaging Ordinance by marking packaging or by other suitable means (e.g. by informing customers at the point of sale or by a package leaflet). The marking of packaging with a system mark in the absence of membership of the system is not punishable by a fine under the Packaging Ordinance ⁽⁷⁾.

⁽⁶⁾ See Section 6(3) and Section 3(1), point 2, and (10), and the third sentence of paragraph 1 of Annex I to the Packaging Ordinance.

⁽⁷⁾ (Question put by the Commission:) 'Does the Packaging Ordinance allow a range of packaging to be uniformly marked despite its being partially disposed of under Section 6(3) of the Packaging Ordinance (e.g. in the circumstances provided for in the ninth sentence of Section 6(1) of the Ordinance), bearing in mind that the distributor cannot foresee which specific packaging will be disposed of in the vicinity of the shop and which will be disposed of in the vicinity of the home?' (Answer given by Germany:) 'The marking of packaging with the system mark pursuant to paragraph 2 of point 4 of Annex I in the absence of membership of the system is not punishable by a fine under the Packaging Ordinance. It may, however, be caught by other legal provisions, such as trade mark law.'

⁽⁵⁾ See Cologne Regional Court judgment of 13 January 2000, ref. 31 0 991/99.

- (17) Recognition as an extensive system within the meaning of Section 6(3) of the Packaging Ordinance is granted by decision of the competent authority of the *Land*. The fourth sentence of Section 6(3) of the Packaging Ordinance provides that the system must be consistent with existing collection and recovery systems as employed by the local bodies responsible for waste collection. In practice, the recognition of a system by the competent *Land* authority is dependent on a 'declaration of consistency' being issued by the relevant body. This means that municipal and rural district authorities must endorse the agreement concluded in their territory between the system operator and the collector.
- (18) In an annex to the Ordinance, the quantitative conditions for recognition are laid down. Before the Ordinance was amended, these collection and sorting quotas were defined by reference to the total amount of packaging material in the source area (i.e. *Land*). Thus, for example, as of 1 July 1995, 80 % of all packaging material was covered by the collection system. From the materials collected, 90 % of glass, tinplate and aluminium and 80 % of cardboard, paperboard, paper, plastic and compound packaging had to be sorted into a quality suitable for recycling. During the period from 1993 until 30 June 1995, reduced quota requirements applied.
- (19) Once the Packaging Ordinance was amended, this absolute calculation method was converted into an individual-system-based calculation method (i.e. one covering the sales packaging fed into a given system). In future, moreover, those manufacturers and distributors who do not participate in a system pursuant to Section 6(3) of the Packaging Ordinance also have to meet these quantitative requirements. Since 1 January 2000, 75 % of packaging made of glass, 70 % of packaging made of tinplate, paper, cardboard and paperboard, and 60 % of packaging made of composites must be recovered both by the operators of extensive systems within the meaning of Section 6(3) of the Ordinance as regards packaging for which manufacturers and distributors participate in their system and by manufacturers and distributors who opt for a self-management solution. At least 60 % of packaging made of plastic must be recovered, and at least 60 % of this quota must be recovered using processes whereby new, physically identical material is produced or the plastic remains available for another material use ('reusable' material process). Packaging made of material for which no specific recovery methods are prescribed is to be recycled as far as is technically possible and economically reasonable. In the case of a self-management solution, compliance with the take-back and recovery requirements must be certified by an independent expert on the basis of verifiable documents (paragraph 1 of point 2 of Annex I). An exemption system must furnish verifiable evidence of the quantities collected and recovered. At the request of the competent authority, the evidence must be confirmed by an independent expert's report (paragraph 4 of point 3 of Annex I).
- (20) Germany has indicated that a simultaneous combination of the self-management solution and participation in a Section 6(3) system is possible and that therefore participation in a Section 6(3) system with a certain quantity of a packaging product is also possible. In the interests of the consumer and of the authorities, however, a degree of transparency must be introduced, such as to show which packaging is subject to the take-back obligation at, or in the immediate vicinity of the shop and which is not. Germany has also confirmed that, pursuant to the Packaging Ordinance, the final consumer is free to decide whether to leave the packaging in the shop or to return it to the shop later, or to take it to a disposal point near his home ⁽⁸⁾.
- (21) Where the distributor and the manufacturer do not fulfil the obligations laid down in the first sentence of Section 6(1) and the first sentence of Section 6(2) of the Packaging Ordinance by taking back packaging at the point of sale, they have to ensure, pursuant to the ninth sentence of Section 6(1), read in conjunction with the fourth sentence of Section 6(2), of the Ordinance that it is taken back using a system pursuant to subsection 3. Germany has further indicated in this connection that a self-manager who has not met his recovery quota is required to participate in a Section 6(3) system with the amount of packaging that is necessary in order to meet the quota.
- (22) For transport packaging and secondary packaging, there are similar take-back obligations. However, there is no possibility of release from these obligations by way of participation in a system. Nor are there any take-back
- ⁽⁸⁾ (Question put by the Commission:) 'Is it correct to say that, pursuant to the Packaging Ordinance, the final consumer is free to decide whether to leave the packaging in the shop or to bring it back there, or to take it to a disposal point near his home?' (Answer given by Germany:) 'The Packaging Ordinance does not contain any express provision requiring the final consumer to return the packaging. The assumption contained in the question is therefore correct.'

and quota requirements. Distributors who offer goods in secondary packaging are obliged to remove it when handing goods over to final consumers or to make available at the point of sale facilities where final consumers can return the secondary packaging free of charge. If the final consumer leaves the goods in their secondary packaging, it is treated as sales packaging for the purposes of the Packaging Ordinance.

(23) In response to questions put by the Commission, Germany declared back in 1993 that Section 6(3) of the Packaging Ordinance would not be interpreted as meaning that the establishment of only one system was possible. The Packaging Ordinance allowed the setting-up of additional disposal systems for sales packaging. It was not the legislator's intention that only one system should be created in Germany or in each *Land*.

(24) According to Germany's explanatory memorandum to the amended version of the Packaging Ordinance, one of its basic aims is to enhance competition. This is to be achieved, *inter alia*, by henceforth putting collection, sorting and recovery services out to competitive tender and by selling packaging intended for recovery under competitive conditions. Moreover, the costs associated with the collection, sorting and recovery or disposal of each packaging material are to be published.

III. THE COLLECTION AND RECOVERY SYSTEM OPERATED BY DSD

(25) DSD is the only undertaking in Germany which operates an extensive system for the collection and recovery of sales packaging within the meaning of Section 6(3) of the Packaging Ordinance. At the beginning of 1993, DSD was recognised by all competent authorities in the German *Länder*. The system has been in operation since 1992 and has been fully operational since 1993. It is called a 'dual' system as the collection and recovery of packaging is effected outside the public waste disposal system and is operated by a private undertaking.

(26) Besides DSD, there are a few other undertakings which organise the collection and recovery of sales packaging. However, these undertakings are not extensive systems within the meaning of Section 6(3) of the Packaging Ordinance. They operate as a third undertaking within

the meaning of Section 6(1) and (2) read in conjunction with Section 11 of the Packaging Ordinance. In other words, they fulfil directly the take-back obligations of manufacturers or distributors of sales packaging. A large number of other undertakings collect and recover transport packaging.

(27) DSD is financed by fees from undertakings belonging to the system. Undertakings become members of the system by becoming a signatory to the 'Trade Mark Agreement'. By this means, the undertaking acquires the right, against payment of a fee, to use the Green Dot trade mark on its sales packaging and, as an actual service, exemption from the obligation to take back such packaging.

(28) DSD's turnover in 1998 was DEM 4,2 billion, and for 1999, a turnover of approximately DEM 3,8 billion is expected. DSD collected some 5,6 million tonnes of sales packaging in 1998. Some 17 000 firms are currently members of the system. It is estimated that a Trade Mark Agreement has been concluded for some 70 % of all sales packaging put into circulation in Germany. The following table shows the amount of packaging collected by DSD as a proportion of the total volume of packaging over the period 1995 to 1998:

	1995	1996	1997	1998
Used sales packaging ⁽¹⁾ collected by DSD (million tonnes)	5,06	5,45	5,61	5,60
Consumption of sales packaging by private final consumers (million tonnes)	6,96	6,87	6,85	6,86
Total consumption of sales packaging (million tonnes)	7,91	7,81	7,81	7,85
Percentage of total sales packaging consumption covered by DSD	63,97 %	69,78 %	71,83 %	71,34 %
Percentage of sales packaging consumption of final consumers covered by DSD	72,70 %	79,33 %	81,90 %	81,63 %

⁽¹⁾ All estimates of the consumption of sales packaging were prepared by GVM (Gesellschaft für Verpackungsmarktforschung Wiesbaden) (see in particular the packaging recycling statement of March 1999). Figures for the used sales packaging covered by DSD were supplied by DSD.

- (29) DSD does not perform the task of collection itself but employs local (public or private) collecting companies. DSD has concluded 'service' agreements with those undertakings. There are 546 collection districts. Some collectors are DSD contractors for more than one district. DSD has concluded agreements with 537 collectors in all. Some of the collectors are in turn integrated into larger groups of companies. Under the service contract, the collector has the exclusive task of collecting and sorting used sales packaging in a certain district. The system covers private households and certain business enterprises. The collector does not necessarily collect and sort all packaging himself, subcontractors often being used for the collection and sorting of certain materials.
- (30) The system established by DSD collects used sales packaging made from all kinds of materials. The packaging is deposited either in containers placed close to private households or in plastic bags or containers which have been distributed to individual households. Sorting the collected material is the responsibility of the collector. Usually the sorting is done by specialised undertakings. The collector takes all packaging put into the containers, regardless of whether or not it bears the Green Dot mark. Other objects put into the containers will also be recovered if they are suitable or will be sorted as waste. In the containers/bags used to collect sales packaging made of paper/cardboard, the collector usually also collects old printed matter (newspapers and magazines). This makes up the larger part (about 75 %) of the paper/cardboard collected. The collection of printed matter is not part of the DSD system and is not paid for by DSD.
- (31) Once the material has been sorted it is conveyed to a recovery plant either directly by the collector or with the help of third parties, or handed over to 'guarantee' companies. These guarantee companies have given DSD an assurance that they will recover the used packaging. The guarantee companies are either organised by the industries producing the relevant packaging materials or are undertakings specially created for the purpose of marketing and recovering the collected materials. The Packaging Ordinance requires that recovery should take the form of recycling. Incineration or landfill do not qualify as recovery.
- (32) The system operated by DSD does not collect all sales packaging within the meaning of the Packaging Ordinance but only that arising in private households and comparable sources of waste generation. Transport packaging is not collected. This restriction of the range of DSD's activities has been ordered by the competent German authority, the Federal Cartel Office.
- (33) The Federal Cartel Office has objected several times to attempts by DSD to extend the range of its activities.
- (34) In October 1992, DSD announced plans to start collecting sales packaging which ends up at large enterprises and industrial installations. After the Federal Cartel Office had objected that this would lead to the exclusion from the market of those collectors which are not DSD contractors, the project was abandoned. The Federal Cartel Office expressed the view in this case that the individual *Länder* decisions which obliged DSD to engage in the behaviour in question could not prevent the Office from stopping these activities. In a settlement of the case, it was agreed that DSD may collect from the following premises on the same pattern (in terms of intervals) as for private households: restaurants, canteens, hospitals, government offices, educational establishments, barracks, offices of liberal professions and craft enterprises, excluding printers and other paper-using enterprises, which have containers not larger than 1 100 litres for each material.
- (35) In a second case, the Federal Cartel Office issued a formal prohibition order on 24 June 1993 against a project whereby DSD extended its range of activities to sales packaging which is not sold in retail outlets and to transport packaging. The subject of the order was DSD's plan to collect, via a subsidiary, sales packaging and transport packaging made of paper/cardboard and plastic arising at large commercial and industrial installations. The Federal Cartel Office saw the bundling of the demand for collection services as a restraint of competition within the meaning of Section 1 of the German Law prohibiting Restraints of Competition. DSD has not appealed against the order.
- IV. THE TRADE MARK AGREEMENT AS ONE OF THE AGREEMENTS INVOLVED
- (36) The relationship between DSD and the undertakings which participate in the system is governed by a

standard-form agreement, the 'Trade Mark Agreement for the Use of the Green Dot' (hereinafter called the 'Trade Mark Agreement' or 'the Agreement'). The Agreement has been amended several times since notification, most recently on 5 September 1994.

(37) Under the Agreement, DSD is the owner of the Green Dot registered certification trade mark and grants manufacturers and distributors the right to mark the sales packaging which is to be covered by the system. DSD allows the mark to be used for separately registered sales packaging (Article 1(1) of the Agreement).

(38) DSD undertakes vis-à-vis the participating company (called the licensee in the Agreement) that it will effect the comprehensive/nationwide collection, sorting and recovery of used sales packaging in such a manner as to exempt participating manufacturers and distributors from their take-back and recovery obligations under the Packaging Ordinance (Article 2 of the Agreement).

(39) The other party is obliged to use the trade mark, in a particular shape and manner, on all registered packaging for domestic consumption, so that it is visible to the final consumer. DSD may release it from this obligation (Article 3(1) of the Agreement).

(40) The other party has to pay DSD a licence fee for all packaging bearing the Green Dot mark which it sells on German territory in accordance with the Agreement. Exceptions to this rule require a separate written agreement (Article 4(1) of the Agreement; repeated in Article 5(1), without the possibility of an exception).

(41) The amount of the licence fee is determined according to the price list valid since 1 January 1995 (Article 4(2) of the Agreement). The licence fee is calculated by adding the weight-related charge and the unit charge. The former depends on the weight of the packaging and the material used, while the latter is based on the volume or surface area of the packaging.

(42) The licence fee may be adjusted unilaterally by DSD. Any increase or reduction in it is subject to the

following principles: licence fees are calculated without any profit mark-up; they serve solely to cover the costs incurred in collecting, sorting and recovering packaging and the associated administrative costs (Article 4(3) of the Agreement). The system costs are allocated to the specific groups of materials on the basis of the polluter-pays principle.

(43) The Agreement is renewed for one year at a time, unless notice is given two months prior to expiry (Article 16). The licensee is entitled to terminate the Agreement by giving six months' notice before it ceases to market registered packaging in Germany (Article 11(1)).

The licensee is free to register its complete set of packaging or just specific packaging.

(44) DSD AG is sole owner of the rights to use the Green Dot mark in Germany. For purposes of using the trade mark outside Germany, especially in the territory of the Community, DSD has transferred the rights by way of a general licence to ProEurope (Packaging Recovery Organisation Europe SPRL), whose registered office is in Brussels.

(45) Private-sector take-back and exemption systems comparable to DSD's have also been set up in other Member States of the European Union in recent years. Many of them likewise use, under an appropriate licensing agreement with ProEurope, the Green Dot mark. Currently these systems are: Eco-Emballages SA (France), Altstoff Recycling Austria AG (Austria), asbl Fost plus vzw (Belgium), Sociedade Ponto Verde SA (Portugal), Ecoembalajes España (Spain), Valorlux asbl (Luxembourg) and Repak Limited (Ireland). Many of these, in their own Member States, have attained a comparable market position to that of DSD.

(46) The general licence transferring rights to ProEurope and the licensing agreements between ProEurope and the individual systems are not covered by this Decision.

V. COMMITMENTS SUBMITTED BY DSD

(47) DSD has submitted to the Commission a number of commitments in connection with the Trade Mark Agreement.

- (48) In order to ensure a transparent, equitable determination of the licence fee, DSD has submitted the following commitment:
- (49) 'Duales System Deutschland AG undertakes to determine the amount of the licence fee and/or the basis of its assessment for the use of the Green Dot trade mark in such a way that costs are allocated in accordance with the polluter-pays principle to the specific groups of materials and to let this periodically be verified (e.g. by an accountant).'
- (50) The Agreement does not differentiate between undertakings whose registered office is in Germany and those whose registered office is in some other member country of the European Economic Area. DSD has also given the following commitment:
- (51) 'Duales System Deutschland AG undertakes to conclude with manufacturers and distributors of sales packaging whose registered office is in the European Community or the European Economic Area agreements on use of the Green Dot trade mark within the territory covered by the Packaging Ordinance. It undertakes to treat undertakings whose registered office is in one of the countries referred to in paragraph 1 no differently from those whose registered office is in the territory covered by the Packaging Ordinance. The obligations referred to in paragraphs 1 and 2 may not be derogated from without just cause. In such cases, Duales System Deutschland AG undertakes to inform the Commission immediately.'
- (52) Since for legal, technical, organisational and other reasons it cannot be excluded in certain cases that there will be a discrepancy between use of the Green Dot mark and the actual or intended availment of the service, DSD has submitted various commitments in the light of the concerns expressed by the Commission.
- (53) Where packaging is put into circulation both in Germany and in other member countries of the European Economic Area and participation in the DSD system in Germany is proposed, DSD has submitted the following commitment:
- (54) 'Duales System Deutschland AG may charge a licence fee in the European Community or the European Economic Area for use of the Green Dot trade mark only for packaging which has been put into circulation in the territory covered by the Packaging Ordinance.
- Where packaging for which a licence fee for use of the Green Dot trade mark has already been paid to Duales System Deutschland AG is exported from the territory covered by the Packaging Ordinance to other Member States of the European Community or the European Economic Area, Duales System Deutschland AG undertakes to reimburse the amount paid. This obligation exists only if the manufacturer or distributor proves that the licence fee for the packaging in question has been paid and no claim for reimbursement has been made. Such an obligation to reimburse exists also vis-à-vis manufacturers and distributors which have not concluded an agreement for use of the Green Dot trade mark. Duales System Deutschland AG is obliged to treat as confidential all information which it obtains on suppliers and customers of such manufacturers and distributors.'
- (55) Since a system's scope is restricted under Section 6(3) of the Packaging Ordinance to sales packaging which ends up in the possession of a private final consumer (see recital 15), situations may also arise where uniformly designed packaging ends up partly in the possession of a private final consumer and partly either with the distributor (in which case it is not sales packaging and is hence not covered by systems under Section 6(3)) and/or in the large enterprise/industrial sector, which is not covered by systems under Section 6(3) either. DSD has submitted the following commitment in this regard:
- (56) 'Where Duales System Deutschland AG is prevented by legal reasons from collecting used sales packaging at certain points, it is obliged vis-à-vis those manufacturers and distributors which are not able to use the Green Dot trade mark in such a way that it corresponds with the usual collection points to renounce in writing its claim to payment of part of the licence fee, subject to appropriate conditions.'
- (57) The details of the waiver are set out in supplementary agreements known as 'splitting agreements'. These establish how the fee is to be split and the reasons for doing so. So far DSD has concluded supplementary agreements with 12 industries. It has explained that the splitting agreements are not included in the notification. The conclusion and substance of these splitting agreements are not the subject of this Decision.
- (58) Where systems restricted to one or more *Länder* form an alternative to the DSD system under Section 6(3), it is not improbable that uniformly designed packaging will

- be part of the alternative system in those *Länder* but part of the DSD system in the others. DSD has submitted the following commitment in this respect:
- (59) 'On condition that regional alternative systems to the current Dual System are created which are formally approved by the highest competent regional authority under Section 6(3) of the Packaging Ordinance, Duales System Deutschland AG is prepared to apply the Trade Mark Agreement in such a way that licensees are able to participate in such a system as regards some of their packaging. It will not charge a licence fee under the Trade Mark Agreement for packaging that can be shown to be covered by such an alternative system. A further condition for release from the licence fee obligation in respect of packaging bearing the Green Dot is that protection of the Green Dot trade mark should not be impaired.'
- (60) Where manufacturers and distributors dispose of some of the sales packaging waste themselves and participate in the DSD system for the remainder, DSD has submitted the following commitment:
- (61) 'Where, pursuant to Section 6(1) and/or (2) (read, where appropriate, in conjunction with Section 11) of the Packaging Ordinance, manufacturers and distributors organise the take-back and recovery of some sales packaging sold in the territory covered by the Packaging Ordinance and participate in the DSD system for the remainder (ninth sentence of Section 6(1)), Duales System Deutschland AG will not charge a licence fee under the Trade Mark Agreement for those quantities of sales packaging which can be shown to have been taken back in accordance with Section 6(1) and/or (2) of the Packaging Ordinance. Evidence is to be furnished in accordance with the requirements of point 2 of Annex I to the Packaging Ordinance.'
- (62) Where uniformly designed packaging is put into circulation both in Germany and in one or more other Member States of the European Community or the European Economic area and is taken back in those Member States by a system which uses the Green Dot mark but is not a member of the DSD system in Germany, DSD has submitted the following commitment:
- (63) 'In the case of packaging which is collected and processed in another Member State under a system using the Green Dot trade mark and which is put into circulation using the trade mark in the territory covered by the Packaging Ordinance, Duales System Deutschland AG may not charge a licence fee, if the requirements of the Packaging Ordinance can be shown to have been met other than through participation in the system set up by DSD AG under Section 6(3). This is subject to the condition that it should be made clear to the final consumer on the packaging, in proximity to the Green Dot trade mark, in words or other suitable form, that the packaging does not participate in the dual system set up by DSD AG under Section 6(3) of the Ordinance.'
- (64) DSD has explained to the Commission that the obligation to furnish evidence contained in the commitment should not be interpreted as meaning that DSD can first claim licence fees and only repay them if evidence is supplied that the requirements of the Packaging Ordinance are actually met. Rather, the undertaking concerned need not pay DSD a licence fee if the conditions stipulated in the commitment are actually met. These conditions include, in particular, the provision of clear information to the final consumer that, despite the fact that it bears the Green Dot mark, the packaging does not participate in the dual system set up by DSD under Section 6(3) of the Ordinance. By 1 May of the following year, the firm concerned must then prove to DSD that the requirements of the Packaging Ordinance have actually been met. If the evidence is not sufficient, DSD can claim the licence fee on a pro rata basis. As regards the substantive criteria which the evidence must meet, DSD refers to the specifications given in the Packaging Ordinance. As the law stands, in the case of a Section 6(1) solution, sufficient evidence means a certificate from an independent expert to the effect that the take-back and recovery requirements under the sixth sentence of point 2(1) of Annex I (to Section 6) are met. In the case of participation in a Section 6(3) system, confirmation of the operator's participation is also required in principle in accordance with point 4(3) of Annex I (to Section 6). The essential point about the evidence, however, from DSD's standpoint, is that it must show in a comprehensible way the extent to which, despite bearing the Green Dot mark, the packaging has not been introduced into the system operated by DSD.

B. LEGAL ASSESSMENT

I. ARTICLE 82(1) OF THE TREATY

1. DOMINANT POSITION

1.1. *Relevant market*

1.1.1. *Relevant product market*

(65) The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of their characteristics, their prices and their intended use.

(66) The purpose of DSD is to organise and operate a 'dual private take-back system' for used packaging. The agreements on which the DSD system is based produce economic effects at various levels at which value added is created. The market definition is based on the agreement concerning the use of the trade mark at issue in this case.

Analysis of demand

(67) The market in question came into being as a result of the requirements of the German Packaging Ordinance. With its adoption, manufacturers and distributors were, for the first time, placed under an obligation to take back and recover used sales packaging outside the public waste-management framework (see recitals 10 to 16). The Ordinance offered the undertakings in question two options for fulfilling this obligation.

(a) Under Section 6(1) and (2) of the Packaging Ordinance, manufacturers and distributors are required to take back used packaging from the final consumer free of charge at the place at which it was originally obtained by the latter or in the immediate proximity thereof, and subsequently to recover the said packaging. Manufacturers and distributors may, under Section 11 of the Packaging Ordinance, entrust compliance with their take-back and recovery obligations to third parties.

(b) Under the first sentence of Section 6(3), the take-back obligation does not apply to manufacturers or distributors who participate in a system which, throughout the distributor's trading area, guarantees a regular collection of used packaging directly from the final consumer or at a place close to the final consumer.

(68) According to the arrangements established by the Packaging Ordinance, obligated undertakings thus have two alternative and, since the same rate of recovery must be achieved in both cases (see recital 19), interchangeable options: the 'self-management' solution provided for by Section 6(1) and (2) in conjunction with Section 11 and participation in an exemption system under Section 6(3).

(69) Since, however, the scope of a system under Section 6(3) of the Packaging Ordinance is restricted to sales packaging collected from private final consumers (see recital 15), these two options are interchangeable only in the case of such packaging. Sales packaging that is collected from large enterprises and industrial installations cannot participate in an exemption system under Section 6(3). The obligations stemming from the Packaging Ordinance can accordingly be fulfilled in the case of such sales packaging only through a self-management solution. The demand for take-back and recovery services for used sales packaging which is not collected from private final consumers therefore constitutes a separate (albeit related) market from the market defined below.

(70) In the light of this differentiation, an assessment might accordingly be based on the widest conceivable definition of the market as being a single market for organising the take-back and recovery of used sales packaging collected from private final consumers. On this market, undertakings fulfil their Packaging Ordinance obligations either by themselves taking back and recovering used sales packaging or by participating in a system which exempts them from their obligations. Both possibilities appear to those subject to the obligations to be equally well suited to meeting the requirements of the Packaging Ordinance regarding sales packaging collected from private final consumers and hence are to be considered basically interchangeable.

(71) However, there are *de facto* and *de jure*, differences between a self-management solution and participation in an exemption system which limit their interchangeability in the light of particular combinations of packaging and collection point and which might suggest that a narrower market definition would be more appropriate. The self-management option requires sales packaging to be taken back at the place where it was actually supplied or in the vicinity thereof (i.e. in normal circumstances, at or around the point of sale). In replying to the Commission's questions on this matter, Germany indicated that, in assessing compliance with recovery rates to be achieved in the case of self-management, only packaging taken back at the place at which it was originally obtained by the final consumer or in the immediate proximity thereof would

be taken into account and that any packaging collected directly from households would be disregarded (see recital 13). Accordingly, opting for the self-management solution might, for reasons of organisation or hygiene, give rise to problems in meeting the stipulated recovery rates. In the case of packaging obtained by the final consumer at a given point of sale, it also presupposes that the consumer will be willing to dispose of it at or around the point of sale. This is highly unlikely for the bulk of consumer packaging given that consumers are accustomed to disposing of waste close to their homes.

(72) It would thus appear that, according to Germany's interpretation, the self-management solution enables recovery rates to be fully met solely in the case of certain combinations of packaging and collection point (recital 81). For the vast majority of packaging, it will in fact be possible to meet the recovery-rate requirement and thus comply with the Packaging Ordinance by (also) participating in an exemption system. However, if the interpretation of the Ordinance put forward by the Cologne Regional Court (see recital 13) prevails, full compliance with the rates would generally be attainable with self-management solutions.

(73) Legally speaking, manufacturers and distributors can be released from their Packaging Ordinance obligations solely by participating in a Section 6(3) system. If they opt for the self-management solution but with the involvement of a third party in accordance with Section 11 of the Packaging Ordinance, their obligations remain fully effective until such time as they have been fulfilled by the third party.

(74) The said differences might be an argument in favour of limited substitutability between the self-management solution and participation in an exemption system from the demand viewpoint of obligated undertakings.

Analysis of supply

(75) On the supply side too, the requirements linked to the supply of a service which exempts manufacturers and distributors from their obligations to take back and

recover sales packaging are not necessarily comparable to those of a self-management solution or other services which exist in the waste-management sector.

(76) Recognition as a take-back system within the meaning of Section 6(3) of the Packaging Ordinance by the competent *Land* authorities and hence exemption from the original take-back obligation is subject to compliance with a number of requirements, as set out in the Packaging Ordinance (see recitals 17, 18 and 19). The main requirements of such a system are:

- (a) that it operates in an area covering at least that of a *Land*,
- (b) that it is operated close to the final consumer,
- (c) that regular collections are made,
- (d) that certain quotas are met, and
- (e) that it is consistent with the operations of public waste-management bodies.

(77) All of these requirements, but particularly the one relating to area of coverage, imply substantial initial investment and a long development period. Considerable administrative hurdles must also be overcome in connection with the consistency requirement and the system's exemption by the competent authorities. The cumulative effects of these requirements constitute a significant barrier to market entry which prevents the short-term entry of other service providers in the waste-management sector.

(78) Given that the services in question are a new phenomenon, the nature and the means of pursuing the necessary business activity differ significantly from the services traditionally supplied in the waste-management sector, e.g. in the area of industrial and large-scale waste management or that of traditional household refuse and waste collection. The core services involved are thus less the technical and operational execution of collection, sorting and/or recovery functions and more the targeted combination and organisation of a variety of coordinated services which, taken as whole, make it possible to offer exemption from the take-back obligation in respect of sales packaging to those undertakings which participate in the system.

(79) There is therefore no short-term substitutability of supply.

Conclusions

- (80) Against this background, the relevant product market may be defined as the market for systems which exempt undertakings from their take-back and recovery obligations in respect of sales packaging (hereinafter referred to as the 'exemption market'). A related market would be the market for the organisation of compliance with the take-back and recovery obligations in respect of used sales packaging (hereinafter referred to as the 'self-management market').
- (81) Even if it is assumed that these are two different markets, there is an economically significant area of overlap in the form of a common market segment with regard to certain packaging/collection-point combinations, where a self-management solution and participation in an exemption system are (partially or fully) interchangeable. Primarily at issue here is such sales packaging as is collected from the private final consumer for which it seems possible to meet the quotas solely on the basis of a self-management solution. This might be packaging for which an appropriate return incentive is created by charging a deposit (e.g. one-way packaging material for mineral water). The quota might also be met in respect of sales packaging which is supplied at the place where the final consumer is situated so that collection might also occur there (e.g. the delivery of large quantities of copy and printing paper in cardboard boxes). The main packaging involved here is that which is delivered to recipients which are equivalent to a private final consumer (e.g. restaurants, hotels, canteens, administrations, barracks, hospitals, etc.).
- (82) This overlap on the edge of the market is of particular importance given that a self-management solution in this area serves as a springboard or point of entry to subsequent activity in the market for exemption systems, in which the barriers to entry are much higher. Realistically, it should be possible to acquire the know-how and goodwill necessary to operate in that market solely on the basis of previously having operated in this neighbouring market. This overlap on the edge of the market is thus of twofold significance from a competition point of view. On the one hand, it represents what is at present the only market-based counterbalance safeguarding the marginal and residual competition in the area of exemption systems and, on the other, it constitutes a springboard market for possible subsequent activity in that market and thereby fulfils an important function regarding the emergence of potential competition in that market. At present, various relatively small undertakings are seeking to establish themselves on the edge of the market on the basis of self-management solutions. It is estimated that the volume of the market segment belonging to the two markets currently corresponds to approximately 20 % of the consumption of packaging by private final consumers.
- (83) Should it not seem possible to meet the stipulated quota only through collection at the place where packaging is actually supplied, a combination of a self-management solution and participation in an exemption system is conceivable, whereby an obligated undertaking might want to take part in an exemption system in respect of the difference between the quota and the proportion of packaging which can be obtained at the place of delivery in the context of a self-management solution. Although, in this case, the demand-related supply is not completely or sufficiently interchangeable in view of the overall relevant requirements of undertakings, it is so for certain sub-quantities of sales packaging.
- (84) In its reply to the Statement of Objections, DSD expresses the view that the Commission's assumption that an activity as operator of an exemption system normally presupposes a previous activity as provider of a self-management solution and is greatly facilitated by such an activity is not borne out by any evidence and is not justified in the absence of such evidence. The requirements placed on self-management solutions and exemption systems are, in its opinion, too dissimilar.
- (85) DSD also expresses the view in its reply to the Statement of Objections that it cannot be assumed that in the case of self-management solutions the fulfilment of quotas must in all probability fail as far as the bulk of sales packaging is concerned inasmuch as in the context of such solutions only collection in the vicinity of a shop counts towards the quotas provided for in the Packaging Ordinance. A complete fulfilment of quotas is, it believes, altogether possible in the case of numerous sales packaging materials through the use of suitable incentives to return them (e.g. a deposit).
- (86) However, no final decision need be taken here on which of the two conceivable market definitions should be applied. As shown below (recitals 95, 96 and 97), DSD occupies a dominant position whichever definition is deemed correct. Whichever way the market is defined, there is an abuse of a dominant position (see recitals 98 et seq.). Moreover, the Commission's observations concerning the fulfilment of the quotas on the basis of self-management solutions and their springboard

function are not essential to demonstrating abuse. Consequently, it is not necessary to answer the above mentioned objections put forward by DSD.

substantial part of the common market for the purposes of Article 82 of the EC Treaty.

1.1.2. Relevant geographic market

1.2. Economic strength

- (87) The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.
- (88) The objective supply and demand conditions on the relevant markets covered by the DSD system continue to exhibit considerable variations between Member States. This is due not least to the fact that this is a sector which used to be, and in some areas still is, to a large extent regulated and organised by the State.
- (89) Although the waste-management sector is becoming increasingly internationalised, it is still the case that supply and demand continue to be organised at national level, in particular as regards take-back and waste-management services for used sales packaging.
- (90) This is essentially because the laws and regulations governing the disposal of packaging, including their implementing rules, differ widely from one country to another. This is true not only of the statutory requirements governing extensive take-back and exemption systems and the collection, sorting and recovery quotas to be met, but also of the commercial freedom of action which private undertakings enjoy, e.g. regarding the take-back and disposal of sales packaging under their own responsibility. One result of this is that the take-back and exemption system operated by DSD is restricted to Germany.
- (91) Consequently, it must be assumed that the objective supply and demand conditions on the relevant market in this case differ on a continuing basis from those in other parts of the common market. Therefore, when applying the Community's competition rules to the product markets covered by the DSD system, the relevant geographic market is that of Germany.
- (92) The broadest definable market should therefore be deemed to be the market for the organisation of the take-back and recovery from private final consumers of used sales packaging in Germany. Germany constitutes a

- (93) According to the case-law of the Court of Justice, a dominant position within the meaning of Article 82 of the EC Treaty exists where an undertaking's position of economic strength enables it to prevent effective competition being maintained on the relevant market by the fact that it is able, to a considerable extent, to act independently of its competitors, of its customers and, ultimately, of consumers ⁽⁹⁾.
- (94) An important indication of the existence of a dominant position is a particularly large market share. The Court of Justice took the view in *Akzo* that, under normal circumstances, a market share of 50 % is enough for it to be concluded that there is a dominant position ⁽¹⁰⁾. In *Hilti*, the Court of First Instance held that 'in this case it is established that Hilti holds a share of between 70 % and 80 % in the relevant market. Such a share is, in itself, a clear indication of the existence of a dominant position in the relevant market' ⁽¹¹⁾.
- (95) DSD is the only undertaking to offer an exemption system in Germany. Assuming a market definition based on the exemption market being a market in its own right, DSD would thus have a market share of 100 %. It is estimated that some 70 % of all sales packaging in Germany and some 82 % of sales packaging collected from final consumers in Germany is covered by the DSD system. The sales packaging which is not covered by the DSD system is either disposed of by obligated undertakings themselves without third-party involvement or does not, for other reasons, form part of the demand for a waste-management service, so that DSD can be assumed to have an even higher market share. Even if a broad market definition which includes the self-management market for sales packaging collected from private final consumers is applied, DSD accordingly has a market share of at least 82 %. Moreover, DSD's market share has remained extremely stable since 1995, the year in which the full quota requirements had to be met (see recital 28). This fact

⁽⁹⁾ Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, at paragraph 41.

⁽¹⁰⁾ Case C-62/86 *Akzo v Commission* [1991] ECR I-3439, at paragraph 60.

⁽¹¹⁾ Case T-30/89, *Hilti v Commission* [1991] ECR II-1439, at paragraph 92 (upheld on appeal by the Court of Justice in Case C-53/92-P [1994] ECR I-667).

also leads to the conclusion that DSD has a market position which is highly secure.

- (96) Over and above DSD's particularly large market share, other factors also contribute to the undertaking's economic strength. As stated in recital 79, given the existence of considerable barriers to market entry, there is no short-term substitutability of supply. Other service providers are able to offer a competing exemption system only at great expense. In addition, it realistically has to be assumed given these barriers that potential competing exemption systems will initially emerge in one *Land* or in a few *Länder*, with the result that DSD will remain the sole system to operate nationwide for the foreseeable future. At present, competition only exists at the edge of the market where there is an overlap with self-management solutions. The strength and market position of suppliers active in that area are not comparable to those of DSD. Given DSD's position on the market, any potential competition, in particular the guarantee of unlimited market access by other suppliers and the safeguarding of the hitherto weak marginal and residual competition, takes on a particular significance.
- (97) Consequently, it may be concluded that DSD has a dominant position on the market.

2. ABUSE OF A DOMINANT POSITION

- (98) The Court of Justice has held that a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market ⁽¹²⁾.
- (99) Abuse of a dominant position relates to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition ⁽¹³⁾.

⁽¹²⁾ Case 322/81 *Michelin v Commission* [1983] ECR 3461, at paragraph 57.

⁽¹³⁾ See footnote 9.

2.1. *Nature of the abuse*

- (100) The Trade Mark Agreement, as notified by DSD, provides in Articles 4(1) and 5(1) that the other party must pay DSD a fee in respect of all of the packaging distributed by it in the territory of the Federal Republic of Germany bearing the Green Dot mark. Any exceptions to this requirement require separate written agreement (see recital 40). DSD thus links the fee payable under the Agreement, not to use of the service exempting the other party from its take-back and recovery obligations under Article 2 of the Agreement, but solely to the use of the Green Dot mark on sales packaging. Moreover, DSD requires the other party to affix the mark to all registered packaging for domestic consumption (see recital 39). It lies within DSD's discretion to release the other party from this obligation, there being no limits placed on such discretion under the Agreement.
- (101) Abuse always occurs where an obligated undertaking avails itself of DSD's exemption service only in respect of some of its sales packaging or dispenses entirely with DSD's exemption service in Germany, in particular where it decides:
- (a) to have some of the sales packaging of a product in Germany disposed of using a self-management solution or a competing exemption system; or
- (b) to have all of the sales packaging of a product in Germany disposed of using a self-management solution or a competing exemption system, while participating in a system which uses the Green Dot mark in other Member States ⁽¹⁴⁾.
- (102) Where all of a product's sales packaging distributed in the territory of the Federal Republic of Germany bears the Green Dot mark, obligated undertakings are required under the first sentence of Article 4(1) and the first sentence of Article 5(1) of the Agreement to pay a fee for the entire quantity of packaging, even if they make no use of the service conferring exemption from the take-back and recovery obligation pursuant to Article 2 of the Agreement or if they use it for only some of their packaging. For any packaging disposed of

⁽¹⁴⁾ This Decision merely comments on those cases in which all of the uniformly designed sales packaging put into circulation is accessible to the DSD system. Cases in which only some of the uniformly designed packaging is collected by DSD or in which some of the packaging is, for legal reasons, not accessible to the DSD system (see recitals 55, 56 and 57) are not dealt with in this Decision.

using a rival system, undertakings must pay an additional fee. The financial burden on undertakings is thus much heavier than it would be if they used only the DSD system. Financially speaking, it is therefore of little interest to undertakings to have competitors dispose of some of their sales packaging.

(103) A solution which might initially seem possible in this context, i.e. not to mark with the Green Dot mark that packaging which is not to be covered by the DSD system in Germany, would, in a not inconsiderable number of cases, be economically unrealistic.

(104) It would first require manufacturers to mark a given packaging range differently. Some of that packaging would receive the Green Dot mark and some not. This would lead in particular to considerable additional costs where the manufacturer wished to use one form of packaging for several countries, e.g. common German-language packaging for Germany and Austria or common multilingual packaging for Europe. The advantages of standardised packaging accruing to distributors as a result of the common market would then no longer be fully within reach.

(105) The problem likewise arises where uniformly designed packaging is to be distributed via different channels (e.g. self-service department stores and local supermarkets) and different arrangements are made for waste management in each case. Even relatively simple solutions to this problem, if at all practicable, such as separate affixing of the Green Dot mark would demand greater organisational input and constitute a cost factor for manufacturers and distributors.

(106) A further crucial factor is the fact that manufacturers and distributors would have to have sufficient control as to ensure that packaging marked with the Green Dot mark only ends up at outlets serviced by a system using the mark and that packaging not marked with the Green Dot mark only ends up at outlets serviced by a competitor. The organisational and logistic input associated with the various distribution channels is likely to be considerable, in particular where a manufacturer or distributor uses both DSD and competing suppliers in Germany at the same time. It is likely that it will often be outside the organisational and coordinating power of a manufacturer or distributor to control the actual route taken by specifically marked packaging right up to the final point of sale. This will probably always be the case where a manufacturer makes use of independent intermediaries (e.g. the wholesale trade) and thus no longer has sufficient influence and control over the actual route taken by

packaging in the course of distribution and sale. In such cases, it would not be possible to mark sales packaging with or without the Green Dot mark depending on where it is to end up.

(107) Finally, it is also likely that the final consumer will often not decide until after buying the packaged product and sometimes after consuming the product whether to dispose of the packaging close to his/her home or to bring it back to the place where he/she bought it. It is therefore impossible to determine correctly whether sub-quantities should be marked with the Green Dot mark or not.

(108) Where not just one competitor but rather several alternative waste-management solutions are used in addition to DSD, the effect of the above problem is exacerbated still further (i.e. there is a need to employ various packaging and distribution channels and to check where packaging ends up, and thus additional organisational input is required). The benefit of involving alternative suppliers is thus further reduced.

Interim finding

(109) The linking of the fee payable under the Trade Mark Agreement to the quantity of sales packaging marked with the Green Dot mark compels those obligated undertakings which wish to use competitors of DSD at least for some of their sales packaging to separate their packaging and distribution channels. For some undertakings, this would be impracticable and for others would seem to be not only a disproportionate measure in the context of the take-back exemption being sought but also inconsistent with the requirements of a performance-oriented distribution sector in the common market.

2.2. Effect of the abuse

(110) The effects of this abuse mechanism are described in the following.

2.2.1. Exploitative abuse

(111) Where an undertaking uses the Green Dot mark but does not make use of DSD's exemption service, DSD imposes unreasonable prices and commercial terms. An

infringement of Article 82(2)(a) of the EC Treaty exists where the price charged for a service is clearly disproportionate to the cost of supplying it. The main cost factor for DSD is the operation of an extensive system for the collection, sorting and recycling of sales packaging in accordance with Article 2 of the Trade Mark Agreement. However, DSD incurs only minimal costs by authorising sales packaging to be marked with the Green Dot mark without it being demonstrated that its services have actually been made use of, and no additional costs in the event of its being entrusted with a partial quantity. This is indeed clear from the Trade Mark Agreement, under which licence fees serve solely to cover the costs incurred in collecting, sorting and recovering sales packaging and the associated administrative costs (see recital 42). Therefore, the costs incurred by DSD as a result of the use of the mark can, if anything at all, only be part of the administrative costs. The term 'licence fee' is accordingly misleading inasmuch as, even according to the wording chosen by DSD, the fee is intended to reflect first and foremost the costs of the exemption service. Although DSD makes payment of the licence fee contractually dependent on the use of the mark, the costs which arise for DSD are based on the extent to which the other party actually makes use of the exemption service. Consequently, DSD can be deemed to impose unreasonable prices whenever the quantity of packaging bearing the Green Dot mark is greater than the quantity of packaging making use of the exemption service.

contractually. In so doing it can prevent obligated undertakings at any time from making known, as required by the Packaging Ordinance, their participation in a system by another mark or by 'other suitable means' (see recital 16). Through the combination of a contractual obligation to use the mark, on the one hand, and a linking of the fee to use of the mark, on the other, separate packaging and distribution channels are an inevitability.

- (113) As long as DSD makes the licence fee dependent solely on the use of the mark, it is imposing unfair prices and commercial terms on undertakings which do not use the exemption service or which use it for only some of their sales packaging.

2.2.2. Obstructive abuse

- (112) Unfair commercial terms exist where an undertaking in a dominant position fails to comply with the principle of proportionality ⁽¹⁵⁾. By giving undertakings a choice between introducing separate packaging and distribution channels or paying an unreasonable licence fee, DSD is imposing unfair commercial terms. In balancing the various interests in this case, DSD does not appear to have any reasonable interest in linking the fee payable by its contractual partners not to the exemption service actually used but to the extent to which the mark is used (recitals 136 et seq.). Although DSD does envisage the possibility of agreeing to exceptions (see recital 40), it has formulated the contract in such a way that it is able to decide without reference to predetermined criteria whether the link between the fee payable under the contract and the use of the mark should be severed. In certain cases, DSD refuses to agree to a contractual exception even though there is no correlation between the use of the exemption services and the use of the mark. DSD obliges the other party, moreover, to use the mark and makes exceptions at its own discretion. In the case of partial quantity solutions, DSD is thereby also imposing separate packaging and distribution channels

- (114) An undertaking in a dominant position can obstruct its competitors by binding its customers *de jure* or *de facto* to its services and thereby prevent them from using competing suppliers ⁽¹⁶⁾. The Court has stated on this matter that 'a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators' ⁽¹⁷⁾. Such equality of opportunity is particularly important for new market entrants on a market on which competition is already weakened by the presence of a dominant undertaking and other circumstances ⁽¹⁸⁾. In particular, small competitors should not be the victims of behaviour by a dominant firm, facilitated by that firm's market power, which is designed to exclude those competitors from the market or which has such an exclusionary effect ⁽¹⁹⁾.

⁽¹⁶⁾ See footnote 9.

⁽¹⁷⁾ Case C-202/88 *France v Commission* [1991] ECR I-1271, at paragraph 51.

⁽¹⁸⁾ Commission Decision 95/489/EC of 4.10.1995 in *GSM-Italia* (OJ L 280, 23.11.1995, p. 49, at paragraph 15).

⁽¹⁹⁾ Commission Decision 98/531/EC of 11.3.1998 in *Van den Bergh Foods Limited* (OJ L 246, 4.9.1998, p. 1, at paragraph 262).

⁽¹⁵⁾ Case 27/76 *United Brands v Commission* [1978] ECR 207, at paragraph 190.

(115) The terms governing the fee in the Trade Mark Agreement lead in the cases described below to its being of no interest to undertakings subject to the take-back and recovery obligation to take part in a competing exemption system or a competing self-management solution because either a licence fee must be paid to DSD in addition to the remuneration made to the competitor or separate packaging and distribution channels would be necessary. In their actual effect, these terms are very close to being an exclusivity requirement. They thereby make it much more difficult for competitors to enter the market, strengthen DSD's dominant position and further weaken competition. There is thus no equality of opportunity for competitors.

Interim finding

(116) These terms thus represent an abuse of a dominant position. Against the background of hitherto very weak marginal and residual competition, and given that the only counterbalance to the dominant undertaking which is effective in the short term takes the form of smaller competing suppliers on the edge of the market, this conduct constitutes a particularly severe case of abuse.

2.3. Specific examples of abuse on the basis of groups of cases

(117) The abusive effect of the fee terms is described in greater detail on the basis of specific groups of cases.

Group I — Restriction of competition between DSD and other exemption systems (where membership of DSD is complementary)

(118) Where a new contractor, initially or on a permanent basis, establishes a system under Section 6(3) of the Packaging Ordinance solely on a regional basis, i.e. covering at least one *Land*, but not the whole of Germany, obligated undertakings are able to join a competing system only if they either identify separately the sales packaging which they have put into circulation or pay fees to two systems.

(119) Since the majority of obligated undertakings distribute their packaging on a supraregional or nationwide basis and require a corresponding exemption or arrangement

to fulfil these take-back obligations, they will, even if they would like to opt for a competing supplier regionally, be dependent on membership of another system, i.e. at the present time the DSD system, for those services not covered by that contractor.

(120) Membership of an exemption system operating on only a regional basis would be of no financial interest to obligated undertakings because of the fee terms in the Trade Mark Agreement. In practice this would compel them to go on using DSD for the entire amount of sales packaging and it would be impossible for a competing system to enter the market.

(121) Against the background of the considerable barriers to market entry for exemption systems, a system which initially operates only regionally seems far more economically realistic than the establishment of an exemption system competing nationally from the start (see recitals 75 to 79). One form is actually trying this at present.

(122) With regard to this group of cases DSD has submitted the commitment set out in recital 51: DSD has undertaken to agree to derogations under the second sentence of Article 4(2) of the Trade Mark Agreement in the said group of cases. However, the commitment contains the reservation that protection of the Green Dot trade mark must not be impaired. This fundamental reservation casts considerable doubt on the intended effect of the commitment. DSD thereby retains the possibility, by pointing to an alleged impairment of the trade mark protection, which is not further specified, vis-à-vis contractual partners, to refuse to translate the commitment into action. The Commission has therefore expressed the opinion that this reservation should be deleted. DSD has refused to do this on the ground that it considered the commitment it had already given to be sufficient and saw no reason to go any further.

(123) Consequently, the commitment submitted by DSD on this group of cases is insufficient to allay the Commission's concerns.

Group II — Restriction of competition between DSD and self-management solutions (where membership of DSD is complementary)

(124) The problems already set out with regard to regional exemption systems are similarly echoed for those

obligated undertakings which, in order to fulfil their obligations, use a combination of self-management solution and complementary participation in an exemption system (see recital 83).

- (125) Where an exemption system is used to complement a self-management solution, separate packaging and distribution channels are hardly practicable since, with regard to any particular form of sales packaging, it is almost impossible for the obligated undertaking to determine in advance, and hence possibly also to identify clearly, which used packaging is to be collected from the final consumer, possibly at the place where it was handed over, and which should be left to an exemption system.
- (126) Because of the effect, already explained, of the fee terms, the organisation of a self-management solution for partial amounts of sales packaging is out of the question. Obligated undertakings are therefore in practice compelled to continue to use DSD for the entire amount of sales packaging, making market access for alternative self-management solutions considerably more difficult. Their corrective competitive function, extremely important though it is under the existing market conditions, cannot develop in the area of residual and marginal competition with a view to combined solutions.
- (127) In this connection DSD has submitted the commitment set out in recital 61. According to this commitment use of the trade mark is restricted to sales packaging taking part in the DSD system. Obligated undertakings are thus compelled to introduce separate packaging and distribution channels. The commitment therefore does not eliminate the abusive effect of the fee terms. Furthermore, DSD has included a reference to the ninth sentence of Section 6(1) of the Packaging Ordinance. The combined solutions which define Group II are, however, not based solely on the ninth sentence of Section 6(1) of the Packaging Ordinance, which contains the obligation of additional proportional membership of an exemption system if the quota is not met (see recital 21). Instead it is conceivable that a firm may decide from the outset to practise a self-management solution in respect of only a certain partial amount of packaging and to belong to the DSD system for the remainder.
- (128) The commitment submitted by DSD on this group of cases is therefore not sufficient to allay the Commission's competition concerns.

Group III — Restriction of competition between DSD and other exemption systems or self-management solutions (with no membership of DSD)

- (129) On the basis of the problems already described, a comparable situation can arise in those cases where a distributor in another Member State plans to have a certain type of sales packaging dealt with by a take-back system which uses the Green Dot trade mark, but in Germany fulfils his obligations in respect of the same type of sales packaging without belonging to the DSD system. This can happen if he participates in one or more potentially competing exemption systems or one or more self-management solutions or through a combination of the two possibilities.
- (130) In this group of cases the distributor has a legal obligation to identify the packaging he puts into circulation in another Member State with the Green Dot trade mark, or it is economically advisable for him to do so. A legal obligation can arise from both the environmental legislation applicable and the trade mark agreement concluded with the system operator in each of the other member countries.
- (131) Participation in a competing exemption system or in a self-management solution would not be financially worthwhile because of the fee terms in the Agreement. This would make market access in particular for a competing exemption service operating nationwide or for a nationwide self-management solution considerably more difficult. In this group of cases, too, the fee terms therefore result in exploitative and obstructive abuse. This group of cases is of considerable economic importance not least because, in the context of the single market, many of the consumer goods which are relevant here are increasingly being distributed in more than just one member country and, as stated in recital 45, take-back and exemption systems which use the Green Dot trade mark and are comparable to the DSD system have in the meantime established themselves in several Community Member States.
- (132) The Commission has received a complaint on this group of cases from L'Oréal and other manufacturers of hair-care products and the waste disposal contractor Vfw, who wish to organise in Germany a self-management solution for the take-back and recovery of packaging for the hair-care products used by hairdressers (see recital 6).
- (133) As regards this group of cases DSD has, in order to eliminate the abuse, submitted the commitment set out in recital 63: DSD will not charge a licence fee if it can be proved that the Packaging Ordinance obligations have been fulfilled in another way, provided that the packaging carries an indication that it does not participate in the DSD system. According to a declaration made by DSD (see recital 64), sufficient

proof would be constituted, in the case of a self-management solution, by the presentation of an independent expert's certificate stating that the take-back and recovery requirements have been fulfilled and, in the case of participation in an exemption system, by the system operator's confirmation of participation.

(134) DSD has supplemented this by stating that it was important for the proof that 'it should show clearly the extent to which the packaging, despite being marked with the Green Dot trade mark, is not included in the system operated by DSD AG'. Taking into account DSD's previous declarations, the Commission understands this to mean that the proof should in no case go beyond the Packaging Ordinance requirements. The supplementary statement can therefore not be interpreted as meaning that DSD will check the expert's certificate presented or will require proof, objectively impossible as this is, that none of the packaging has actually been collected and recovered by the DSD system. Instead, on the basis of the commitment submitted by DSD, proof can extend only to a finding that, for all packaging marked with the Green Dot trade mark, the Packaging Ordinance obligations have been fulfilled in another way. This finding is, however, sufficiently verifiable by DSD where the proof states the overall volume of packaging to which the quota fulfilment relates. In the Commission's view the wish expressed by DSD in the supplementary statement is therefore satisfied if the proof contains an indication of the overall volume of packaging.

(135) Provided DSD carries out this commitment having regard to the declaration it made to the Commission, an abuse of a dominant position can no longer be seen to exist in this group of cases on the basis of the existing facts.

2.4. No objective justification

Incompatibility with the Packaging Ordinance

(136) DSD takes the view that the use of the Green Dot trade mark for partial quantities of packaging for which no exemption service is provided is incompatible with the Packaging Ordinance. According to the communication from Germany, the purpose of the obligation to identify packaging was, first, to document the fact that there was no obligation for the packaging to be returned to the vicinity of the shop and, secondly, to provide information that this packaging was to be included in the collection route laid down by the system. The purpose of the trade mark was to fulfil this obligation. This was connected with the statement that the consumer did not have the right to return this packaging in the vicinity of the shop. Contrary to the Commission's view, the consumer had no freedom to decide. In so far as Germany, in its communication to the Commission, had confirmed that the final consumer

was free to decide whether he left the packaging in the shop or returned it to the shop or took it to a collection point near his home, the content of this confirmation was misleading. The trade mark indication that the consumer did not have the right to return this packaging in the vicinity of the shop did not correspond to the facts if partial quantities not included in the DSD system carried the trade mark, since there was an absolute obligation to take such packaging back to the vicinity of the shop. The consumer was being misled about the envisaged collection route. According to Germany's communication, transparency had to be established for consumers and authorities as to which packaging was subject to the take-back obligation and which was not. The fulfilment of this transparency requirement had to be unreservedly guaranteed, because in practice consumers had the possibility of getting rid of used sales packaging by a route other than the particular one provided for.

(137) The Packaging Ordinance requires taking part in exemption systems to be identified. However, the reverse conclusion, that non-participating packaging should not be identified, cannot be inferred from this. In reply to the Commission's question on this point, Germany has stated that the Packaging Ordinance does not impose a fine in cases where packaging is identified by means of a system trade mark but does not participate in the system. Such conduct is therefore not punishable (see recital 16).

(138) DSD's argument is based on the assumption that the final consumer cannot choose whether to take the packaging to a collection point in the vicinity of the shop or of his home. The assumption conflicts with Germany's communication (see recital 20 and footnote 8). Nor is there any convincing justification for the content of the assumption. Group II, which is relevant here, relates to a situation in which packaging is partially collected by a self-management solution. Manufacturers and distributors are obliged to provide a take-back facility in the vicinity of the shop for self-manageable packaging. If partial quantities of a product's packaging are self-manageable in a shop and partial quantities of the same product's packaging are covered by the DSD system (e.g. cardboard packaging left in the furniture store or taken away by the customer; food/drink consumed on the snack bar premises or taken away), the two solutions, i.e. return of packaging in the vicinity of the shop or collection from the vicinity of the home, exist side by side. The final consumer is then free to use the take-back facility near the shop for packaging carrying the Green Dot trade mark as well. Firstly, under the Packaging Ordinance the distributor's take-back obligation extends to all packaging of similar goods or of goods of the same brand (see recital 12). This holds true irrespective of whether the packaging participates in an exemption system or is marked. Secondly, the Packaging Ordinance

nowhere contains obligations for the final consumer. The return of packaging in the vicinity of the shop is therefore in the case of partial quantity solutions not just a practical possibility, which is conceded by DSD, but also a legal option for action. There are therefore no grounds for maintaining that the Commission's interpretation of Germany's communication is not valid in Group II cases as defined by the Commission.

- (139) Because of the final consumer's freedom of choice the transparency requirement is met if it is made clear that both collection options exist. This is the case if the packaging carries the trade mark (may be covered by DSD) and collection containers are installed in the vicinity of the shop and attention is drawn to them (may be left in the shop). The final consumer has the choice and exercises it, so he cannot be misled.
- (140) DSD takes the view, moreover, that general identification with the Green Dot trade mark would infringe the Packaging Ordinance also where partial quantities of packaging are covered not by the DSD system but by a competing exemption system. In this case the identification would have the function of providing information on which of the systems was to collect the packaging in question. Because of the identification requirement at least the partial quantities included in the competing exemption system would (also) have to carry such identification. These partial quantities would then bear two identifying marks. This would give the consumer the impression that he was free to decide to convey the packaging to either of the two systems for collection. Contrary to the Commission's assumption, the consumer was not free to decide this. The fact that consumers could in practice also use the DSD system to dispose of the packaging it did not cover, made no difference.
- (141) The wording of the Packaging Ordinance gives no indication as to whether partial quantities of packaging which participate in a competing exemption system may not be identified by the Green Dot trade mark. The transparency mentioned by Germany (see recital 13) requires only that the consumer recognises whether the packaging may be taken back in the vicinity of the shop (i.e. at least partial participation in a self-management solution) or not (i.e. exclusive participation in one or more exemption systems). This does not imply that it would have to be apparent to the final consumer which specific system was to take care of the collection. It should also be added that here too the final consumer is able to choose the system by which he has the packaging collected, since the exemption system must collect all the sales packaging that is fed into it and the Packaging Ordinance obligations are not addressed to the consumer.

- (142) Public law precepts do not therefore require the partial abandonment of identification by means of the Green

Dot trade mark in the case of either partial participation in a self-management solution or partial participation in another exemption system. DSD's abusive conduct is accordingly not prescribed by the Packaging Ordinance. The Commission Decision does not compel DSD to breach the Packaging Ordinance rules.

Considerations under trade-mark law

- (143) DSD further states that the trade mark necessarily loses its identifying power where it is carried on packaging which is not exempted from the take-back obligation or is to be collected by a competing system. The more packaging carries the trade mark without belonging to the system, the greater the loss of identifying power. This could lead to the trade mark's identifying power becoming weakened to such an extent that large sections of the public no longer understood it as indicating exemption from the take-back obligation and the possibility that it could be collected by the DSD system. It could threaten the collapse of the DSD system, because consumers would not convey enough used sales packaging into the system.
- (144) Here it must be commented that, according to the case-law of the Court of Justice and Court of First Instance, exercise of an exclusive right may be prohibited by Article 82 of the EC Treaty if it gives rise to certain abusive conduct on the part of an undertaking occupying a dominant position⁽²⁰⁾. The crucial point is whether the conduct goes beyond what is necessary to fulfil the essential function of the exclusive right as permitted in Community law⁽²¹⁾.
- (145) The Green Dot trade mark was registered under the pre-1 January 1995 Trade-Mark Law as an association trade mark within the meaning of Article 17 of that law. According to a judgment by the Berlin Higher Regional Court, the content of the trade mark gives no indication as to the quality of the collection service, but for the market in question says no more than that the product thus identified may be collected via the dual system⁽²²⁾. The consumer, as the market addressed, therefore infers from the trade mark that he can convey the packaging for collection by the DSD system. But the Green Dot trade mark does not imply that collection by means of the DSD system constitutes the only collection possibility. In Groups I and II, a partial quantity of packaging is contractually tied to one of DSD's competitors and the remainder of the packaging is

⁽²⁰⁾ Case 53/87 *CICRA and another v Renault* [1988] ECR 6039, at paragraph 16; Case 238/87 *Volvo v Veng* [1988] ECR 6211, at paragraph 9; Case T-70/89 *BBC v Commission* [1991] ECR II-535, at paragraph 59; Case T-198/98 *Micro Leader v Commission* [1999] ECR II-3989.

⁽²¹⁾ See footnote 20 (*BBC v Commission*), at paragraph 61.

⁽²²⁾ Berlin Higher Regional Court, judgment of 14 June 1994, BB 1994, 2299.

- covered by the DSD system. Ultimately, the consumer can, however, decide whether to convey any particular item of packaging for recycling by the competitor of the DSD system. The consumer's decision is influenced by a number of factors (e.g. acquired disposal habits, attitudes, type of packaging, product use, accessibility of the point of sale, take-back incentives). The essential function of the Green Dot trade mark is therefore fulfilled when it signals to the consumer that he has the option of having the packaging collected by DSD. Accordingly the Green Dot trade mark's function does not require that, where participation in the DSD system is only partial, only a partial quantity of the packaging should carry the trade mark.
- (146) Furthermore, a partial identification of the packaging makes no sense in particular if a given system of distribution and sales does not allow for the channelling of waste on the basis of the place where it accumulates, or if the consumer decides on the form of collection only after the purchase. Partial identification would neither improve the protection of the trade mark's function nor make clear the identification of participation in the system. It is also clear that, where a partial quantity of packaging is covered by the DSD system, the content of the Green Dot trade mark can be understood only as indicating a collection option.
- (147) DSD also states that the danger of trade-mark misuse exists. Where only partial quantities of sales packaging were covered by the DSD system and at the same time the remainder also carried the trade mark, it was to be expected that far larger quantities than the partial quantities for which manufacturers or distributors had contracted would be channelled into the DSD system. While DSD could ask to be reimbursed for the costs of handling the additional quantities, this would not be sufficient, since the controls in the case of self-management solutions were not as reliable as in the DSD system and the claim could be made only after one year's delay. DSD would therefore have to finance the costs in advance and bear a considerable risk of loss.
- (148) Against this it may be argued that competing exemption systems and, under the new version of the Packaging Ordinance, self-management solutions as well, have to meet identical recycling quotas. Under the Packaging Ordinance checks on whether quotas have been met are at least as strict in the case of self-management solutions as in the case of exemption systems (see recital 19). Besides this, the ninth sentence of Section 6(1) of the Packaging Ordinance compels self-management firms which do not meet the quotas to complement them by joining an exemption system. The delay in the event of compensation is reasonable. The allocation of packaging amounts can only be established after the year in question has elapsed. It must be assumed that DSD's competitors and DSD itself offer their services with a view to meeting the prescribed quotas. Obligated undertakings participate in the DSD system only in respect of a partial quantity and must therefore pay a fee only for that quantity. If any other solution were adopted, manufacturers and distributors would have to pay in advance whenever, as intended, DSD's competitors actually meet their quotas.
- (149) DSD also states that, even bearing in mind the difficulties which may exist for manufacturers and distributors if the use of the trade mark were restricted to partial quantities of sales packaging, there is no justification for requiring DSD to grant isolated rights to use the trade mark and hence to provide services as yet not offered by DSD, especially since these difficulties are not caused by DSD but are the result of manufacturers' and distributors' organisation and activity. The difficulties mentioned in the Statement of Objections of limiting use of the trade mark to the partial quantities of sales packaging covered by the DSD system are therefore not decisive as far as the legal assessment of DSD's conduct is concerned.
- (150) The inference of abuse shows that the difficulties stem from the fee terms in the Trade Mark Agreement. It would not be possible, or possible only with disproportionate extra expenditure, for manufacturers and distributors to change the packaging and distribution process in such a way as to eliminate the difficulties.
- (151) Lastly, DSD maintains that the balanced relationship between licence fee income and the costs of meeting collectors' claims would be disturbed.
- (152) Again it must be pointed out that in the said groups DSD does not provide an exemption service or provides it only for partial amounts. Accordingly the parties to the service agreements also have to provide a reduced service for DSD. For this case DSD has agreed in the service agreements concluded with collection firms to a reduction in the fee payable by DSD to the collectors by deduction of the 'self-management amount' (defined as 'per capita consumption of quantities which in accordance with Section 6(1) and (3) of the Packaging Ordinance have to be collected and recovered outside the dual system'). The extent of the collectors' activity does not depend on whether or not packaging carries the Green Dot trade mark.
- (153) The arguments put forward by DSD are therefore not capable of providing an objective justification for the licence fee terms and hence of ruling out the abuse of a dominant market position.

Result

The functioning and efficiency of the common market is affected to an appreciable extent.

- (154) DSD is therefore abusing its dominant position within the meaning of Article 82 of the EC Treaty as regards both its customers and its competitors.

II. ARTICLE 3(1) OF REGULATION NO 17

3. EFFECT ON TRADE BETWEEN MEMBER STATES

- (155) The abuse of a dominant position as a result of the licence fee terms in the Trade Mark Agreement is likely to have an appreciable effect on trade between Member States.

- (161) Article 3(1) of Regulation No 17 states that where the Commission finds that there is infringement of Article 82 of the EC Treaty, it may require the undertakings concerned to bring such infringement to an end.

- (156) The abuse of a dominant position may affect trade between Member States if it is sufficiently likely, given the objective legal and factual circumstances, that it directly or indirectly, actually or potentially, influences trade in goods between Member States in a way which suggests that in so doing it prevents the achievement of a single market between them.

- (162) The Commission is therefore justified in requiring DSD to bring the present infringements to an end and to take the necessary measures to prevent them from being continued or repeated.

- (157) First, it should in principle be pointed out that many of DSD's present licensees come from other Community Member States. Restrictions or barriers to alternatives for the take-back and recovery of sales packaging for these distributors in Germany therefore appreciably affect international trade in the context of the existing market conditions.

- (163) The infringements consist in the fact that, under the first sentence of Article 4(1) and the first sentence of Article 5(1) of the Trade Mark Agreement, DSD requires the payment of a licence fee for the total quantity of sales packaging carrying the Green Dot trade mark which is put into circulation in Germany even when the exemption service referred to in Article 2 of the Agreement is used only for partial quantities or not at all. Although the second sentence of Article 4(1) of the Trade Mark Agreement allows derogations, DSD has refused to submit commitments for Groups I and II which would have put an end to the abusive situation and would have been implemented as derogations under the Agreement.

- (158) It is also conceivable for firms from other Member States to offer self-management solutions or exemption systems in Germany. An attempt could in particular be made to establish exemption systems in a *Land* bordering on a Member State or to implement self-management solutions in areas near the border. Abuse of the fee terms in the Trade Mark Agreement also makes market access considerably more difficult for these contractors from other Member States.

- (164) For Group III, DSD has submitted a commitment to the Commission and has made an explanatory declaration. Provided DSD carries out the commitment having regard to the declaration in accordance with the considerations in recitals 133 and 134, an infringement can no longer be seen to exist.

- (159) It should also be borne in mind that manufacturers who also export their products to other Member States are under not inconsiderable pressure from the fee terms in the Trade Mark Agreement to take part in the system that uses the Green Dot trade mark in both Germany and these Member States. Lastly, manufacturers can achieve their goal of a product distributed throughout Europe in the same packaging only if they take part throughout Europe in the exemption systems which use the Green Dot trade mark.

- (165) In order to prevent the infringements established from being continued or repeated, DSD must undertake vis-à-vis all parties to the Trade Mark Agreement not to charge any licence fee for those partial quantities of sales packaging carrying the Green Dot trade mark which are put into circulation in Germany for which the exemption service referred to in Article 2 of the Trade Mark Agreement is not used. This commitment replaces a derogation under the second sentence of Article 4(1) of the Agreement.

- (160) In so far as the manufacturer belongs to different systems in each of the Member States and accepts the need for different forms of packaging, the relevant product market is arbitrarily segmented. The manufacturer has to ensure that the envisaged channels of distribution are adhered to. This makes cross-border trade in the product more difficult. In particular, parallel imports are possible only if the packaging is changed. This is an artificial alteration of market conditions. It prevents the Member States from becoming economically intertwined, as intended by the EC Treaty.

- (166) Furthermore, the commitment submitted by DSD in respect of Group III must be made binding. According to this commitment DSD may require that it be made clear to the final consumer on the packaging, in proximity to the Green Dot trade mark, in words or other suitable form, that the packaging does not participate in the system set up by DSD under Section 6(3). Inasmuch as findings of suitability and clarity, in particular, are based on value judgments, it cannot be ruled out that there may be differences of opinion between DSD and obligated undertakings as to the form the message should take. In order to make sure that the

commitment is carried out, a procedure must be laid down by which such differences of opinion can be settled quickly to the satisfaction of both sides. A decision by an expert appointed by the Commission fulfils this need.

(167) Both for Groups I and II and pursuant to the commitment submitted in respect of Group III, DSD may require its contractual partners to provide proof that, in respect of quantities of sales packaging put into circulation in Germany and carrying the Green Dot trade mark for which the exemption service referred to in Article 2 of the Trade Mark Agreement is not used, the Packaging Ordinance obligations have been fulfilled in another way. It cannot be ruled out that there may be differences of opinion between DSD and obligated undertakings as to the form the requisite proof should take. For clarity's sake the criteria which the proof must satisfy must therefore be defined in this Decision. In so doing the Commission will be guided by the purpose of the obligation to provide proof. DSD ought to be able to ascertain that it is renouncing payment of a fee only for packaging with which obligated undertakings take part in a competing exemption system or fulfil the collection and recovery requirements via a self-management solution, it being in these cases that there is the risk of a double payment obligation (see recital 115). Where there is partial or complete participation in a competing exemption system, the system operator's confirmation that the relevant quantity of packaging is covered by the competing system will constitute sufficient proof. Obligated undertakings will be exempted from their obligations in respect of the participating quantity of packaging only through participation in an exemption system. Where there is partial or complete participation in a self-management solution, the subsequent presentation of an independent expert's certificate, which may be issued either individually to the individual manufacturer or distributor or to an association of self-managers, stating that the take-back and recovery requirements for the corresponding amount of packaging have been fulfilled will be sufficient. DSD may not require the certificate to be presented at an earlier time than is laid down under the Packaging Ordinance. Irrespective of the version of the Packaging Ordinance in question, the fact that the certificate confirms to the contractual partner that the take-back and recovery requirements, related to a specific quantity of packaging, have been fulfilled will suffice for the proof to be provided to DSD. Should the certificate contain other information (such as the name of the undertaking acting as the appointed third party, collection points or precise quotas), this must be obliterated to prevent DSD from obtaining sensitive information about competitors. Both the system operator's confirmation and the independent expert's certificate may be replaced by an accountant's certificate confirming retrospectively the fulfilment of the Packaging Ordinance obligations in respect of a specific volume of packaging. The accountant's certificate will provide proof of fulfilment of the Packaging Ordinance obligations without revealing whether this was done through a competing exemption system or through a self-management solution. In order to prevent the above requirements regarding proof from being circumvented to the detriment of the obligated

undertaking, it must be ensured that other provisions of the Trade Mark Agreement are not applied in such a way as to require a higher level of proof to be provided to DSD,

HAS ADOPTED THIS DECISION:

Article 1

The conduct of Der Grüne Punkt — Duales System Deutschland AG, Cologne (hereinafter: 'DSD'), in requiring, under the first sentence of Article 4(1) and the first sentence of Article 5(1) of the Trade Mark Agreement, payment of a licence fee for the total quantity of sales packaging carrying the Green Dot trade mark and put into circulation in Germany is incompatible with the common market even where undertakings subject to the obligations arising out of the Packaging Ordinance:

- (a) either use DSD's exemption service as referred to in Article 2 of the Trade Mark Agreement only for partial quantities or, instead of using the said service, put into circulation in Germany uniformly designed packaging which is also in circulation in another member country of the European Economic Area and participates in a take-back system using the Green Dot trade mark, and
- (b) prove that, in respect of the quantity or partial quantity for which they do not use the exemption service, they fulfil their obligations under the Packaging Ordinance through competing exemption systems or through self-management solutions.

Article 2

DSD shall bring the infringement referred to in Article 1 to an end immediately.

DSD shall refrain from continuing or repeating the conduct described in Article 1 or from taking measures having the same effect.

DSD shall further fulfil the terms set out in Articles 3 to 7.

Article 3

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

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

Article 4

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

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

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

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

The expert's costs shall be borne by the parties equally.

Article 5

1. Where there is partial or complete participation in a competing exemption system, the system operator's confirmation that the relevant quantity of packaging is covered by the competing system shall constitute sufficient proof that the Packaging Ordinance obligations under Articles 3 and 4 have been fulfilled in another way.

2. Where there is partial or complete participation in a self-management solution, the subsequent presentation of an independent expert's certificate stating that the take-back and recovery requirements for the relevant amount of packaging have been fulfilled shall be sufficient. The certificate may be issued either to the individual manufacturer or distributor or to an association of self-managers.

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

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

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

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

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

Article 6

1. DSD shall, as from the date of notification of this Decision, enter into the commitments set out in Articles 3, 4 and 5 vis-à-vis all parties to the Trade Mark Agreement and shall bring this to the attention of the said parties within two months of the notification of this Decision.

2. The provisions of the Trade Mark Agreement may not be applied in such a way that they delay the immediate performance of the obligation set out in paragraph 1.

Article 7

DSD shall inform the Commission, within three months of notification of this Decision, of the fulfilment of the commitments under Articles 3 to 6.

Article 8

This Decision is addressed to:

Der Grüne Punkt — Duales System Deutschland AG
Frankfurter Straße 720-726
D-51145 Cologne

Done at Brussels, 20 April 2001

For the Commission

Mario MONTI

Member of the Commission