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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other Acts are printed in bold type and preceded by an asterisk.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 17 December 2002

relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement

(Case COMP/C.37.671 — Flood flavour enhancers)

(notified under document number (2002) 5091)

(Only the English text is authentic)

(Text with EEA relevance)

(2004/206/EC)

CONTENTS

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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 1/2003 [2], and in particular Articles 3 and 15 thereof,

Having regard to the Commission decision of 10 July 2002 to open a proceeding in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Regulation No 17 and 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,

Having regard to the report of the Hearing Officer in this case [4],

Whereas:

PART I — FACTS

A. SUMMARY OF THE INFRINGEMENT

(1) This Decision is addressed to the following undertakings:

— Ajinomoto Company Incorporated

— Takeda Chemical Industries Limited

— Daesang Corporation

— Cheil Jedang Corporation

(2) The infringement consists in the participation of those producers of nucleotides in a continuing agreement contrary to Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement covering the Community and the EEA, by which they fixed the prices of the product, implemented price increases, allocated customers and set up a scheme to monitor and enforce their agreements.

(3) The undertakings participated in the infringement between November 1988 and June 1998 [5].

B. THE NUCLEOTIDE INDUSTRY

1. *THE PRODUCT*

(4) Nucleic acid or nucleotide is made from glucose through a process of fermentation, separation, crystallisation and filtration.

(5) There are two nucleotides, which are used for food flavour enhancement, namely disodium 5'-inosinate (IMP) and disodium 5'-guanylate (GMP). Both nucleotides are also sold in mixtures of these two products, such as I & G, a 50/50 mixture of the two nucleotides.

(6) IMP was the first nucleotide to be discovered with the ability to sharpen flavours in some foods. It was later discovered that GMP had the same properties. Both products are only used in small quantities. They function as a food flavour enhancer only in the presence of a glutamate, whether added, like monosodium glutamate (MSG), or naturally occurring, like the glutamate contained in tomatoes. Among other applications IMP and GMP are effective in low-sodium formulations. Nucleotide flavour enhancers are used by major food manufacturers to add flavour to foods either on their own (with naturally occurring glutamate) or, most often, in combination with MSG.

(7) As such, they are mainly used to replace beef extracts, to enhance sweet and meaty flavours, to mask 'off' flavours in various food formulations and to overcome bitterness.

2. *THE PRODUCERS*

(a) AJINOMOTO COMPANY, INC. (JAPAN)

(8) Ajinomoto Company, Inc. (Ajinomoto) is the ultimate parent company of a group of companies manufacturing chemicals, including nucleotides and food products. Backed by capabilities in amino acid technology, the group of companies is also engaged in the development and manufacture of pharmaceuticals. Ajinomoto's operations encompass manufacturing and marketing bases in 21 countries.

(9) Ajinomoto operates nucleotide production plants in Japan.

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[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 1, 4.1.2003, p. 1.
[3] OJ L 354, 30.12.1998, p. 18.
[4] OJ C 64, 12.3.2004.

[5] See under the heading 'Duration' for individualised dates per undertaking.

(10) Its European affiliates are Ajinomoto Europe Sales GmbH (Hamburg, Germany), Ajinomoto Eurolysine (Paris, France), OmniChem (Louvain-la-neuve, Belgium) and Forum Holdings Ltd (United Kingdom).

(11) In 2001, all companies belonging to the Ajinomoto group had a total worldwide turnover of EUR 8 680 million.

(b) TAKEDA CHEMICAL INDUSTRIES LIMITED (JAPAN)

(12) Takeda Chemical Industries Ltd (Takeda) is the ultimate parent company of a group of companies manufacturing pharmaceuticals, chemicals, bulk vitamins, plant protection products and food additives such as nucleotides.

(13) The distribution of nucleotides into the EEA markets is organised through Mitsui & Co. (Japan). There are however several local sales subsidiaries in Europe: Mitsui & Co. Deutschland GmbH (for sales to western Europe (including Germany, the Netherlands, Portugal and Switzerland), northern Europe, eastern Europe and Turkey), Mitsui & Co. UK Plc (for sales in the United Kingdom and Ireland) and Mitsui & Co. France SA (for sales in France).

(14) For the financial year running from 1 April 2001 to 31 March 2002, Takeda had a total worldwide turnover of EUR 9 247 million ([6]).

(c) DAESANG CORPORATION (SOUTH KOREA)

(15) Daesang Corporation (Daesang) is the ultimate parent company of a group operating worldwide, the activities of which include the manufacture of seasonings, animal feeds and amino acids. It was created in November 1997 through a merger of Daesang Industrial Limited and Miwon Corporation Limited. Daesang Industrial Limited was formerly known as Sewon Corporation Limited and Miwon Foods Corporation Limited ('Daesang' or 'Miwon').

(16) Since September 1994, Daesang Europe BV is Daesang Corporation's European sales company for nucleotides. Daesang Europe mainly sells nucleotides to independent distributors in the EEA.

(17) Daesang's worldwide turnover in 2001 was EUR 1 382 million ([7]).

([6]) The following exchange rate was used: EUR 1 = 108,682 JPY (Eurostat's reference database — 2001 exchange rate).

([7]) EUR 1 = 1 154,83 won (Eurostat's reference database 2001 exchange rate).

(d) CHEIL JEDANG CORPORATION (SOUTH KOREA)

(18) Cheil Jedang Corporation (Cheil) is the ultimate parent company of a group of companies established and operating worldwide. It was established as the South Korean Samsung Group's first manufacturing affiliate back in 1953. In 1993, Cheil Jedang Corporation became independent. Cheil is a diversified company focusing among other things on pharmaceuticals and foodstuffs. Cheil entered the nucleotide market in 1977.

(19) Cheil operates in the EEA through its wholly owned subsidiary, CJ Europe GmbH, and various independent distributors.

(20) In 2001, the companies belonging to the Cheil group had a total turnover of EUR 1 976 million ([8]).

3. *THE MARKET*

(a) SUPPLY SIDE

1. ***Production***

(21) The main four producers of nucleotides are Ajinomoto, Takeda, Cheil and Daesang. At the time of the infringement, other producers were Kyowa Hakko Kogyo Co. Ltd (Kyowa) (Japan) ([9]) and Yamasa Corporation (Yamasa) (Japan) ([10]).

(22) The total worldwide nucleotide production capacity in 1997 was approximately 10 700 metric tonnes. In 1992, the total worldwide nucleotide production capacity was around 6 660 metric tonnes.

(23) None of the Japanese or Korean manufacturers of nucleotides have production facilities in the Community. Cheil has a production plant in Indonesia and Kyowa has recently constructed a production plant in the USA.

2. ***Distribution***

(24) The abovementioned Japanese and South Korean producers of nucleotides sell the product on the EEA market through sales subsidiaries and independent distributors established in different Member States.

(25) Since September 1994, Daesang sells nucleotides in Europe through its wholly owned subsidiary Daesang Europe BV. Daesang Europe BV imports nucleotides from Asia and sells them mainly to independent distributors in the EEA.

([8]) EUR 1 = 1,13404 USD (Eurostat's reference database 2001 exchange rate).

([9]) In 1992 Kyowa ceased exporting nucleotides to Europe.

([10]) Yamasa Corporation ceased supplying food flavour enhancer to Europe in 1994.

(26) Ajinomoto sells nucleotides in the EEA through its sales subsidiary Ajinomoto Europe Sales GmbH established in Hamburg, Germany, as well as through independent distributors.

(27) Cheil sells nucleotides in the EEA through its wholly owned subsidiary, CJ Europe GmbH, and through independent distributors.

(28) Takeda sells nucleotides on the EEA through an independent distributor, which distributes the product to customers through its subsidiaries established in Germany, France and the United Kingdom.

(b) DEMAND SIDE

(29) The demand for nucleotides is directly linked to the food industry. As mentioned before, nucleotides are mainly used by major food manufacturers to add flavour to foods.

(30) Between 1992 and 1999, the nucleotides market grew rapidly: whereas worldwide consumption in 1992 was still at approximately 4 465 metric tonnes, it was well over 9 000 metric tonnes in 1999. Over the same period, it is estimated that the Community consumption of nucleotides has risen from approximately 200 metric tonnes to over 500 metric tonnes in 1999.

(31) According to the Commission's best estimates, the total EEA market was worth in the region of EUR 12 million in 1997. In 2000, the EEA market for nucleotides was worth around EUR 7,5 million.

(32) It is estimated that the three main customers in Europe, [ ]* (*), [ ]* (including [ ]*, which was acquired by [ ]* during the 1990s) and [ ]* represent between 45 % and 55 % each year of all nucleotides sold in Europe. On an individual basis, [ ]* purchases approximately 20 % and [ ]* 15 % of all nucleotides imported into Europe.

(c) MARKET INFORMATION

(33) The nucleotides business is essentially a global one. The major producers of nucleotides are large, multinational corporations established in Japan and South Korea. Although production is essentially based in Asia, sales are global (essentially to three major geographical areas — North America, Europe and Asia). The relevant geographic market for nucleotides should therefore be described as worldwide.

(*) The square brackets marked with an asterisk denote confidential information which has been deleted from the text.

(34) All nucleotides sold in the EEA are imported from outside the EEA.

(35) South Korean producers benefited from a Community preferential custom tariff regime until 30 April 1998 ([11]).

(36) The strain on which the production of commercial nucleotides is essentially based (as well as the production process itself) has been patented. Among other factors that may influence the customer's choice of supplier, parties have mentioned the quality of the product, price, delivery and technical support.

(37) From the beginning of 1988 until the end of 1997, the average monthly nucleotide prices in the EEA remained fairly stable (approximately between EUR 22 and EUR 27 per kilogram). After this period, nucleotides prices started to fall considerably (prices estimated approximately between EUR 12 and EUR 16 in 1999 and between EUR 8 and EUR 12 in 2000).

(d) INTER-STATE TRADE

(38) Over the period considered in this Decision, the nucleotides market was characterised by important flows between the current Member States as well as between the Contracting Parties to the EEA Agreement.

(39) All undertakings marketed the product in almost every Member State, either through sales subsidiaries or through distributors established in the Community.

(40) Daesang, for instance, sells nucleotides in the whole of the Community through Daesang Europe BV, established in the Netherlands. Cheil and Ajinomoto operate in a similar way. Takeda, on the other hand, markets its nucleotides through an independent distributor who has sales subsidiaries in Germany, the United Kingdom and France. The German outlet is responsible for virtually all of the Community territory with the exception of France, the United Kingdom and Ireland, where other subsidiaries are established.

([11]) 1.1.1989 to 31.12.1989: 0 % (GSP) Council Regulation (EEC) No 4257/88 of 19 December 1988 applying generalised tariff preferences for 1989 in respect of certain industrial products originating in developing countries (OJ L 375, 31.12.1988, p. 1.); 1.1.1990 to 31.12.1990: 0 % (GSP) Council Regulation (EEC) No 3896/89 of 18 December 1989 applying generalised tariff preferences for 1990 in respect of certain industrial products originating in developing countries (OJ L 383, 30.12.1989, p. 1); 1.1.1991 to 31.12.1994: 0 % (GSP) Council Regulation (EEC) No 3831/90 of 20 December 1990 applying generalised tariff preferences for 1991 in respect of certain industrial products originating in developing countries (OJ L 370, 31.12.1990, p. 1); 1.1.1995 to 30.4.1998: 0 % (GSP) Council Regulation (EC) No 3281/1994 of 19 December 1994 applying a four-year scheme of generalised tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries (OJ L 348, 31.12.1994, p. 1).

(41) Accordingly, a significant part of the nucleotide sales in the Community represented inter-State trade.

(42) During the period of the infringement and since the creation of the EEA, there were also sales to nucleotide users established in the EEA, mainly through the sales subsidiaries and distributors already established in the Community.

C. **PROCEDURE**

(a) COMMISSION PROCEEDINGS

(43) On 9 September 1999, the Japanese company Takeda filed an application pursuant to the Commission Notice on the non-imposition or reduction of fines in cartel cases ([12]) (the Leniency Notice) by informing the Commission of a cartel existing with regard to nucleotides, expressing its intention to cooperate fully with the Commission. On 14 September 1999, Takeda handed a file to the Commission containing certain documents relating to the case.

(44) On 1 February 2000, Daesang approached the Commission, confirming the existence of a cartel with regard to nucleotides and expressing its intention to cooperate fully with the Commission's investigation.

(45) On 21 February 2000, the Commission addressed requests for information to Ajinomoto, Cheil, Daesang and Kyowa requiring detailed explanations concerning contacts with competitors between 1992 and 1999.

(46) On the basis of the information received during 2000, it became clear that the cartel had operated prior to 1992 and the Commission sent additional requests for information on 11 June 2001 to Takeda, Ajinomoto, Daesang and Cheil concerning the period between 1988 and 1992.

(47) In its response to the Commission's first request for information (dated 3 April 2000 and 21 April 2000), Daesang admitted participating in meetings with competitors and provided the Commission with certain documents specifying the purpose, dates and participants of various meetings. Daesang submitted a supplementary submission on 10 May 2001.

(48) Ajinomoto responded to the Commission's request for information on 3 April 2000 and 5 May 2000 handing over certain documents relating to the meetings and expressing its intention to extend its full cooperation in the Commission's proceedings. In its reply to the Commission's request for information, which was received on 17 April 2000, Cheil admitted participating in meetings between competitors and provided the Commission with more details and documents relating to these meetings. Cheil also expressed its intention to fully cooperate with the investigation. Kyowa submitted a statement in response to the Commission's request for information on 4 May 2000, admitting its participation in meetings between competitors until the end of 1993, and equally expressing its intention to cooperate fully with the investigation. Kyowa also demonstrated that it had ceased supplying nucleotides used as food flavour enhancers in Europe since 1992.

(49) On 20 October 2000, Takeda issued to the Commission a corporate statement relating to certain anti-competitive activities involving Takeda in the Community, complementing the documents submitted on 14 September 1999. In its corporate statement, Takeda submitted detailed information on the cartel, its structure, basic rules and the meetings between competitors.

(50) As stated, the Commission issued a second request for information concerning the period 1988 to 1992 on 11 June 2001. In its response of 20 July 2001, Takeda provided additional information with regard to the operation of the cartel before 1992.

(51) Ajinomoto, on the other hand, submitted in its reply of 30 July 2001 that it was unable to find any references to meetings with nucleotide competitors during the period 1988 to 1991. However, it admitted that from time to time such meetings must have taken place.

(52) Daesang replied on 23 July 2001 and confirmed its participation in the cartel as from October 1988.

(53) Cheil submitted its reply on 14 August 2001, stating that it believed that the meetings between 1988 and 1991 did not discuss the European market.

(54) On 24 October 2001 and 20 December 2001, the Commission addressed a request for information to Yamasa. In its response of 17 January 2002, Yamasa demonstrated that it had ceased supplying nucleotides used as food flavour enhancers in Europe since July 1994.

(55) On 24 October 2001 and 31 January 2002, representatives of Ajinomoto met with the Commission to discuss their cooperation and submitted additional memoranda on 17 December 2001 and 31 January 2002.

(56) On 10 July 2002, the Commission issued a statement of objections addressed to Ajinomoto, Takeda, Daesang and Cheil.

([12]) OJ C 207, 18.7.1996, p. 4.

D. **DESCRIPTION OF EVENTS**

1. *PARTICIPANTS AND ORGANISATION*

(57) The meetings were generally held at top level (general manager and manager level), as is demonstrated by the evidence in the file concerning the dates, locations and attendance for most of the cartel meetings ([13]).

(58) Kyowa Yamasa withdrew from selling outside Japan respectively in 1992 and 1994, leaving only Ajinomoto, Takeda, Cheil and Daesang as players on the worldwide markets (outside Japan). Consequently, and as shown by the evidence in the Commission's file, the meetings would be restricted to Takeda, Ajinomoto, Cheil and Daesang as from October 1994 ([14]).

(59) The participants would usually meet in the last half of August/September, prior to the annual quotations that were to be sent to the three (initially four) big European commercial users of nucleotides, [ ]*, [ ]*, [ ]* (and [ ]*, which was acquired by [ ]* during the 1990s). These prices would then be used as a benchmark for determining the prices for sales to other customers ([15]) and to allocate these customers between them.

(60) Usually between the following January and March, the manufacturers would then hold a meeting to review the results of the annual contract negotiations with the big three customers and discuss prices generally applicable on the market ([16]).

(61) The participants would also hold bilateral meetings during which they would prepare the multilateral meetings or review the implementation of the agreements, such as in relation to specific customers.

2. *THE ESSENTIAL FEATURES OF THE CARTEL*

BASIC PRINCIPLES

(62) The structure, organisation and operation of the cartel was based upon a shared assessment of the market. As mentioned above, the producers recognised that in Europe, the market was largely made up by three large industrial users of nucleotides: [ ]*, [ ]* (who acquired [ ]* during the 1990s) and [ ]*. Between them, they purchased around 45 to 55 % of all nucleotides sold in Europe each year.

(63) The purpose of the cartel meetings was to discuss the general trends on the nucleotides market, to share information on prices and to discuss allocation between the manufacturers of the annual nucleotides sales contracts concluded with the three large industrial users of nucleotides in the Community. The meetings included discussions to the effect that the prices at which nucleotides were sold to these three companies were to be used as the benchmark for determining the prices for sales to other customers ([17]).

(64) As part of the agreement, the Japanese producers would purchase product from the Korean producers in exchange for which the Korean producers agreed to limit their sales to certain markets as well as to certain customers ('counterpurchasing agreements'). In fact, Takeda would be in charge of the counterpurchases from Cheil, whilst Ajinomoto would have similar arrangements with Daesang ([18]).

(65) The basic principles of the cartel are very clearly explained in Takeda's minutes of a meeting held on 25 July 1997 between Takeda and Ajinomoto ([19]), where Ajinomoto's new [...] was introduced. In Takeda's own words, it was explained to him that the regular meetings between competitors aimed at '(a) maintaining and reforming international market prices, (b) respecting each other's markets and (c) allocating large clients in Europe'.

(a) ***Price fixing***

(66) The cartel members agreed on 'minimum' and 'target' prices to be implemented. Prices would be set for the sale of nucleotides to the big three European customers and these prices would then be used as a benchmark for determining the sales to other customers. Every year, a target price for the next year in relation to the big three customers would also be discussed ([20]) (see, for instance, recitals 80, 87, 92, 94, 98, 108, 112, 113, 118 to 120, 124, 127 to 129, 139 to 141).

(67) Prices were mainly established both in USD and DEM. In the European market the DEM would be usually used as the benchmark currency and converted into the appropriate national currency when quoting and charging prices to the national customers.

([13]) See pages 1931 to 1947 and 1961 to 1974 of the Commission's file; see also pages 316 to 319, 1995 and 2174 to 2175 of the Commission's file.
([14]) See pages 2170 to 2171 of the Commission's file.
([15]) Ajinomoto refers to these other customers (other than [ ]*, [ ]* and [ ]*) as 'the general market'.
([16]) See pages 2170 to 2171 of the Commission's file.
([17]) See Takeda's corporate statement, page 2170 of the Commission's file.
([18]) See pages 303 and 1962 of the Commission's file.
([19]) See pages 2158 to 2161 of the Commission's file.
([20]) See Takeda's corporate statement, pages 2170 to 2171 of the Commission's file; see also Daesang's statement, page 1933 of the Commission's file; see also Daesang's supplementary submission, page 1963 of the Commission's file; see also Kyowa's statement, pages 870 and 871 of the Commission's file; see also Cheil's statement, page 304 of the Commission's file; see also Ajinomoto's memorandum, page 2, paragraph 3, page 2445 of the Commission's file.

(b) ***Customer allocation (and market sharing)***

(68) [ ]* and [ ]* were historically supplied by Takeda whereas [ ]* was historically supplied by Ajinomoto ([21]). According to Daesang, an agreement existed between Takeda and Ajinomoto not to sell to each other's respective European customers ([22]).

(69) In order to protect their sales to these major European nucleotides users, Takeda and Ajinomoto also entered into agreements with their main competitors whereby Takeda and Ajinomoto purchased product from their competitors in exchange for which the respective competitors would limit their sales to the main European nucleotides users ([23]). As Cheil puts it ([24]), 'The Japanese companies (Takeda and Ajinomoto) were to buy nucleotides from Cheil and Miwon (Daesang) respectively. In exchange, the Korean producers were supposed not to sell to the European "big three" and were to restrict quantity to Japan'. (see, for instance, recitals 78, 81, 84, 86, 100 to 102, 108, 111, 112, 114, 116, 117, 122, 123).

(70) This compensation scheme, which was a corollary to the customer allocation scheme, also lead to the allocation of markets on a worldwide basis, as confirmed by Cheil ([25]). In exchange for not selling to certain customers, the Japanese undertakings purchased product from their Korean counterparts ([26]). Given that these customers were situated in different markets from where the compensation sales occured, this effectively lead to the allocation of markets (see, for instance, recitals 81, 82, 85, 94, 95, 100 to 102, 110, 112, 122, 124, 134).

(71) Takeda confirms that an integral part of the cartel arrangements concerned 'the allocation between the manufacturers of the annual nucleotides sales contracts concluded with the three large commercial users of nucleotides in the Community: namely [ ]*, [ ]* and [ ]*'.

IMPLEMENTATION

(72) The holding of regular and frequent meetings between the addressees of this Decision was a key feature of the cartel's organisation. From 1989 to 1998, more than 20 multilateral meetings (including all cartel members) have been identified. In addition, the parties held regular bilateral meetings during this period (more than 35 of such contacts have been identified). These meetings were for example used to prepare the respective positions of the undertakings in the multilateral meetings. There were also occasional contacts by telephone (approximately 10 telephone conversations have been identified).

(73) The timing of the cartel meetings was usually set shortly prior to the annual contract negotiations with the three 'big European customers' in order to agree on the target prices to be quoted as well as on the allocation of those contracts ([27]). The parties also held meetings to review the implementation of the target prices during the sales negotiations ([28]), although the review of past target prices as well as the discussions on new target prices to be applied were often combined in one and the same meeting (see, for instance, recitals 93, 94, 96, 103, 109, 118, 125, 126, 130, 131, 141).

(74) The participants also exchanged their sales prices and volumes, which were used as a basis in their discussions to determine the target prices to be fixed ([29]) (see, for instance, recitals 80, 96, 98, 103, 115, 133).

3. *INITIAL CONTACTS*

(75) Cheil admits that certain meetings took place between competitors as from July 1988, although it first stated that the meetings between 1988 and 1991 did not appear to pertain to the EEA, focusing on the Japanese and Asian markets instead ([30]).

(76) A business trip report submitted by Cheil dated 16 to 28 July 1988 and attached as Annex 5 to Cheil's 2001 statement, mentions that 'Takeda said they were making P-meeting ([31]) for nucleotides to avert severe competition which would be occurred by Miwon's [Daesang] entry and asked us to support and join into the P-meeting'.

([21]) See Takeda's corporate statement, page 2170 of the Commission's file.
([22]) See Daesang's supplementary submission, page 4, or page 1963 of the Commission's file.
([23]) See Cheil's statement, page 2, paragraph 2 (page 301 of the Commission's file); Kyowa, page 5, paragraph 1 (page 870 of the Commission's file); Daesang's supplementary statement, pages 1963 and 1964.
([24]) Page 5 of Cheil's statement, page 304 of the Commission's file.
([25]) See Cheil's statement, page 4, page 303 of the Commission's file.
([26]) See Cheil's statement, page 5 (page 304 of the Commission's file); see also pages 1963 to 1964 of the Commission's file.
([27]) See Takeda's corporate statement, pages 2170 and 2171 of the Commission's file.
([28]) See Takeda's corporate statement, page 2171 of the Commission's file.
([29]) See Takeda's corporate statement, page 2170 of the Commission's file.
([30]) See pages 1181 to 1182 of the Commission's file.
([31]) Referring to the meetings between producers or price-fixing meetings.

(77) Takeda, for its part, situates the initiation of the meetings between competitors around 1989 ([32]).

(78) Kyowa, on the other hand, has submitted that the meetings between Japanese nucleotides producers started at least in 1986, but '[...] there may have been even earlier meetings' ([33]). Kyowa further submits that in its view, 'the main players behind the meetings were Takeda and Ajinomoto. Takeda was in charge of dealing with Cheil, and Ajinomoto was in charge of dealing with [Daesang]. Takeda was also the coordinator of the group.' ([34]).

(79) Ajinomoto admits that representatives of Ajinomoto did from time to time meet with Cheil, Takeda, Kyowa and Yamasa from 1988 onwards. Whereas it first claimed that it had not been able to collect any information on the subject matter of these meetings for the period 1988 to 1991 ([35]), it subsequently submitted various internal documents on contacts during that period in its additional memorandum of 17 December 2001 ([36]).

(80) An internal memorandum submitted by Ajinomoto shows that representatives of the Japanese nucleotides producers (Takeda, Ajinomoto, Kyowa and Yamasa) held meetings on 8 and 10 November 1988 where, as regards the European market, they exchanged information on, and discussed and/or agreed upon the prices that were offered or to be offered by each company to the three big end-users in Europe, i.e. [ ]*, [ ]* and [ ]* as well as the target prices in the general market in Europe other than the 'Big three customers' for the 1989 calendar year ([37]).

(81) Daesang submits ([38]) that it was first contacted by the Japanese producers shortly after it started to produce nucleotides in 1987: a meeting was organised between the Japanese producers (Daesang speaks of the 'Association' of Japanese producers), and representatives of Miwon (now Daesang) in Tokyo on 5 October 1988. The purpose of this meeting was to limit Miwon's penetration into the Japanese market and to discuss possible cooperation with the Korean producers. The discussions at this meeting led to the conclusion, on 19 December 1988, of a 'counterpurchasing agreement' between Ajinomoto and Miwon. Although presented as a 'supply contract', Daesang admits that the verbally agreed condition for this contract was that Miwon was not to increase its sales to Japan and not to obstruct the Japanese producers' cooperation on world prices ([39]).

(82) This is corroborated by an internal fax of Miwon dated 9 November 1988 where reference is made to the negotiations for the supply contract with Ajinomoto, stating that 'the contract contains a clause on the prohibition of new sales'. Daesang submits that this meant that Ajinomoto was only willing to buy product from Miwon if Miwon did not increase its sales to Japan ([40]).

(83) In addition, Daesang submits that at this meeting on 5 October 1988, Ajinomoto made it clear that counterpurchases from Miwon would be made by Ajinomoto whilst counterpurchases from Cheil would be made by Takeda. Ajinomoto purchased Miwon products through Takeda's distributor, which it used as a cover ([41]).

(84) In this respect, Daesang indicates that the initiative for the agreement came from the Japanese producers ([42]), thus confirming Kyowa's statements as mentioned above ('the main players behind the meetings were Takeda and Ajinomoto. [...] Takeda was also the coordinator of the group.' ([43])). The view that the cartel was lead by the Japanese producers is also shared by Cheil, stating that 'the broad commercial background to the events set out is one of dominant players seeking to protect an effective duopoly from emerging competition' ([44]).

(85) Ajinomoto submits ([45]) in this respect that its role should be considered as subordinate to Takeda's which is said to have initiated and orchestrated the cartel activities: 'Faced with the fact that it lacked a well-organised sales network in the EEA [...] and the entry of additional competition from Korean companies, it was Takeda that was keen to protect its leading position vis-à-vis [ ]* and [ ]* through customer allocation and price fixing. Meetings among the competitors were initiated by [a Takeda representative]*[...].[a Takeda representative]* chaired the meetings and made the opening and concluding speeches. During the meetings, he would lead the discussion and write grid-charts on a whiteboard. Takeda would complain vigorously whenever it came to its attention that other companies had undercut the predetermined price to [ ]* and [ ]*.' ([46])

([32]) See page 2170 of the Commission's file.
([33]) See page 869 of the Commission's file.
([34]) See page 869 of the Commission's file.
([35]) See page 2030 of the Commission's file.
([36]) See pages 2256 to 2299 of the Commission's file.
([37]) See pages 2264 to 2269 of the Commission's file.
([38]) Supplementary submission, see p. 2, point 1.
([39]) See page 1962 of the Commission's file; see also pages 986 to 989 of the Commission's file.
([40]) See pages 1962 and 990 to 992 of the Commission's file.
([41]) Daesang's supplementary statement, p. 3; see also Annexes K and L attached thereto.
([42]) See pages 1961 to 1962 of the Commission's file.
([43]) See page 4 of Kyowa's statement; page 869 of the Commission's file.
([44]) See Cheil's statement, page 2, paragraph 2; page 301 of the Commission's file.
([45]) See pages 2557 to 2558 in the Commission's file.
([46]) This is contradicted by the facts in the Commission's file. In an internal note of Ajinomoto (see Annex 11 to Ajinomoto's Memorandum of 30 June 2000 or pages 2496 to 2499 of the Commission's file, it is stated that 'we [Ajinomoto] as leading manufacturer as well as Takeda, have to take the lead in the price increase race, and therefore it is most likely to run against a head wind. However, it is inevitable that we have to take risks'; see also Annexes 7 and 8 to Ajinomoto's memorandum, pages 2483 to 2488 of the Commission's file).

(86) According to Daesang, another counterpurchasing contract was concluded between Takeda and Miwon in early March 1989. According to Daesang, this contract was negotiated on behalf of Miwon by Ajinomoto. The Commission notes that, in its reply to the statement of objections, Ajinomoto contests that it negotiated a contract with Takeda on behalf of Miwon. The conditions of the contract with Takeda were that Miwon (now Daesang) was not to increase its sales to Japan, that Miwon was to cooperate with the Japanese producers in raising the world price for nucleotides and that Miwon was to cooperate with (i.e. refrain from selling to) the 'Big three' customers ([ ]*, [ ]*, [ ]*).

4. *OPERATION OF THE CARTEL AGREEMENT*

(87) According to a business trip report ([47]), a meeting among the manufacturer(s) of nucleotides (in which Cheil participated) was held between 7 and 23 March 1989. The same business report indicates that attendants agreed to meet again in Kyung Ju, Korea on 7 June 1989 (according to Daesang, this is the meeting where the target prices for 1989 were agreed upon).

(88) An internal fax from Miwon Japan to Mitra ([48]) dated 30 May 1989 ([49]), mentions, in addition to the supply of product to Ajinomoto, an upcoming nucleotide meeting with competitors on 6 and 7 June 1989 in Kyung Ju, Korea, which was to be attended by representatives of Takeda, Ajinomoto, Miwon as well as representatives of two other producers.

(89) Daesang states that it believes that the target prices for 1989 were set at this producers' meeting of 6 and 7 June 1989 ([50]).

(90) An internal fax of Ajinomoto dated 9 June 1989 confirms this meeting, stating that 'at a meeting which took place the day before yesterday in Korea, Takeda told the Koreans that a request was received by [...] to reduce the USD 27,50 cif price to the prevailing market price' ([51]).

(91) An internal fax from Ajinomoto dated 13 July 1989 indicates that Ajinomoto's European sales office was requested to research and confirm their information relating to Takeda's selling price of nucleotides to [ ]* and [ ]* and certain information on low selling price and sales quantities of Takeda and other manufacturers in West-Germany, France, the United Kingdom, Switzerland and Spain in preparation for an upcoming meeting between four Japanese and two Korean nucleotides manufacturers in Taiwan on 7 August 1989. No further information is available on whether or not this meeting of 7 August 1989 took place.

(92) On 5 October 1989, representatives from Takeda, Ajinomoto, Cheil, Miwon and two other producers met in the ANA hotel in Tokyo in order to discuss prices for the forthcoming negotiations with the big customers, including the European market for 1990, and to review the implementation of the 1989 price-fixing agreement ([52]).

(93) However, it should be noted that according to Daesang, the meeting of 5 October 1989 consisted in fact of several meetings. The discussion on prices for European customers for 1989 and 1990 were discussed bilaterally between Takeda and Miwon and Takeda and Cheil respectively. Miwon was informed by Takeda that 'Cheil is basically cooperating, which indicates that Takeda had previously met with Cheil' ([53]). A final meeting was held at 17.00 the same day, but essentially dealing with issues relating to the [ ]* market.

(94) It was concluded that there was a huge gap between the target price and the actual price of nucleotides. The target prices (including Europe) for 1990 were discussed on the basis of the 'guidelines for pricing in the European market in 1990', submitted by Takeda and indicating three different target prices based on the volume ordered by a customer (large, middle or small customer). In addition, Daesang submits that in view of an expected visit to Korea by a purchaser from [...], Takeda instructed Miwon to offer [...] a price in accordance with the guidelines (for a reproduction of these guidelines, see below).

(A) Europe market — suggested guidelines for 1990

Price (CIF)	Target Customer	Remarks
USD 30/Kg	More than 1 000 kg (large)	One lot quantity
USD 31/Kg	500 — 1 000 kg (middle)	One lot quantity
USD 32/Kg	Less than 500 kg (small)	One lot quantity

Source: Annexes J and L to Daesang's supplementary submission ([54]).

(95) During the meeting on 5 October 1989, Takeda also stated that 'Europe is Takeda territory' ([55]).

([47]) See Annex 5 of Cheil's 2001 statement, pages 2616 to 2619 of the Commission's file.
([48]) Miwon Trading and Shipping Company, a subsidiary of Miwon.
([49]) See pages 1963 to 1965 of the Commission's file.
([50]) See page 1965 of the Commission's file.
([51]) See pages 2259 and 2270 to 2272 of the Commission's file (page 3 and exhibit 2 of Ajinomoto's supplementary statement of 17 December 2001).
([52]) See pages 2174, 1009 to 1015, 1016 to 1024 and 1025 to 1032 of the Commission's file, respectively.
([53]) See page 1965 of the Commission's file.
([54]) See Ajinomoto's supplementary Submission of 17 December 2001, page 4, or page 2260 of the Commission's file.
([55]) See page 1009 of the Commission's file.

(96) Annex M to Daesang's supplementary submission ([56]) is an internal fax from Miwon in follow-up of the meeting of 5 October 1989 which states that the basic position of the (Miwon) headquarters is to try to follow the basic cooperative framework of the Japanese companies. It is further stated that the 'Japanese producers have been selling (in 1989) at a much lower price than the target price in the European market [...]. Therefore it is questionable, whether the above price guideline will be followed by the Japanese companies during the 1990 contract period'.

(97) The abovementioned guidelines are confirmed by an internal fax of Ajinomoto dated 6 October 1989, which specifies that the guidelines were handed over to the Korean producers. However, for the purpose of the Japanese producers, a separate set of guidelines were also exchanged on 'guidelines prices' to be quoted for 1990: USD 28/kg (DEM 52,20/kg) for the big users and USD 30/kg (DEM) 55,80/kg for the other customers (general market big accounts) ([57]).

(98) An internal fax from Ajinomoto of 19 December 1989 reports on a meeting held between the Japanese producers regarding nucleotides prices in Europe for 1990 on that same day. According to the fax, Takeda said that they commenced negotiations with [ ]* and [ ]* during their two recent European trips, but they did not agree. Takeda made an offer to [ ]* at USD 27,50/kg but Takeda wished to make a revised offer price at USD 26/kg. Takeda's negotiations with [ ]* were still pending ([58]).

(99) As stated before, the parties to the cartel would also occasionally contact each other on a bilateral basis. The documents contained in Annexes N and O to Daesang's supplementary submission are good examples of this.

(100) Annex N to Daesang's supplementary submission ([59]) contains an internal fax from Mitra to Miwon Japan dated 22 November 1989, which expressly indicated that Takeda had proposed that, if Miwon would agree to limit its sales to [...] and [...], Takeda would accept a lower standard of product from Miwon as part of its counterpurchasing arrangement.

(101) Annex O to Daesang's supplementary submission ([60]) concerns a telex dated 28 November 1989 from Takeda, which was only received a few days later by Miwon, listing the terms of its purchases from Miwon in 1990, and also containing the request from Takeda to Miwon to offer a certain price to [...] and [...] and to subsequently confirm its compliance with this request.

(102) According to Daesang, it would no longer agree to cooperate on pricing to [...] and [...] in 1991 unless Takeda agreed to buy at least 20 tonnes of nucleotides from it and it would not cooperate with regard to [...] unless Takeda would purchase a total of 40 tonnes. Its fax of 10 November 1990 ([61]) stated that this matter was discussed with [ ]* from Takeda when he visited Mitra on 7 November 1990. It is mentioned that 'Mitra fully agrees to cooperate in order to increase the [worldwide] market price. However, in the future, exports to Europe freely with some customers accounts, so would like to cooperate, in regard to '91, only with respect to [...] and [...]. In addition, currently [...] and other customers are continuously requesting offers and if possible looking to confirm contracts. If we [continue] to follow Takeda's request and offer at a higher price, then it is certain that we will not be able to have [any] contracts'. An internal fax dated 19 November 1990 ([62]) concerns the same issue. The precise terms of the counterpurchasing arrangements were also the main topic discussed at a meeting between Ajinomoto, Takeda's distributor and Miwon in Tokyo on 1 May 1991 ([63]).

(103) According to Kyowa's statement ([64]), [ ]* of Takeda announced Takeda's prices to [...] and [...] to Kyowa at a meeting in January 1991, following a telephone call that he made to his counterpart at Kyowa, reporting that Takeda wanted to increase these prices up to a particular level as from October 1991.

(104) Ajinomoto submitted an internal memorandum on Takeda's nucleotides negotiation status for 1992, which was presumably written on 21 November 1991. According to this memorandum, Takeda informed Ajinomoto regarding the 1992 contract that 'Takeda was trying to raise the price by two dollars on USD basis (to USD 28,50) but the negotiation was very difficult because the price increase would be very significant on a local currency basis due to the exchange rate'. Furthermore, Takeda complained that [ ]* was receiving lower offers from Ajinomoto (USD 17,20 instead of Takeda's USD 17,70) and requested Ajinomoto to offer to sell at USD 18 for 1992, which would be higher than Takeda's price ([65]).

([56]) See pages 1033 to 1036 of the Commission's file.
([57]) See page 2260 of the Commission's file.
([58]) See Ajinomoto's supplementary submission of 17 December 2001, page 4, or page 2260 of the Commission's file.
([59]) See pages 1037 to 1038 of the Commission's file.
([60]) See pages 1039 to 1040 of the Commission's file.
([61]) See pages 1041 to 1044 of the Commission's file.
([62]) See pages 1045 to 1050 of the Commission's file.
([63]) See pages 1051 to 1054 of the Commission's file.
([64]) See page 871 of the Commission's file.
([65]) See exhibit 7 attached to Ajinomoto's supplementary submission of 17 December 2001 or pages 2285 to 2287 of the Commission's file; see also exhibit 8, or pages 2288 to 2290. The first price quote (USD 28,50) concerns I & G product (mixture of IMP and GMP), whereas second price quote (USD 17,20 to 18) concerns IMP.

(105) Sometimes, in order to limit the risk of detection, the meetings between competitors were limited to just a few undertakings who would then act on behalf of certain other competitors. For instance, Daesang submits ([66]) that a high level two-day meeting was organised on 27 and 28 April 1992 between the presidents of Daesang, Cheil and Ajinomoto who acted on behalf of the other Japanese producers as well because, as Ajinomoto stated, 'it would look suspicious if the Japanese producers all went to a Korean resort together'.

(106) During this meeting, the cooperation on nucleotides was discussed. Daesang believes that Ajinomoto also attended the meeting on behalf of the other Japanese producers including, among others, Takeda ([67]).

(107) Daesang submits that representatives of Miwon attended a meeting in Korea on 30 June 1992 with representatives from Takeda. No information is given, however, as to the subject of the meeting ([68]).

(108) The target prices for 1993 were discussed at a meeting organised in Tokyo on 20 August 1992. According to Daesang's statement, the agenda for the meeting concerned cooperation in setting the international market price for nucleotides, 'counterpurchasing' and restrictions on sales to the [ ]* market. The final goal, as expressed by Takeda, was to have one world price, including the Japanese market and for the Japanese producers to buy a significant amount of the Korean producers' production. The world target price ([...]) presented at the meeting was between USD 30 and USD 32. After a meeting recess, an agreement was reached on the world target price. According to Daesang, 'it was clear that the Japanese companies had discussed all the issues amongst themselves before the meeting and had agreed upon a unified presentation' ([69]). In support of its statement, Daesang has provided a copy of a target price list prepared by Takeda for the purpose of the meeting of 20 August 1992. The list states that for Europe, the target prices would be at DEM 48/kg and DEM 45/kg for the big three customers ([70]). According to Cheil, the Japanese producers requested during this meeting that prices for Europe be offered only in local currencies ([71]).

(109) On 28 January 1993, the participants met again in Tokyo in order to review the implementation efforts to achieve the target price set on 20 August 1992. During this meeting, the parties decided whether the target price set in 1992 should be adjusted and considered ways to achieve it. Daesang submits that the two Korean producers considered it too difficult to raise prices and asked their Japanese counterparts for permission to sell below target price. The Japanese producers refused. The Japanese argued, among other things, that the Koreans could sell into Europe at a lower price because they were not subject to any duty due to the Community preferential custom tariff regime (GSP). Even though the parties apparently did not reach a consensus as to how to achieve the target price, everyone reaffirmed the target price ([72]).

(110) Furthermore, regional prices were discussed to see if the companies were adhering to the worldwide target price agreed to at the meeting of 20 August 1992. Specifically, prices in the [ ]*, [ ]* and Europe were discussed. There also was a discussion in general about cooperation with regard to the European big three customers ([73]).

(111) Ajinomoto, Takeda, Miwon and Cheil met again in Fukuoka (Japan) on 2 March 1993. During this meeting an adjustment was made to the target prices for the various regions for 1993. Furthermore, discussions were held to clarify the terms of the counterpurchasing agreements, since the cooperation did not always go as smoothly as the Japanese producers would have liked. Cheil states that the attempt that was made during this meeting to set the price in the Community area failed because the Korean producers wanted to quote a different price as they benefited from the GSP. Cheil concludes that 'in fact, it was the conduct of the Korean companies which prevented the arrangements from working more effectively' ([74]).

(112) Daesang's minutes of that meeting ([75]) provide, however, a more detailed version of the events. According to Daesang, the meeting was initially conducted by Ajinomoto's Deputy General Manager, who threatened to end the counterpurchasing agreements if the Korean companies continued to fall behind in their cooperation with regard to the big three customers, maintaining the agreed world price and restricting their sales to Japan. Cheil and Daesang agreed that the counterpurchasing practice had to be maintained and, consequently, they agreed with the Japanese producers to improve their cooperation efforts. Daesang states that it agreed to cooperate with respect to the 'big three' customers but wanted Ajinomoto and Takeda to increase the quantity of nucleotides that they purchased from Daesang. Finally, a discussion was held on how the cooperation could be implemented, regulated and enforced.

([66]) See pages 1970 to 1971 of the Commission's file.
([67]) See pages 1061 to 1066 of the Commission's file.
([68]) See pages 1067 to 1068 of the Commission's file.
([69]) See pages 1069 and 1070 to 1071 and 392 to 393 of the Commission's file.
([70]) Daesang explains that these figures are related to I & G. A converting rate for prices for IMP and GMP separately is inserted on the bottom of the same target price table.
([71]) See Cheil's statement, page 4, No 2.
([72]) See pages 1072 to 1073 of the Commission's file.
([73]) See pages 1072 to 1073 of the Commission's file.
([74]) See Cheil's statement, page 5, No 5.
([75]) See pages 395 to 396 of the Commission's file.

(113) During the remainder of 1993, Miwon received several more visits by Takeda and Ajinomoto representatives. During these visits, the same topics were discussed, i.e. cooperation on the 'big three' customers and the world market prices ([76]).

(114) Further meetings were organised in Seoul and Tokyo and regular contacts by telephone were held between the parties (i.e. meetings between Takeda and Cheil on 7 and 26 May 1993 and 30 August 1993, meeting between Ajinomoto, Takeda, Cheil and Miwon on 7 July 1993). Most of these contacts related to the execution of either the counterpurchasing arrangements (i.e. prices and quantities), or complaints about non-compliance with the target prices by one of the (Korean) participants.

(115) Prices to particular customers were also discussed: on 13 September 1993, for example, Takeda phoned Cheil to inform Cheil of the prices that were to be quoted to the European big three customers ([ ]*, [ ]* and [ ]*). In addition, the relationship between IMP, GMP and I & G prices was discussed (see Cheil's statement).

(116) On 25 January 1994, a meeting was organised between Cheil and Takeda to discuss the continuation of the counterpurchasing contract. It was agreed that the quantity and price would be kept the same as in 1993. According to Cheil, Takeda complained that Cheil did not comply with the existing arrangements for Europe, [ ]* and the [ ]*. For example, Takeda is said to have complained to Cheil about the fact that [ ]* had asked Takeda to reduce its price for IMP to USD 16,5/kg after Cheil had offered a quote at this level to [ ]*.

(117) Cheil submits that the minutes it kept of this meeting indicate clearly that the incumbent Japanese producers played the leading role. Following discussions between Cheil and Takeda concerning the 'counter procurement' by the Japanese industry, Takeda is reported to have stated that a final decision in this respect would be taken in a meeting between Ajinomoto and Takeda ([77]).

(118) On 25 August 1994 ([78]), a meeting took place in Tokyo. The records of the meeting of Cheil and Miwon show that at this meeting, the international market prices and sales prices of nucleotides were discussed. The parties exchanged their opinions on the new target prices to be quoted. The Japanese wished to increase the international prices. According to Cheil's business report of that meeting ([79]), Takeda suggested that the parties raise the price up to USD 30/kg at a stroke, whereas the others suggested that they raise the prices by USD 1 to 2/kg step by step. Cheil submits that the Japanese complained about the lack of compliance by the Korean companies.

(119) Finally, the parties discussed their cooperation on the European big three customers. In particular, Ajinomoto asked Cheil and Daesang to refrain from selling to [ ]*. As a conclusion to the meeting, it was agreed to hold another meeting in Seoul in the middle of September 1994 where the main issues would be the following: '(a) price raise: setting target price at USD 30/kg; (b) Cheil and Miwon would define their attitude to big 3 (especially [ ]*)' ([80]).

(120) Earlier, on 7 and 8 July 1994, there had been a meeting between the Japanese and the Korean producers concerning the 1995 price offer for Europe. It follows from Cheil's minutes of this meeting that the Japanese producers insisted strongly on raising prices in 1995. The Korean producers were requested to offer a price lower than that of the Japanese products by USD 2/kg. The minutes continue with an internal memo with one clear message: 'Please, try to raise the price based on the shortage of Korean makers and yen appreciation' ([81]).

(121) According to Cheil, another meeting was held on 6 October 1994 between Ajinomoto, Takeda and Cheil at the Hotel Lotte in Seoul where the Korean cooperation in Europe regarding the 'big three' customers was discussed. Other items on the agenda were the Korean cooperation on the [ ]* market and an overview of the [ ]* market (including Cheil's sales to a [ ]* client, which already formed the object of disputes between Cheil and the Japanese producers). Cheil submits that it did not make any commitments during this meeting, using the absence of Miwon as an excuse ([82]).

(122) An internal fax from Ajinomoto dated 17 October 1994 reports on a telephone conversation between Miwon, Cheil and Ajinomoto showing that Ajinomoto asked Cheil to make an offer to [ ]* Europe one week earlier than Ajinomoto's offer to the same company. Cheil replied that they would accept if Miwon accepted first. Regarding the price offer, Cheil said that they would instruct their people to offer to sell at DEM 49,50/kg but refused to make an offer at DEM 50/kg. Miwon demanded that Ajinomoto purchase an additional amount of product from Miwon as a condition for accepting Ajinomoto's request to offer to [ ]* at a high price.

(123) Takeda and Miwon met in Seoul on 6 February 1995 ([83]) to discuss world prices for nucleotides as well as the counterpurchasing conditions.

([76]) See page 1935 of the Commission's file.
([77]) See page 306 of the Commission's file.
([78]) Daesang submits that the Japanese producers had a premeeting on 24 August 1994 in preparation of the meeting of 25 August 1994 with the two Korean producers (see page 5 of its statement, page 1935 of the Commission's file).
([79]) See pages 392 to 393 of the Commission's file.
([80]) See pages 397 to 404 of the Commission's file.
([81]) See Cheil's statement, page 6 and Annex 5.
([82]) See page 307 of the Commission's file.
([83]) See pages 1937 and 405 to 410 in the Commission's file.

(124) On 16 and 17 October 1995, a meeting was held in Takeda's head office in Tokyo. Ajinomoto, Takeda, Cheil and Daesang attended. According to Daesang, during this meeting the nucleotide world markets and the situation concerning the 'big three' were discussed. Current prices in various countries and regions (including Europe) were discussed to see if the target prices were met or should be adjusted. Ajinomoto gave prices that other producers should offer to [ ]* and the other producers agreed. Takeda is said to have done the same with respect to [ ]* and [ ]* and the others, including Ajinomoto, agreed ([84]).

(125) Prior to this meeting, several other meetings took place between the parties bilaterally and between the four producers. Daesang submits that between April 1995 and 16 October 1995, it attended approximately three or four meetings with Ajinomoto at Mitra's head office in Seoul and approximately one or two meetings with Takeda at the same offices. There were approximately two or three meetings at a conference room in the Lotte Hotel which all four producers attended. At each of these meetings, the parties would review prices in various regions to see if target prices previously agreed to were being met or should be maintained, lowered or raised. Some of the target prices were increased (i.e. the [ ]* target price was maintained even though it was converted into a price per pound rather than a price per kilo). The parties also discussed and agreed to the concept of raising the market prices in various regions as a basis for raising the price to the European big three customers ([85]).

(126) The participants of the cartel met in Seoul during the month of December in order to review the 1995 cooperation. According to the report of the meeting ([86]), Ajinomoto led the meeting and thanked everyone for their cooperation during 1995 which resulted in the effective implementation of nucleotide price increases and asked everyone to continue their cooperation in 1996 so as to further increase the nucleotide prices. Mr C.H. Kim of Daesang is said to have said that he would and the other participants 'showed their agreement by nodding or saying words to that effect'.

(127) According to Daesang's statement ([87]), the four producers (Takeda, Ajinomoto, Daesang and Cheil) met on 7 March 1996 in Seoul in order to fix the 1996 target price for sales to the 'big three customers'. Ajinomoto proposed an international target price of USD 35/kg. With regard to the European market in general, Takeda suggested that a new price should be applied in Europe by the end of August 1996. Ajinomoto suggested that this price should be set at DEM 51/kg. Takeda submitted a copy of its report of that meeting to the Commission ([88]).

(128) According to this meeting memo, there was a common understanding between the participants regarding a price improvement to be realised in 1996. Each company confirmed that it would not change the current supply amount and agreed that price improvement would be the priority. According to the meeting memo, the participants discussed the policy of improvement of the 1996 prices, with the 1997 price plan for the big three (European) customers in mind. It was agreed that the target price for the three big companies should be USD 35/kg (about 10 % up) on a USD basis. In order to achieve this price, the nucleotide producers would prepare a price improvement schedule for the general market prices, which should reach the level of USD 35/kg by September/October (1996).

(129) On 21 May 1996, Ajinomoto requested and obtained a meeting with Miwon about the low price sales of Miwon in Europe. Concerning Europe, Ajinomoto informed Miwon that it was negotiating the price for the second half of 1996 with European customers, but that a price increase in Germany and Spain would be very difficult. Ajinomoto noted that in Spain the price level was DEM 44 to 45/kg, but that it should have been DEM 49/kg based on the price in 1995. A European target price of DEM 50/kg was agreed as of June 1996, with the exception of sales to the 'big three customers' ([89]).

(130) The same day, Ajinomoto also met with Cheil in order to discuss the implementation of the agreed price increases. Cheil is said to have stated that such price increases would not be possible in Europe before July 1996. Ajinomoto insisted that the agreed prices be implemented by the end of August 1996 ([90]).

(131) According to Daesang's supplementary submission ([91]), discussions on the prices to be charged to the big three customers for 1997 started during a meeting held on 3 July 1996. A new European target price was proposed by Takeda and the other parties commented on that proposal during the meeting.

([84]) See page 1075 of the Commission's file.
([85]) See pages 1937 to 1939 and 405 to 423 of the Commission's file.
([86]) See page 1076 of the Commission's file.
([87]) See page 10 of its statement or page 1940 of the Commission's file; see also Annex 12 to its statement, pages 426 to 427 of the Commission's file.
([88]) Takeda rightly observed in its reply to the statement of objections that it had confirmed that although the memo refers to 17 March 1996, rather than 7 March, reference is actually made to the meeting held on 7 March. (In fact, the memo also states the conclusions drawn at the meeting, whilst having been drafted on 12 March 1996).
([89]) See page 1941 of the Commission's file.
([90]) See Annex 5 attached to Cheil's statement, pages 2610 to 2612 of the Commission's file.
([91]) See pages 12 and 13 of Daesang's statement, pages 1942 to 1943 of the Commission's file.

(132) Miwon and Takeda met again on 9 July 1996 in New Jersey, USA and discussed the market price of nucleotides in the world. Takeda asked Daesang for its cooperation in pricing ([92]).

(133) Somewhere in the summer of 1996, Ajinomoto, Takeda, Miwon and Cheil met again in order to discuss the current situation of nucleotides markets, including Europe, and exchange information on sales prices ([93]).

(134) At a meeting on 29 August 1996 in Seoul, Takeda informed the others ([94]) of the price that it planned to offer to [...] for 1997 and asked the others to offer at a higher price (DEM 54/kg). Takeda also asked the others to inform it in case [...] requested a price offer from them. Takeda also suggested different reasons that could be given to customers to justify a price increase ([95]).

(135) It should also be noted that bilateral meetings were also used to influence the outcome of the 'general' competitors meetings. For example, Ajinomoto and Miwon held a meeting on 28 August 1996, one day before the actual competitors meeting, where Ajinomoto advocated a price increase for the customer [...] for 1997. According to Daesang, Ajinomoto wanted to secure the support of Miwon before the actual meeting between competitors took place ([96]).

(136) Takeda submits in this respect that following the US investigations into Ajinomoto's involvement in a worldwide cartel on lysine, Ajinomoto avoided attending the four-party meetings with other nucleotides producers (as from August 1996) although it continued to participate in the nucleotides arrangements. Instead, it continued to hold direct bilateral contacts with Takeda, usually before or after those meetings. According to Takeda, Ajinomoto expected Takeda to use the information given by Ajinomoto as a basis for the talks with the Korean producers ([97]). In reply to the statement of objections, Ajinomoto submits that these allegations are incorrect and are not corroborated by evidence. The exact duration of Ajinomoto's participation in the cartel arrangements is discussed in more detail under 'Duration'.

(137) According to Daesang, it was informed by Takeda that all parties had reached an agreement on the prices for the big three customers during a round of golf organised between representatives of Miwon and Takeda in New Jersey on 10 September 1996.

([92]) See Daesang's statement, page 1943 of the Commission's file.
([93]) See Daesang's statement, page 1944 of the Commission's file.
([94]) Cheil, Daesang and Ajinomoto.
([95]) See page 1945 of the Commission's file.
([96]) See page 1944 of the Commission's file.
([97]) See pages 2171 to 2172 of the Commission's file.

(138) According to a report submitted by Takeda, a meeting was held in March 1997 between Takeda, Cheil and Daesang and an agreement was reached on target prices of USD 30 ([98]).

(139) The target prices that were set for 1997 appeared to be difficult to maintain. A meeting was organised in Seoul between 26 to 28 May 1997. According to Takeda's report of this meeting ([99]), an agreement was reached to set the current overseas price at USD 25/kg for 1997, 'a level falling short of USD 30 agreed upon in the March 1997 meeting'. The report continues that 'proceeding from the judgment that price improvements are necessary before the next year's contracts are negotiated with the different major European companies scheduled for autumn, we exchanged views with the two companies (Cheil and Daesang) on the range of price improvement and the timing (schedules)'.

(140) Finally, they agreed on an improvement up to USD 29 to 31/kg for the following year. A price-fixing agreement was equally reached for [ ]*, one of the European customers. According to Takeda's report of that meeting ([100]), the contract price to [ ]* that was agreed upon for 1997 stood at DEM 48/kg USD 32/kg. An increase would be sought of around 6 % (DEM 51/kg), but Takeda acknowledged that attaining such an increase would be difficult.

(141) Takeda visited Miwon in Amsterdam on 3 June 1997. The items discussed at this meeting were the nucleotide market in Europe, sales by Miwon to [...], [...] and [...] and the exchange of information on prices in Europe and possibilities for price improvements. A similar meeting was held between Takeda and Cheil in Frankfurt on 9 June 1997 where information was also exchanged on prices in Europe and the possibility of improving these prices ([101]).

(142) Takeda met again with Miwon in New Jersey, USA on 10 July 1997 and 16 September 1997 in order to discuss the nucleotides market in general ([102]).

(143) According to Takeda's corporate statement, Takeda's [ ]* met for the first time with his new counterpart at Ajinomoto on 25 July 1997. At this meeting, which took place at a restaurant in Tokyo, they discussed how the nucleotides market had been organised between the manufacturers in recent years and they exchanged their companies' views in relation to price strategy. Ajinomoto, on the other hand, states that during this and later meetings, to the best of Ajinomoto's knowledge, 'European target prices or customers were not discussed'.

([98]) See page 2146 of the Commission's file.
([99]) See page 2146 of the Commission's file.
([100]) See page 1946 of the Commission's file.
([101]) See pages 2217 to 2220 of the Commission's file.
([102]) See Daesang's statement, page 1947 of the Commission's file.

(144) The information provided by Takeda with regard to this meeting, as well as to the meeting held in September 1997, provides a somewhat different picture. Takeda's report of that meeting ([103]) clearly mentions that, among other things, Ajinomoto informed Takeda 'that Ajinomoto had already suggested a 10 % increase on a DEM basis (to around DEM 51?) to their distributors for next year [...]'. Takeda mentioned to Ajinomoto that 'they understood their increase in DEM pricing with a change to dollar pricing in mind, but that [this] depend[s] on how this was passed on the other companies, Takeda, Cheil and Miwon'. Takeda also informed Ajinomoto that it would decide on pricing towards [ ]* and [ ]* based upon the European market research planned for early October ([104]).

(145) About a month later, Takeda met with representatives of Cheil and Miwon separately in bilateral meetings on 27 to 29 August 1997. According to Takeda, the main subject of the meetings were the counterpurchasing agreements, but it is possible that the companies also mentioned the forthcoming annual contract negotiations with the three big customers at this meeting. Daesang submits that it also met with Takeda in the USA on 10 July 1997 and 16 September 1997 and discussed the nucleotides market in general ([105]).

(146) In September 1997, Takeda met again with Ajinomoto. According to Takeda, Ajinomoto communicated that it sought a 15 % price increase for 1998 and a minimum of 10 % ([106]). In a contemporaneous document submitted by Takeda related to this meeting ([107]), it is stated that 'the head office of each company seems to have decided [upon] the offered price from A[jinomoto], C[heil] and MW (Miwon/Daesang) to [...]* and the offered price from T[akeda] to [...]*, [...]* for contract negotiations for the next year. We assumed that in Europe, the products of C[heil] and MW (Miwon) would get GSP treatment' ([108]).

([103]) See page 2223 of the Commission's file.
([104]) In its reply to the Commission's statement of objections, Ajinomoto contests Takeda's description of these events, as further discussed in detail under 'Duration'.
([105]) See pages 1947 and 1974 of the Commission's file.
([106]) See page 2176 of the Commission's file; Ajinomoto contests this description of events, as further discussed in relation to the duration of Ajinomoto's participation in the infringement.
([107]) See page 2224 of the Commission's file.
([108]) The translation provided by Ajinomoto in its statement of 29 November 2002 reads as follows: 'Seems that the head office of each company has studied and tentatively decided on the price to be proposed at the negotiation for the next year contract scheduled for October and November by A, C, MW with [ ]* and by T with [ ]* and [ ]* groups. On the premise that C's and MW's product will continue to enjoy GSP in Europe next year'.

(147) According to Daesang, Miwon held a meeting with Takeda in Seoul in October 1997 where they had a general discussion about the declining price for nucleotides in the world market ([109]).

(148) Cheil submits that it held meetings with Takeda on 24 and 26 March 1998 in Seoul and that on these occasions ([110]), the worldwide nucleotide market and production was discussed. Another meeting between Cheil and Takeda has been identified on 2 June 1998 and Cheil submits that the items discussed concerned the price decline for nucleotides and Cheil's low-priced sales on the Japanese market.

(149) No other cartel related meetings have been identified.

PART II — LEGAL ASSESSMENT

A. JURISDICTION (APPLICATION OF THE TREATY AND THE EEA AGREEMENT)

1. *RELATIONSHIP BETWEEN THE TREATY AND THE EEA AGREEMENT*

(150) The arrangements set out above applied to most of the Member States and to the EEA (Norway and, prior to its accession to the Community, Austria).

(151) The EEA Agreement, which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994. This Decision therefore includes the application as from that date of those rules (primarily Article 53(1) of the EEA Agreement) to the arrangements to which objection is taken.

(152) In so far as the arrangements affected competition and trade between Member States, Article 81 of the Treaty is applicable. In so far as the cartel operations had an effect on trade between the Community and the EFTA countries or between EFTA countries which were part of the EEA, Article 53 of the EEA Agreement is applicable.

(153) If an agreement or practice affects only trade between Member States, the Commission retains competence and applies Article 81(1) of the Treaty. If an agreement affects only trade between EFTA/EEA States, then the EFTA Surveillance Authority (ESA) is alone competent and applies the EEA competition rules, in particular Article 53(1) of the EEA Agreement ([111]).

([109]) See Daesang's statement, pages 1947 to 1948 of the Commission's file.
([110]) See page 309 of the Commission's file.
([111]) Pursuant to Article 56(1)(b) of the EEA Agreement, and without prejudice to the competence of the Commission where trade between Member States is affected, the ESA is also competent in cases where the turnover of the undertakings concerned in the territory of the EFTA States equals 33 % or more of their turnover in the territory of the EEA.

(154) In this case, the Commission is the competent authority to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement on the basis of Article 56 of that Agreement, since the cartel had an appreciable effect on trade between the Member States ([112]).

B. APPLICATION OF ARTICLE 81 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT

1. *ARTICLE 81(1) OF THE TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT*

(155) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trade conditions, limit or control production and markets, or share markets or sources of supply.

(156) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains an identical prohibition of agreements, decisions and concerted practices but substitutes the conditions of effect on trade between Member States with 'between contracting parties' (in this context 'contracting parties' means the Community and the individual (then) EFTA States), and the prevention, restriction or distortion of competition within the common market with 'within the territory covered by ...[the EEA] Agreement'.

2. *AGREEMENTS AND CONCERTED PRACTICES*

(157) Article 81(1) of the Treaty and Article 53 of the EEA Agreement prohibit agreements, decisions of associations and concerted practices.

(158) An agreement can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing, no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties.

(159) In its judgment in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV and others* v *Commission* (PVC II) ([113]), the Court of First Instance stated (in paragraph 715) that 'it is well established in the case-law that for there to be an agreement within the meaning of Article [81(1)] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way'.

(160) An 'agreement' for the purpose of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term 'agreement' can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose.

(161) As the Court of Justice (upholding the judgment of the Court of First Instance) pointed out in Case C-49/92P *Commission* v *Anic Partecipazioni SpA* ([114]), in paragraph 81, it follows from the express terms of Article 81(1) of the Treaty that that agreement may consist not only in an isolated act but also in a series of acts or course of conduct.

(162) A complex cartel may thus properly be viewed as a single continuing infringement for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81(1) of the Treaty.

(163) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries or even cheating may occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.

(164) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is also responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk (Judgment of the Court of Justice in *Commission* v *Anic*, paragraph 83.)

([112]) See Chapter 5 'Effect upon trade between the Members States and between EEA contracting parties'.

([113]) [1999] ECR II-931.

([114]) [1999] ECR I-4125.

(165) Article 81 of the Treaty ([115]) draws a distinction between the concept of 'concerted practice' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings' in order to bring within the prohibition of that Article any form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. Even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour, the conduct may still fall under Article 81(1) of the Treaty as a 'concerted practice' ([116]).

(166) It is not necessary, however, particularly in the case of a complex infringement of long duration, for the Commission to characterise it as exclusively one or other of these forms of illegal behaviour ([117]). The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible realistically to make any such distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct while, considered in isolation, some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to subdivide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 81 lays down no specific category for a complex infringement of the present type ([118]).

([115]) The case-law of the Court of Justice and the Court of First Instance analysed under this heading in relation to the interpretation of the terms 'agreements' and 'concerted practices' in Article 81 of the Treaty expresses principles well established before the signature of the EEA Agreement. It therefore also applies to these terms in so far as they are used in Article 53 of the EEA Agreement. References to Article 81 of the Treaty therefore also apply to Article 53 of the EEA Agreement.

([116]) See judgment of the Court of First Instance in Case T-7/89 *Hercules* v *Commission* [1991] ECR II-1711, paragraph 256. See also Case 48/69, *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraph 64 and Joined Cases 40-48/73, etc. *Suiker Unie and others* v *Commission* [1975] ECR 1663.

([117]) See also the judgment in PVC II, where it is stated that '[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both forms of infringement are covered by Article [81] of the Treaty'.

([118]) Judgment of the Court of First Instance in Case T-7/89 *Hercules* v *Commission*, paragraph 264.

3. *SINGLE CONTINUOUS INFRINGEMENT*

(167) In this case, the manufacturers of nucleotides adhered, over a long period of time, to a common scheme which laid down the lines of their action in the market and restricted their individual commercial conduct. As such, the arrangements present the characteristics of an agreement in the sense of Article 81(1) of the Treaty, although some factual elements of the illicit conduct could aptly be described as a concerted practice were it appropriate to do so.

(168) From the end of 1988 to June 1998, there is ample evidence to show the existence of this single and continuous collusion in the EEA market for nucleotides between Takeda ([119]), Ajinomoto ([120]), Daesang ([121]) and Cheil ([122]) which together account for virtually the entire market. Indeed, the parties expressed to each other their joint intention to behave on the market in a certain way and adhered to a common plan to limit their individual commercial conduct. The agreement to enter into this plan with a view to restrict competition can therefore be dated back at least to 1988. This collusion was in pursuit of a single anti-competitive economic aim: preventing price competition by agreeing on target prices and price increases.

(169) Given the common design and common objective which the producers steadily pursued of eliminating competition in the nucleotides market, the Commission considers that the conduct in question constituted a single continuing infringement of Article 81(1) of the Treaty in which each participant must bear its responsibility for the duration of its adherence to the common scheme. These arrangements are described in detail in the factual part of this Decision. This description is supported by widespread and clear evidence, systematically referred to throughout the text.

4. *RESTRICTION OF COMPETITION*

(170) The complex of agreements in this case had the object and effect of restricting competition in the Community and EEA.

([119]) With regard to Takeda, from 8 November 1988 until 2 June 1998.

([120]) With regard to Ajinomoto, from 8 November 1988 until September 1997.

([121]) With regard to Daesang, from 19 December 1988 until 31 December 1997.

([122]) With regard to Cheil, from (end of) March 1989 until 2 June 1998.

(171) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement expressly mention as restrictive of competition agreements which:

> 'directly or indirectly fix selling prices or any other trading conditions; (b) limit or control production, markets or technical development or, (c) share markets or sources of supply'.
>
> The list is not exhaustive.

(172) In the complex of agreements and arrangements considered in this case, the following elements can be identified as relevant in order to find a breach of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement:

— allocating customers,

— allocating markets,

— agreeing target and minimum prices,

— agreeing concerted price increases,

— exchanging information on sales figures so as to monitor the implementation of the target prices,

— participating in regular meetings and other contacts in order to agree the above restrictions and to implement and/or modify them as required.

(173) These kinds of arrangements have as their object the restriction of competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. Price being the main instrument of competition, the various collusive arrangements and mechanisms adopted by the producers were all ultimately aimed at an inflation of the price to their benefit and above the level which would be determined by conditions of free competition.

(174) In order to conclude that Article 81(1) of the Treaty and 53(1) of the EEA Agreement apply, there is no need to consider the actual effects upon competition of an agreement once it is established that the agreements had the object of restricting competition ([123]).

(175) However, the cartel also had a restrictive effect on competition. In fact, the cartel arrangements involved the major worldwide nucleotides producers and were conceived, directed and encouraged at high levels in each participating company ([124]). The target prices, price rises and customer allocation, which were the primary objective of the cartel, were agreed, announced to customers and implemented throughout the EEA.

(176) In their replies to the statement of objections, Cheil and Ajinomoto claim that the restrictive impact on competition was very limited. Ajinomoto further argues that the Commission's conclusion is based on inconclusive evidence, having failed to demonstrate sufficiently the impact of the arrangements on the market. The restrictive effect of the arrangements in questions is established in more detail in recitals 224 to 238.

5. *EFFECT UPON TRADE BETWEEN MEMBER STATES AND BETWEEN EEA CONTRACTING PARTIES*

(177) The continuing agreement between the producers had an appreciable effect upon trade between Member States and between contracting parties of the EEA.

(178) Article 81(1) of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Similarly, Article 53(1) of the EEA Agreement is directed at agreements which undermine the realisation of a homogeneous European Economic Area.

(179) According to the case-law of the Court, 'in order that an agreement may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law that it may have an influence, direct or indirect, actual or potential, on the pattern between Member States' ([125]). In any event, Article 81(1) of the Treaty 'does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect' ([126]).

([123]) Judgment of the Court of First Instance, in Joined Cases T-25/95 etc *Cimenteries CBR and others* v *Commission* [2000] ECR II-491, paragraph 3927. See also judgment in Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services and others* v *Commission* [1998] ECR II-3141, paragraph 136, where the Court has confirmed this in specific relation to price-fixing agreements.

([124]) See above, under 'Participants'.

([125]) Judgment in Joined Cases C-215/96 and C-216/96 *Bagnasco* v *Banca popolare di Novale and others* [1999] ECR I-135, paragraphs 47 and 48.

([126]) Judgment in Case C-306/96 *Javico* v *Yves Saint Laurent* [1998] ECR I-1983, paragraphs 16 and 17; see also Joined Cases T-374/94 etc *European Night Services and others* v *Commission* [1998] ECR II-3141, paragraph 136.

(180) As demonstrated in the section 'inter-State trade', the nucleotides market is characterised by an important volume of trade between the Member States. Although none of the nucleotide producers had any production capacity based in the EEA during the relevant period, nucleotide was marketed in virtually all States of the EEA territory, either through wholly owned sales subsidiaries, or through distributors established in only a few of the Member States. There was also a considerable volume of trade between the Community and the EFTA countries that are members of the EEA. Norway imports 100 % of its requirements, primarily from the Community, and prior to the accession of Austria, Finland and Sweden, these countries imported the totality of their requirements of nucleotides.

(181) The application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement to a cartel is not, however, limited to that part of the members' sales which actually involve the transfer of goods from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States ([127]).

(182) In this case, the cartel arrangements covered virtually all trade throughout the world, including the Community and EEA. The existence of price-fixing and customer allocation mechanisms must have resulted, or have been likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed ([128]).

6. *PROVISIONS OF COMPETITION RULES APPLICABLE TO AUSTRIA, FINLAND, ICELAND, LIECHTENSTEIN, NORWAY AND SWEDEN*

(183) The EEA Agreement entered into force on 1 January 1994. For the period prior to that date during which the cartel operated, the only provision applicable to these proceedings is Article 81 of the Treaty; in so far as the cartel arrangements within that period restricted competition in Austria, Finland, Iceland, Liechtenstein, Norway and Sweden (then EFTA Member States) they were not caught by that provision.

(184) In the period 1 January to 31 December 1994, the provisions of the EEA Agreement applied to Austria, Finland, Iceland, Liechtenstein, Norway and Sweden; the cartel thus constituted a violation of Article 53(1) of the EEA Agreement as well as of Article 81(1) of the Treaty, and the Commission is competent to apply both provisions. The restriction of competition in those six EFTA States during that one year period falls under Article 53(1) of the EEA Agreement.

(185) After the accession of Austria, Finland and Sweden to the Community on 1 January 1995, Article 81(1) of the Treaty became applicable to the cartel in so far as it affected competition in those markets. The operation of the cartel in Norway, Iceland and Liechtenstein remained in violation of Article 53(1) of the EEA Agreement.

(186) In practice, it follows from the above that in so far as the cartel operated in Austria, Finland, Iceland, Liechtenstein, Norway and Sweden, it constituted a violation of the EEA and/or Community competition rules as from 1 January 1994.

C. **ADDRESSEES**

1. *PRINCIPLES APPLICABLE*

(187) In order to identify the addressees of this Decision, it is necessary to determine the legal entities to which the responsibility for the infringement should be imputed.

(188) The subject of Community and EEA competition rules is the 'undertaking', a concept that is not identical with the notion of corporate legal personality in national company or fiscal law. The term 'undertaking' is not defined in the Treaty. It may however refer to any entity engaged in a commercial activity.

(189) When an infringement of Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement is found to have been committed over a given period of time, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed, so that it can answer for it.

(190) A change in legal form or corporate identity does not however relieve an undertaking of liability to penalties for the anti-competitive behaviour. Liability for a fine may thus pass to a successor where the corporate identity which committed the violation has ceased to exist in law.

2. *ADDRESSEES OF THE DECISION*

(191) In this procedure no issue arises regarding the appropriate addressee of the Decision and it will be sent to those legal entities directly involved in the infringement.

([127]) See judgment in Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 304.

([128]) Judgment in Joined Cases 209 to 215 and 218/78, *Van Landewyck and others* v *Commission* [1980] ECR 3125, paragraph 170.

(192) In the case of Miwon Corporation ([129]), which changed legal form in November 1997, this assessment is in conformity with the Commission's normal practice and current case-law ([130]). Miwon Corporation Limited's full merger with Sewon Co. Ltd to form Daesang Corporation ([131]) means that responsibility passes to the new entity. There is an obvious continuity between Miwon and the new entity into which it has been subsumed. Miwon ceased to exist in law and its legal personality as well as all its assets and staff were transferred to Daesang Corporation.

D. **DURATION OF THE INFRINGEMENT**

(193) Although certain evidence submitted to the Commission (see recital 77) indicates that the initial contacts between the Japanese producers go back as far as 1986, the Commission will, for the purpose of these proceedings, limit its assessment under the competition rules and the application of any fines to the period from 8 November 1988, this being the date of the first known meeting between the Japanese producers where prices for the forthcoming negotiations with the big three customers were discussed and agreed upon (see recital 79). The starting date of the infringement taken into account with regard to Takeda and Ajinomoto will therefore be 8 November 1988.

(194) As far as Daesang is concerned, it admits having concluded a counterpurchasing agreement with Ajinomoto on 19 December 1988, when it was verbally agreed that the condition for this contract was that Miwon was not to increase its sales to [ ]* and not to obstruct the [ ]* producers' cooperation on world prices ([132]). The Commission will therefore take 19 December 1988 as the starting date of the infringement with regard to Daesang.

(195) According to a business trip report ([133]), the first meeting of the manufacturer(s) of nucleotide in which Cheil participated was held between 7 and 23 March 1989. The same business report indicates that attendants agreed to meet again in Kyung Ju, Korea on 7 June 1989 (according to Daesang, this is the meeting where the target prices for 1989 were agreed upon).

(196) With regard to the same 'P-meetings', a third business trip report dated 3 to 10 October 1989 ([134]) explains that the purpose of the meeting was to 'discuss the way to prevent the price decline in the global market' and to have a 'preliminary meeting with Takeda to discuss nucleotides supply to Takeda in 1990'.

(197) Cheil's participation in the infringement prior to 1991 is also confirmed by the minutes of a meeting held on 5 October 1989 between Ajinomoto, Takeda, Daesang and Cheil where target prices for 1990 had been discussed and where the implementation of the 1989 target prices had been reviewed ([135]).

(198) Cheil confirms that this meeting took place even though it first claimed that it had found little evidence as to the content of that meeting ([136]).

(199) In its reply to the statement of objections, Cheil confirms, however, that certain meetings between competitors took place from July 1988 and admits its participation in the infringement from March 1989, although it adds that prior to 1992 the main focus was on markets other than the EEA and that, in any case, Cheil only had minor activities on the European market between 1989 and the end of 1991 ([137]).

(200) On the basis of the abovementioned evidence, the Commission considers Cheil to have participated in the infringement from March 1989.

(201) It should of course be noted that in so far as the cartel covered Austria, Finland, Norway and Sweden, this does not constitute an infringement of the EEA Agreement before 1 January 1994, when the Agreement came into effect.

(202) In its reply to the statement of objections, Ajinomoto argues that it ceased its participation in the cartel after August 1996. In support thereof, Ajinomoto submits that it not only stopped attending producers' meetings after August, but that it also ceased counterpurchases from Daesang. Ajinomoto argues that the evidence in the Commission's file itself indicates that its withdrawal from the nucleotides arrangements was complete, genuine and permanent: there is no evidence that Ajinomoto attended any of the producers' meetings after August 1996 and contacts with Takeda were limited to unsuccessful attempts by Takeda to re-involve Ajinomoto in the arrangements.

([129]) Miwon Corporation Limited participated in the infringement through its subsidiaries Miwon Japan Inc. and Mitra (Miwon Trading & Shipping Company) as well as directly (see for example Annexes T and U of Daesang's supplementary submission).

([130]) Case C-49/92 P, *Commission* v *Anic Partecipazioni SpA*, paragraph 145.

([131]) See above under 'The producers'.

([132]) See pages 1962 and 986 to 989 of the Commission's file.

([133]) See Annex 5 of Cheil's 2001 statement, page 2617 of the Commission's file.

([134]) See Annex 5 to Cheil's 2001 statement, page 2618 of the Commission's file.

([135]) See Annexes I, J, K, L and M attached to Daesang's supplementary submission; see also Daesang's supplementary submission, page 6 and Takeda's corporate statement, page 7.

([136]) See Annex 5 to Cheil's 2001 statement, page 2618 of the Commission's file.

([137]) See pages 5 and 6, last paragraph of Cheil's 2001 statement, and pages 9 and 10 of its response to the Commission's statement of objections.

(203) Takeda, for its part, argues that the Commission should consider the date of the last known meeting where target prices were agreed to constitute the end of the infringement.

(204) Daesang and Cheil do not contest the duration of the infringement as established in this Decision.

(205) As far as Ajinomoto is concerned, the Commission agrees that there is not sufficient evidence to demonstrate that it participated in the agreement on the target prices for 1997. Nevertheless, the Commission can not accept Ajinomoto's claim that it ceased participating in the infringement after the meeting of August 1996.

(206) As a matter of fact, the contemporaneous evidence submitted by Takeda concerning the bilateral meetings it held with Ajinomoto clearly demonstrates that both undertakings discussed the nucleotides market and prices during these contacts. In the notes relating to the July 1997 meeting, for instance, Takeda states that it was told by Ajinomoto that they would travel to Europe in August and September and suggest a 10 % price increase to their distributors, for which they expected the distributors to protest strongly. In the following note concerning the September meeting, Takeda states for example that '[A]jinomoto's basic policy is 15 % (minimum 10 %) up. In August at a meeting with Europe branches, they received strong resistance as expected, but they decided that they would start at DEM 53 and would achieve at least DEM 51 (10 % up)' ([138]). The combination of these two notes clearly shows that Ajinomoto had not only indicated the price increase it would seek in Europe, but also gave feedback as to how the discussions had gone and how they would proceed from there. This clearly goes beyond mere unsuccessful attempts made by Takeda to re-involve Ajinomoto in the arrangements ([139]).

(207) The Commission therefore considers that Ajinomoto continued to take part in the infringement beyond the meeting of August 1996 by continuing to meet with Takeda and discussing nucleotides prices.

(208) Even if Ajinomoto ceased counterpurchases after August 1996 and did not participate in any multilateral meeting after August 1996, Ajinomoto continued to participate in the illegal scheme, actively contributing by exchanging price information. Although the form may have changed from participating in the multilateral meetings into holding bilateral contacts with Takeda, it must be concluded that Ajinomoto participated in the infringement until at least the last known meeting in which it discussed nucleotides prices, namely the September 1997 meeting it held with Takeda.

(209) With regard to the other parties, given that they participated in the agreement on the target prices for 1997, the Commission will consider the infringement to have lasted until the end of 1997, except where any illicit contacts between participants have been identified beyond the end of 1997. In the case of Takeda and Cheil, the last known meeting between them where nucleotides prices were discussed is 2 June 1998 ([140]). Consequently, the Commission considers that as far as Takeda and Cheil are concerned, the infringement lasted until 2 June 1998.

(210) The Commission therefore considers the infringement to have lasted until September 1997 as far as Ajinomoto is concerned, until the end of 1997 as far as Daesang is concerned and until 2 June 1998 as far as Cheil and Takeda are concerned.

E. **REMEDIES**

1. *ARTICLE 3 OF REGULATION No 17*

(211) Where the Commission finds there is an infringement of Article 81(1) of the Treaty or 53(1) of the EEA Agreement it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation 17.

(212) In this case, the Commission indicated in its statement of objections that the participants went to considerable lengths to conceal their activities and that they had also given contradictory information regarding the period during which the infringement took place. In their reply to the statement of objections, all undertakings submit that they terminated their participation before the Commission initiated its investigation. Ajinomoto submits that it ended its participation in August 1996.

(213) Notwithstanding these observations, and for the avoidance of doubt, the undertakings which remain active in the nucleotides market and to which this Decision is addressed should be required to bring the infringement to an end, if they have not already done so, and henceforth to refrain from any agreement, concerted practice or decision of an association which might have the same or similar object or effect.

(214) The prohibition applies to all secret meetings and multilateral or bilateral contacts between competitors in view of restricting competition between them or enabling them to concert their market behaviour, in particular their pricing.

([138]) The translation provided by Ajinomoto in its letter of 29 November 2002 reads as follows: 'A's head office's basic policy about DEM price is 15 % (minimum 10 %) up adjustment. Met with strong opposition, as expected, at the meeting with European branches in August, but for the time being will start with DEM 53 and attempt to achieve minimum DEM 51 (10 % up)'

([139]) In its letter of 29 November 2002, Ajinomoto confirms contesting the facts as established in Takeda's notes and calls into question the probative value of the two Takeda notes as evidence for Takeda's continued participation in the infringement.

([140]) See page 309 of the Commission's file.

2. *ARTICLE 15(2) OF REGULATION No 17*

(a) GENERAL CONSIDERATIONS

(215) Pursuant to Article 15(2) of Regulation No 17, the Commission may by decision impose upon undertakings fines from one thousand to one million euro, or a sum in excess thereof not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement.

(216) In fixing the amount of any fine the Commission must have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation 17.

(217) The role played by each undertaking party to the infringement will be assessed on an individual basis. In particular, the Commission will reflect in the fine imposed any aggravating or attenuating circumstances and will apply, as appropriate, the Leniency Notice.

(218) In assessing the gravity of the infringement, the Commission will take account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant market. The role played by each undertaking party to the infringement will be assessed on an individual basis.

(b) THE AMOUNT OF THE FINE

(219) The cartel constituted a deliberate infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement: with full knowledge of the restrictive character of their actions and, moreover, of their illegality, leading producers of nucleotides combined to set up a secret and continuous system designed to restrict competition.

1. ***The basic amount***

(220) The basic amount of the fine is determined according to the gravity and duration of the infringement.

Gravity

(221) In its assessment of the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

Nature of the infringement

(222) It follows from the facts set out above that this infringement consisted of market-sharing and price-fixing practices, which are by their very nature the worst kind of violations of Article 81(1) of the Treaty and 53(1) of the EEA Agreement.

(223) The cartel arrangements involved major worldwide operators and were conceived, directed and encouraged at high levels in each participating undertaking ([141]). By its very nature, the implementation of a cartel agreement of the type described above leads to an important distortion of competition, which is of exclusive benefit to producers participating in the cartel and is detrimental to customers and, ultimately, to the general public.

(224) The Commission therefore considers that this infringement constituted by its nature a very serious infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

(225) Ajinomoto argues that in this case, a number of elements show not only that the infringement had a limited impact on the market, but also that the infringement was not as serious as suggested by the Commission. These elements include the fact that the European nucleotide sector is of limited size, the fact that the infringement was not fully implemented, the fact that nucleotides represent only a very small proportion of the cost of the end products and that thus any harm to consumers was limited and the fact that the ability to play off suppliers against each other limited any harm to direct customers.

(226) The Commission must reject these arguments. It is clear that price and market-sharing cartels by their very nature jeopardise the proper functioning of the single market. It would be erroneous to conclude on the basis of the small size of the market that this infringement was not very serious. What matters is that the normal competitive pattern that would have governed the single market for nucleotides was replaced by a system of collusion concerning the price of the product, the essential component of competition. As demonstrated in the recitals below, the arrangements were actually implemented and had an actual impact on the EEA nucleotides market ([142]). As such, the infringement of Article 81(1) of the Treaty and 53(1) of the EEA Agreement is considered very serious. The Commission considers the argument on the limited size of the market in recitals 241 to 242.

([141]) See recitals 57 and following.

([142]) The remaining elements adduced by Ajinomoto are also dealt with under the heading 'impact on the market'.

The actual impact of the infringement on the nucleotides market in the EEA

(227) The infringement was committed by undertakings which, during the material period, held the lion's share of the world and European markets for nucleotides. Moreover, the arrangements were specifically aimed at raising prices higher than they would otherwise have been and restricting the quantities sold. Given that these arrangements were implemented, they had a material impact on the market.

(228) There is no need to quantify in detail the extent to which prices differed from those which might have been applied in the absence of these arrangements. Indeed, this cannot always be measured in a reliable manner, since a number of external factors may simultaneously have affected trends in the price of the product, so making it extremely difficult to draw conclusions on the relative importance of all possible causal effects.

(229) The cartel agreements were, however, implemented. Throughout the duration of the cartel, the parties exchanged information on their sales prices and volumes and, on the basis of those figures, the parties agreed on target prices (see, for instance, recitals 80, 89, 91, 92 to 94, 97 to 98, 104, 108 to 111, 115 to 116, 118 to 131, 133, 135, 138 to 141). As demonstrated throughout the factual part of this Decision, the target prices and price rises were agreed, announced to customers and implemented throughout the EEA (see, for instance, recitals 86, 104, 118 to 120, 122, 124, 126, 128, 134, 139 to 141, 144). The parties closely monitored the implementation of their agreements by organising regular multilateral and bilateral meetings among them. At these meetings, the parties exchanged their sales figures, discussed market prices (thus enabling the parties to monitor whether the agreed target prices were being met) and, where necessary, agreed to adjust the target prices (see, for instance, recitals 92, 109, 111, 124, 128 to 130.

(230) In view of the above and the effort invested by each participant in the complex organisation of the cartel, there is no doubt that the anti-competitive agreement was implemented throughout the material period of the infringement. Such continuous implementation over a period of nine years must have had an impact on the market.

(231) Ajinomoto argues that the Commission bases itself on inconclusive evidence in demonstrating that the infringement had a significant impact on the market. According to Ajinomoto, the impact of the infringement on the market was only limited. In fact, Ajinomoto submits that it not only proved very difficult to reach agreements on target prices, but that even where agreements were reached, these agreements were never fully complied with: deviation from the arrangements was frequent and not punished and no effective monitoring system was established. Consequently, according to Ajinomoto, the infringement was not fully implemented.

(232) In addition, Ajinomoto submits that nucleotide costs account on average for less than 0,1 % of the price of the final product and the ability to play suppliers off against each other limited harm to direct consumers. Finally, Ajinomoto argues that an analysis of the economic conditions during the period under review confirms that price evolution was consistent with competitive behaviour. In support thereof, Ajinomoto has submitted a report prepared by RBB Economics which states that there is no basis for concluding that prices in the 1988 to 1997 period were unusually stable or that the price drop at the end of 1998/beginning of 1999 reflected the termination of the infringement. According to the report, it is doubtful that any customer allocation arrangements between nucleotides manufacturers were efficient and, secondly, the price drop at the end of 1998/beginning of 1999 is the result of important changes in external market factors which fundamentally changed pricing conditions in Europe rather than caused by the end of the cartel: a substantial increase in capacity caused by the opening of Cheil's plant in Indonesia combined with a stagnation of demand from 1997 onwards led to a high excess in capacity. Devaluation of Korean and Indonesian currencies created additional pressure on European prices. In a supplement to its reply to the statement of objections, Ajinomoto submits that the average estimates of the capacity data provided to the Commission by the undertakings (and made accessible) confirm that price development throughout the relevant period was consistent with competitive conditions and the infringement had a limited impact on the market.

(233) In its reply to the statement of objections, Cheil draws the same conclusions, emphasising that it was Cheil's decision to increase its capacity that caused prices to fall significantly at the end of 1998/beginning of 1990. Cheil also argues that the small size of the market means that the real economic impact of the illegal conduct is smaller, justifying setting the basic amount of the fine at a lower level. Furthermore, Cheil, supported by Daesang ([143]), argues that the Commission should take into account when determining the gravity of the infringement the fact that the impact of the infringement on consumers is negligible as well as the fact that the Koreans were drawn into a pre-existing scheme.

(234) Similarly, Takeda submits that even the maximum potential impact on ultimate consumers is very limited in view of the small size of the European market, the fact that nucleotides are purchased by large food manufacturers rather than end consumers and in view of the small cost factor nucleotides constitute in the end product. Takeda further reserves its rights as to the fact that the Commission has not sought to quantify precisely any increase of price caused by the infringement above the level which would have been obtained.

([143]) See both Daesang's response of 20 September 2002 as well as the summary sent by letter of 27 November 2002.

(235) None of the arguments used by the parties to minimise the Commission's finding that the cartel had an actual effect on the market is conclusive. The explanations concerning the price stability between 1988 and 1997 and the price drop at the end of 1998/beginning of 1999 may have some validity (in particular regarding the capacity increase caused by the opening of Cheil's new plant in Indonesia towards the end of the cartel), but they do not demonstrate in a convincing manner that the implementation of the cartel agreement could not have played a role in the setting and fluctuation of prices on the nucleotides market. Indeed, given that the parties had replaced the uncertain situation of free competition with continuous collusion, prices were necessarily established at a level different to that which would have prevailed in a competitive market.

(236) The fact, highlighted by Ajinomoto and Cheil, that, towards the end of the cartel, the production capacity was significantly increased at a time when demand was diminishing, leading to a drop in prices (and a reduction in the capacity utilisation rates of the respective producers), certainly illustrates the difficulties encountered by the parties towards the end of the cartel to influence prices in a difficult market situation, and perhaps even the reasons for the collapse of the cartel itself. It does not, however, demonstrate that the illegal practice had no effect on the market during the nine-year existence of the cartel, nor does it demonstrate that prices were not kept above a competitive level.

(237) On the contrary, when examining the combined efforts of the cartel members (see recitals 75 to 149, it can reasonably be concluded that during the entire period of the cartel, the cartel members managed to maintain prices at a level higher than they would have been without the illicit arrangements.

(238) Even if the results sought by the cartel participants were not entirely achieved, this would not prove that the cartel did not affect the market. Moreover, it is inconceivable, given, *inter alia*, the risks involved, that the parties would repeatedly have agreed to meet in locations across the world to set target prices over the period of the infringement, if they had perceived the cartel as having little or no impact on the nucleotides market. In this respect, one can as an example make reference to the specific congratulations expressed by Ajinomoto to all cartel members during one of the cartel meetings for the successful implementation of the 1995 target prices (see recital 126 or Annex Z attached to Daesang's supplementary submission ([144])).

(239) In their replies to the statement of objections, Ajinomoto, Cheil and Daesang have also argued that the Commission's own evidence shows that they have often disregarded the arrangements and often acted autonomously on the market. This argument cannot, however, be followed. Not only does the Commission have ample evidence showing that Ajinomoto, Daesang and Cheil actually continued to take part in the infringement throughout the entire duration of the infringement (which is also not contested by the parties, except for Ajinomoto as far as its participation beyond August 1996 is concerned), but the fact that any of the parties may well have had 'hidden agendas' causing them to disregard to some extent the commitments made towards the other cartel participants does not imply that they did not implement the cartel agreement. As the Court of First Instance held in *Cascades* v *Commission*, 'an undertaking which, despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit' ([145]).

The size of the relevant geographic market

(240) The cartel covered the whole of the common market and, following its creation, the whole of the EEA. Every part of the common market and the EEA was under the influence of the collusion. For the purposes of determining gravity, the Commission therefore considers the entirety of the Community and, following its creation, the EEA to have been affected by the cartel.

Conclusion of the Commission on the gravity of the infringement

(241) Taking into account the nature of the behaviour under scrutiny, its actual impact on the nucleotides market and the fact that it covered the whole of the Common market and, following its creation, the whole EEA, the Commission considers that the undertakings concerned by this Decision have committed a very serious infringement of Article 81(1) of the Treaty and 53(1) of the EEA Agreement.

(242) A clear distinction must be made between the question of the size of the product market and that of the actual impact of the infringement on this product market. It is not the practice of the Commission to consider the size of the product market as a relevant factor to assess gravity.

(243) Nevertheless, without prejudice to the very serious nature of an infringement, the Commission will in this case take into consideration the limited size of the product market.

([144]) See page 1076 of the Commission's file.

([145]) Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 230.

Classification of cartel participants

(244) Within the category of very serious infringements, the proposed scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition and to set the fine at a level which ensures it has sufficient deterrent effect. This seems particularly necessary where, as in this case, there is considerable disparity in the market share of the undertakings participating in the infringement.

(245) In the circumstances of this case, which involves several undertakings, it will be necessary, when setting the basic amount of the fines, to take account of the specific weight, and therefore the real impact on competition, of each undertaking's offending conduct.

(246) For this purpose the undertakings concerned can be divided into different categories according to their relative importance in the market concerned, subject to adjustment where appropriate to take account of other factors, such as in particular, the need to ensure effective deterrence.

(247) As a basis for comparison of the relative importance of the undertakings in the market concerned, the Commission considers it appropriate in this case to take their respective shares of the world market for the product. Given the global character of the market, these figures provide the most suitable picture of the participating undertakings' capacity to cause significant damage to other operators in the common market and/or the EEA. Moreover, the world market share of any given party to the cartel also gives an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had it not participated. The comparison is based on shares of the world market for the product in the last full calendar year of the infringement (1997).

(248) Ajinomoto was at all times the largest producer of nucleotides in the relevant geographic market. In 1997 its estimated share of the world market was between 40 % and 50 %.

(249) Takeda, Cheil and Daesang were smaller players on the world nucleotides market. In 1997 their respective estimated market share was between 10 % and 20 %, more than two times' smaller than that of Ajinomoto, the largest player.

(250) Ajinomoto will therefore constitute a first category. Takeda, Cheil and Daesang will constitute a second category.

(251) On the basis of the above, the basic amounts of the fines determined for gravity should be as follows:

— Ajinomoto: EUR 6 million,

— Takeda, Daesang and Cheil: EUR 2,4 million.

Sufficient deterrence

(252) In order to ensure that the fine has a sufficient deterrent effect and takes account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, the Commission will further determine whether any further adjustment of the basic amount is needed for any undertaking.

(253) With respective worldwide turnovers of EUR 8,7 billion and EUR 9,2 billion in 2001, Ajinomoto and Takeda are much larger players than Daesang (worldwide turnover of EUR 1,4 billion (2001)) and Cheil (worldwide turnover of EUR 1,9 billion in 2001). In this respect, the Commission considers that the appropriate starting point for the fines based on the criterion of the relative importance in the market concerned requires further upward adjustment to take account of the size and the overall resources of Ajinomoto and Takeda respectively.

(254) On the basis of the above, the Commission considers that the need for deterrence requires the starting point for the fines determined in recital 251 to be increased by 100 % to EUR 12 million as regards Ajinomoto and by 100 % to EUR 4,8 million as regards Takeda.

Duration of the infringement

(255) The Commission considers that Daesang has infringed Article 81(1) of the Treaty from 19 December 1988 until the end of 1997 and Article 53(1) of the EEA Agreement from 1 January 1994 until the end of 1997.

(256) The Commission considers that Cheil has infringed Article 81(1) of the Treaty from March 1989 until 2 June 1998 and Article 53(1) of the EEA Agreement from 1 January 1994 until 2 June 1998.

(257) Takeda submitted that the Commission should take the date of the last known cartel meeting as the final date for the infringement. As demonstrated above under 'Duration', the evidence in the file shows that 2 June 1998 was, in fact, the last known illicit contact between Takeda and a cartel member. Consequently, the Commission considers that Takeda infringed Article 81(1) of the Treaty from 8 November 1988 until 2 June 1998 and Article 53(1) of the EEA Agreement from 1 January 1994 until 2 June 1998.

(258) Lastly, Ajinomoto contests the duration of the infringement, only admitting its participation in the infringement until August 1996. The duration of Ajinomoto's participation in the cartel is discussed in recitals 202 to 210). The Commission considers that Ajinomoto has infringed Article 81(1) of the Treaty from 8 November 1988 until at least September 1997 and Article 53(1) of the EEA Agreement from 1 January 1994 until at least September 1997.

(259) The Commission therefore concludes that Takeda, Ajinomoto, Daesang and Cheil have committed the infringement for respectively nine years and six months (Takeda), eight years and nine months (Ajinomoto), nine years (Daesang) and nine years and two months (Cheil), which corresponds to a long duration (more than five years). The starting amounts of the fines determined for gravity (see recitals 251 and 254) are therefore increased by 10 % per year and 5 % per six months, i.e. by 95 % as far as Takeda is concerned, 90 % as far as Cheil and Daesang are concerned and 85 % as far as Ajinomoto is concerned.

(260) Cheil submits however in its reply to the statement of objections that, although the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty [146] indicate that an infringement of 'long duration' may merit an increase of 10 % per annum, this does not mean that every infringement should be subject to such a 'per year' increase. In particular, Cheil submits that the Commission should consider applying a lower increase on account of duration than the standard 10 % per year for the period from March 1989 to the start of 1992 in the light of the small participation of Cheil in the infringement during that period (and the resulting small impact on the market). Similarly, Cheil submits that regarding the post-1996 events, such an approach would be equally justified in view of the fact that the intensity of these events was much lower and in view of Cheil's 1996 decision to increase capacity (effective towards the end of the 1990s).

(261) The Commission must reject this argument. Cheil's participation in the infringement during the entire duration of the infringement has been established in the factual part of this Decision. It is also established that the infringement had an impact on the EEA market. The mere fact that a participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same objective [147]. The Commission therefore considers that Cheil participated in the infringement in the same manner throughout the entire duration of the infringement.

[146] OJ C 9, 14.1.1998, p. 3.

[147] Judgment of the Court of Justice in *Commission* v *Anic*, paragraph 83.

Conclusion on the basic amounts

(262) The basic amounts of the fines should therefore be as follows:

— Takeda: EUR 9 360 000,

— Ajinomoto: EUR 22 200 000,

— Daesang: EUR 4 560 000,

— Cheil: EUR 4 560 000.

2. ***Aggravating circumstances***

(263) The Commission has not identified any aggravating circumstances to be taken into account in this Decision.

3. ***Attenuating circumstances***

Exclusively passive role in the infringement

(264) Cheil and Daesang state in their reply [148] that they always played a passive or 'follow-my-leader' role in the infringement. They were drawn into a pre-existing cartel which was lead by Takeda and, to a minor extent, Ajinomoto who wished to protect their own markets and limit competition through counterpurchases. Ajinomoto states in this respect that it played a subordinate role to Takeda, who should be considered as the real leader of the cartel. Moreover, the Korean producers argue that they are much smaller than their Japanese counterparts, which also demonstrates the limited impact of their behaviour on the market.

(265) The effective economic capacity of the undertakings to influence the EEA market on the basis of their economic size has been taken into account in the calculation of the basic amount of the fine (see recitals 244 to 251).

(266) Even if, on the basis of these statements, there might be certain elements indicating that the Japanese undertakings started the cartel and took the initiative to organise certain meetings, the Commission has no reason to consider that either of the Korean producers played a purely passive role or 'follow-my-leader role' in the infringement. Both undertakings participated in the vast majority of the cartel meetings identified and took part directly and actively in the infringement. Indeed, Cheil and Daesang took part in the meetings and exchanged sales information throughout their participation. They cannot therefore claim to have played a purely 'passive role' [149].

[148] See also Daesang's summary statement of 27 November 2002.

[149] See, for instance, paragraph 365 of Commission Decision 2001/418/EC in Case COMP/36.545/F3 *Amino Acids* (OJ L 152, 7.6.2001, p. 24).

(267) For example, Daesang's own report of the meeting that took place in December 1995 in review of the 1995 cooperation ([150]) shows clearly that all parties had cooperated in implementing the 1995 price increases and all parties agreed to continue the cooperation for 1996. As shown by the facts, Cheil and Daesang would in turn also make proposals on target prices and hold meetings among them to prepare a common position for the producers meetings.

(268) In view of the totality of the evidence in this case, as described under the factual part of this Decision, the picture is that of a cartel in which all parties participated actively and directly in the infringement, exchanging their sales figures and reviewing and discussing the target prices. All participants held a shared interest in the arrangements. All cartel members have been identified as participating in most of the cartel meetings and taking turns organising the meetings concerned. As such, there is also no undertaking which can be considered as a leader in the sense of the Guidelines.

Non-implementation in practice of the offending agreements

(269) As discussed in recital 229, the Commission considers that the anti-competitive agreements were implemented. This attenuating circumstance is not therefore applicable to any of the addressees of this Decision. The Commission notes that in principle, an agreement restricting competition is implemented where the cartel members determine their conduct on the market according the joint intentions expressed. In case of repeated agreements, concluded over a long period, it can be presumed that the agreements have been implemented by each of the participants as they would otherwise not have repeatedly agreed to meet in locations worldwide to fix prices and allocate customers over such a long period of time. None of the arguments put forward by the parties, can validly overthrow the proof adduced by the Commission.

(270) As already stated in recital 239, an undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit ([151]). The fact, as is claimed by the parties, that they regularly did not comply with the agreed arrangements, can therefore not be regarded as sufficient evidence demonstrating the non-implementation of the agreements.

Other attenuating circumstances

(271) In its reply to the statement of objections, Ajinomoto submits that the Commission should regard its unilateral and voluntary termination of its participation, in particular prior to any Commission intervention, in the infringement as a mitigating circumstance as well as the fact that this unilateral withdrawal would have contributed to the unravelling of the infringement.

(272) In support thereof, Ajinomoto refers to Takeda's internal memoranda of 28 May 1997 and 9 June 1997 ([152]), and Takeda's corporate statement ([153]), where reference is made to the concerns of the cartel members with regard to Ajinomoto's decision no longer to participate in the multilateral meetings after August 1996 and the effects this would have on these meetings.

(273) This argument must be rejected. It has been demonstrated under 'Duration' that Ajinomoto's decision no longer to participate in the multilateral meetings after August 1996 can not be considered as demonstrating its unilateral termination of its participation in the infringement as from that date. On the contrary, the Commission considers that it continued to participate in the infringement by maintaining bilateral contacts with Takeda, discussing the nucleotides market and prices. In these circumstances, the Commission considers that Ajinomoto's lack of participation in the multilateral meetings can only have played a minor role, if indeed any at all, in the 'unravelling' of the cartel.

(274) Cheil submits that the Commission should take into account the fact that it has already been fined for this infringement in the USA, claiming that undertakings should not be exposed to 'double jeopardy' and that the Commission should solely base the level of the fine on the effects that the infringement had in the relatively small Community market.

(275) This argument should be rejected. Fines imposed in other jurisdictions, including the USA, do not have any bearing on the fines to be imposed for infringing Community competition rules. The exercise by the United States (or any other third country) of its jurisdiction over cartel behaviour can in no way limit or exclude the Commission's jurisdiction under Community competition law. It is noted that by virtue of the principle of territoriality, Article 81 of the Treaty is limited to restrictions of competition in the common market and Article 53 of the EEA Agreement is limited to restrictions of competition in the EEA market. In the same way, the US antitrust authorities only exercise jurisdiction to the extent that the conduct has a direct and intended effect on the United States.

([150]) See Annex Z attached to Daesang's supplementary submission, page 1076 of the Commission's file.
([151]) Case T-308/94 *Cascades SA* v *Commission*, paragraph 230.
([152]) Respectively, pages 2147 and 2151 of the Commission's file.
([153]) Takeda's statement, page 2173 of the Commission's file.

(276) Takeda submits that the Commission should take into account the fact that it already paid a substantial fine in the *Vitamins* case ([154]). Ajinomoto puts forward a similar argument in relation to the fine it paid in the *Lysine* case ([155]). The Commission rejects that argument. The *Vitamins* case and the *Lysine* case did not deal with Takeda's and Ajinomoto's infringement on the nucleotides market and can therefore not be taken into account for the purpose of this Decision.

(277) Cheil and Daesang further submit that they regularly did not comply with the arrangements and even acted against them, such as by increasing production capacity or undercutting the target prices.

(278) The Commission stresses once again that the fact that an undertaking which has been proved to have participated in collusion on prices with its competitors did not behave at all times on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as an attenuating circumstance when determining the amount of the fine to be imposed. As stated earlier, an undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit ([156]).

(279) Ajinomoto, Cheil and Takeda also point out that they have taken measures to prevent any future infringement of anti-trust rules. In this context, they have adopted or strengthened compliance programmes. The Commission welcomes the fact that these undertakings have set up an anti-trust law compliance policy. It nevertheless considers that this initiative came too late and cannot, as an instrument of prevention, dispense the Commission from its duty to penalise an infringement of the competition rules committed by these undertakings in the past. In the light of the above, the adoption of a compliance programme should not be considered as an attenuating circumstance justifying a reduction in the fine.

(280) There are therefore no attenuating circumstances applicable to the participants in this infringement affecting the nucleotides market.

4. ***Application of the leniency notice***

(281) The addressees of this Decision have cooperated with the Commission at different stages of the investigation into the infringement for the purpose of obtaining the favourable treatment set out in the Leniency Notice. In order to meet the legitimate expectations of the undertakings concerned as to the non-imposition or reduction of the fines on the basis of their cooperation, the Commission examines in the following section whether the parties concerned satisfied the conditions set out in the Leniency Notice.

Non-imposition of a fine or a very substantial reduction of its amount (Section B)

(282) Takeda has requested the benefit of maximum leniency. In this respect, Takeda claims that it should benefit from changes in the leniency policy introduced by the Commission Notice on immunity from fines and reduction of fines in cartel cases ([157]) published in 2002 (the 2002 Leniency Notice), arguing that it did not take any steps to coerce any other undertaking to participate in the infringement. Consequently, Takeda submits that it could qualify for maximum leniency under the new rules. Takeda argues that Community law recognises the principle that in certain circumstances, retroactive effect should be given to changes in the treatment of penalties having a deterrent effect, and that principle can apply more generally in relation to administrative decisions, as is applied in a number of Member States.

(283) The 2002 Leniency Notice clearly states that it is not applicable to cases in which undertakings have already contacted the Commission to take advantage of the favourable treatment set out in the previous notice. Consequently, all leniency applications should be treated in the light of the provisions of the Leniency Notice published in 1996, which remains applicable for the purpose of this Decision.

(284) The Commission acknowledges that Takeda was the first to come forward adducing decisive evidence of the existence of the cartel and maintaining continuing and complete cooperation throughout the investigation. Takeda first informed the Commission of the existence of the cartel on 9 September 1999, handing over a file with contemporaneous evidence on 14 September 1999. At that time, the Commission had not received any information of the cartel from any other source.

(285) In assessing Takeda's cooperation, the Commission notes that the documentary evidence it first produced did not relate to the activities of the cartel prior to 1992. Nevertheless, in its corporate statement, Takeda indicated that the cartel did in fact originate in 1989. There is no indication that Takeda has any other information or documents available concerning the cartel. Therefore, it must be concluded that Takeda's cooperation with the Commission has been complete.

([154]) Case 37.512, not published yet.
([155]) Case 36.545 (OJ L 152 7.6.2001, p. 24-72).
([156]) Case T-308/94 *Cascades SA* v *Commission*, paragraph 230.
([157]) OJ C 45, 19.2.2002, p. 3.

(286) Despite there being elements in the file indicating that Takeda may have played, on certain occasions, a coordinating role in the cartel, Takeda did not compel any other enterprise to take part in the cartel and did not act as an instigator in the cartel nor did it play a determining role in the illegal activity in the sense of the Leniency Notice. It has also been established that Takeda had put an end to its involvement in the infringement before coming forward to the Commission.

(287) In the light of its overall cooperation in the investigation, Takeda fulfils the conditions set out in Section B of the Leniency Notice and should be granted a 100 % reduction in the fine that would have been imposed had it not cooperated with the Commission.

Substantial reduction in a fine (Section C)

(288) Daesang, Cheil and Ajinomoto request the benefit of a reduction in fine in accordance with Section C of the Leniency Notice. At the time when Daesang, Cheil and Ajinomoto started to cooperate with the Commission, Takeda had already submitted sufficient information to establish the existence of the cartel. Consequently, it is concluded that Daesang, Cheil and Ajinomoto were not the first to provide the Commission with decisive evidence on the existence of the nucleotides cartel, as required under point (b) of Section B of the Leniency Notice. Accordingly, none of those undertakings meets the conditions as set out in Section C.

Significant reduction of a fine (Section D)

(289) Daesang submits that it not only offered to cooperate with the Commission's investigation before the Commission issued the first request for information but also provided the Commission with its complete and continuous cooperation throughout the investigation. It also argues that it has enabled the Commission to establish the entire duration of the infringement as from October 1988 and was thus the first to adduce decisive evidence of the entire infringement set out in the statement of objections.

(290) Although Daesang only contacted the Commission after Takeda had already come forward, it nevertheless contacted the Commission on its own initiative prior to receiving any request for information. In addition, Daesang fully cooperated with the Commission's investigation throughout the entire investigation. Daesang also provided information that contributed materially to establishing the facts relating to the existence of the cartel arrangements prior to 1992.

(291) The information provided by Daesang, prior to the Commission sending it a request for information, was detailed and extensively used by the Commission in the pursuit of its investigation. In particular, but not exclusively, Daesang provided valuable information on the operation of the cartel prior to 1992. After receiving the statement of objections, Daesang did not substantially contest the facts on which the Commission bases its findings. Daesang therefore fulfils the conditions set out in the first and second indent of paragraph 2 of Section D of the Leniency Notice and should consequently be granted a reduction of the fine of 50 %.

(292) Cheil provided many contemporaneous reports of meetings and contacts thus materially contributing to establishing the existence of the cartel. The information provided by Cheil was extensively used by the Commission. Furthermore, Cheil does not contest the facts of the infringement as set out by in the statement of objections. It must therefore be concluded that Cheil fulfils the conditions as set out in the first and second indent of paragraph 2 of Section D of the Leniency Notice, as argued by Cheil. Consequently, in view of the overall cooperation provided by Cheil to the Commission's investigation, it should be granted a 40 % reduction in the fine that would have been imposed had it not cooperated with the Commission.

(293) Ajinomoto has fully cooperated with the Commission during the entire duration of the investigation, assisting the Commission in materially establishing the existence of the infringement, providing contemporaneous documents which were extensively used by the Commission as well as clarifications given on the operation of the arrangements. Consequently, Ajinomoto fulfils the conditions laid down under the first indent of paragraph 2 of Section D of the Leniency Notice.

(294) However, Ajinomoto contests the facts as set out in the statement of objections as far as the duration of the cartel is concerned. Ajinomoto therefore does not qualify for a reduction of the fine pursuant to the second indent of paragraph 2 of Section D of the Leniency Notice. On the basis of the foregoing, it is concluded that Ajinomoto fulfils the conditions set out in the first indent of paragraph 2 of Section D of the Leniency Notice and should accordingly be granted a reduction of 30 %.

Conclusion on the application of the Leniency Notice

(295) In conclusion, with regard to the nature of their cooperation and in the light of the Leniency Notice, the addressees of this Decision should be granted the following reductions of their respective fines:

— to Takeda: a reduction of 100 %,

— to Ajinomoto: a reduction of 30 %,

— to Daesang: a reduction of 50 %,

— to Cheil: a reduction of 40 %.

5. *The final amounts of the fines imposed in these proceedings*

(296) In conclusion, the fines to be imposed, pursuant to Article 15(2)(a) of Regulation No 17, should be as follows:

— Takeda: EUR 0,

— Ajinomoto: EUR 15 540 000,

— Daesang: EUR 2 280 000,

— Cheil: EUR 2 736 000,

HAS ADOPTED THIS DECISION:

Article 1

Ajinomoto Company Incorporated, Takeda Chemical Industries Limited, Daesang Corporation and Cheil Jedang Corporation have infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating, in the manner and to the extent set out in the reasoning, in a complex of agreements and concerted practices in the nucleotides sector.

The duration of the infringement was as follows:

(a) Ajinomoto Company Incorporated, from 8 November 1988 until September 1997;

(b) Takeda Chemical Industries Limited, from 8 November 1988 until June 1998;

(c) Daesang Corporation, from 19 December 1988 until the end of 1997;

(d) Cheil Jedang Corporation, from March 1989 until June 1998.

Article 2

The undertakings listed in Article 1 shall immediately bring to an end the infringement referred to therein, in so far as they have not already done so.

They shall refrain from any agreements or concerted practices in relation to their activities in nucleotides that may have the same or similar object or effect as the infringement.

Article 3

The following fines are hereby imposed on the undertakings listed in Article 1 in respect of the infringement referred to therein:

— Ajinomoto Company Incorporated, a fine of EUR 15 540 000,

— Daesang Corporation, a fine of EUR 2 280 000,

— Cheil Jedang Corporation, a fine of EUR 2 736 000.

The fines shall be paid within three months of the date of the notification of this Decision to the following account of the European Commission:

Account No 642-0029000-95
IBAN code: BE76 6420 0290 0095
SWIFT code: BBVABEBB
Banco Bilbao Vizcaya Argentaria (BBVA) SA
Avenue des Arts/Kunstlaan, 43
B-1040 Bruxelles/Brussel

After expiry of that period, interests shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 6,75 %.

Article 4

This Decision is addressed to:

Takeda Chemical Industries Limited
12-10, Nihonbashi 2-chome
Chuo-ku
Tokyo 103-8668
Japan

Ajinomoto Company Incorporated
15-1, Kyobashi itchome
Chuo-ku
Tokyo 104-8315
Japan

Cheil Jedang Corporation
6F, Cheiljedang Bldg
Namdaemoon-Ro
Chung-Ku, 100-095 Seoul
Korea

Daesang Corporation
Daesang Building
96-48 Shinsul-Dong
Dongdaemoon-Ku, Seoul
Korea

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 17 December 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 16 July 2003

relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement

(Case COMP/38.369: T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag)

(notified under document number C(2003) 2432)

(Only the German text is authentic)

(Text with EEA relevance)

(2004/207/CE)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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 1/2003 [2], and in particular Articles 2, 6 and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption submitted pursuant to Articles 2 and 4 of Regulation 17 on 6 February 2002,

Having regard to the summary of the application and notification published pursuant to Article 19(3) of Regulation No 17 and to Article 3 of Protocol 21 of the EEA Agreement [3],

After consulting the Advisory Committee for Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case [4],

Whereas:

1. INTRODUCTION

(1) On 6 February 2002, T-Mobile Deutschland GmbH (T-Mobile) and O2 Germany & Co OHG (O2 Germany) (formerly VIAG Interkom GmbH) notified to the Commission a framework agreement of 20 September 2001 concerning infrastructure sharing and national roaming for the third generation of GSM mobile telecommunications (3G) on the German market (the Agreement). In their notification T-Mobile and O2 Germany (the Parties) have requested either negative clearance under Article 81(1) EC/Article 53(1) EEA, or an exemption under Article 81(3)/Article 53(3) EEA [5].

(2) In February 2002, the Commission published a first notice summarising the notified agreement and inviting third party comments [6]. This was followed in August 2002 by a notice published pursuant to Article 19(3) of Regulation 17/62 which set out the Commission's preliminary position and gave third parties an opportunity to provide their comments on the proposed favourable approach [7]. In February 2003 a supplementary consultation took place of those third parties who had reacted to the notice published pursuant to Article 19(3) of Regulation 17/62, in relation to certain amendments to the notified agreement. The present Decision represents the final step in the Commission's decision-making procedure.

[1] OJ 13, 21.1.1962, p. 204.
[2] OJ L 1, 4.1.2003, p. 1.
[3] OJ C 189, 9.8.2002, p. 22.
[4] OJ C 64, 12.3.2004.

[5] The Commission has also received a related notification from O2 UK Limited (formerly BT-Cellnet Limited) and BT3G Limited, and from T-Mobile UK (formerly One2One Personal Communications Limited) dated 6 February 2002 relating to a 3G Network Deployment and 3G Bilateral Roaming Agreement for the United Kingdom. This agreement is being dealt with separately (Case COMP/38.370 — UK Agreement) and a decision was adopted on 30 April 2003.
[6] OJ C 53, 28.2.2002, p. 18.
[7] OJ C 189, 9.8.2002, p. 22.

2. THE PARTIES

(3) T-Mobile is an operator of digital mobile telecommunications networks and services in Germany using the GSM family of standards. T-Mobile provides GSM services in Germany based on a GSM 900 licence, and was awarded a universal mobile telecommunications system (UMTS) licence in Germany in August 2000 ([8]). It is wholly owned by T-Mobile International AG, which in turn is a wholly owned subsidiary of the incumbent fixed network operator Deutsche Telekom AG (DTAG).

(4) T-Mobile International AG is an international holding company acting in mobile telecommunications. Its main subsidiaries operate networks in the United Kingdom (T-Mobile (UK) Limited, T-Motion, Virgin Mobile), Austria, the Czech Republic and the USA. T-Mobile International AG also has subsidiaries active in the Netherlands, Russia and Poland. In the 2001 financial year, DTAG had a worldwide turnover of EUR 48,3 billion and T-Mobile International AG had a worldwide turnover of EUR 14,6 billion.

(5) O2 Germany likewise operates digital mobile telecommunications networks and services in Germany, where it entered the market as the fourth out of four operators based on a GSM 1800 licence awarded in 1997, and was awarded a UMTS licence in August 2000. O2 Germany is a wholly owned subsidiary of mmO2 plc, formerly BT Cellnet limited, a company previously controlled by British Telecommunications plc. mmO2 operates, through its subsidiaries, networks in the United Kingdom (O2 UK), Germany (VIAG — renamed O2 Germany), Ireland (Digifone — renamed O2 Ireland) and the Isle of Man (Manx Telecom). In the financial year ending 31 March 2002, the mmO2 group had a turnover of GBP 4,3 billion (about EUR 6,7 billion).

3. LEGAL AND FACTUAL BACKGROUND

3.1. The Development of 3G mobile communications in the EU

(6) In Europe, the first generation (1G) of mobile communications systems was based on analogue technology. This was followed at the beginning of the 1990's by the second generation (2G) systems which introduced digital technology, namely GSM 900 (the European Global System for Mobile Communications) and DCS 1800 (so called Personal Communications Networks or PCN services). Both GSM 900 and DCS 1800 services are now commonly referred to as GSM services. Standard GSM communications are circuit-switched, which means that for any call a physical path is set up and dedicated to a single connection between the two communicating end points in the network for the duration of the connection. Transmission rates for GSM are 9,6 kbit/s (kilo bits per second) to 11,4 kbit/s, or with compression 14 kbit/s, which allows the delivery of basic voice telephony, short messaging service (SMS) and e-mail, and circuit-switched data.

(7) Enhanced 2.5G mobile technologies that use more efficient packet-switched communications to send data in packets to their destinations (via different routes) without requiring the reservation of a dedicated transmission channel (using radio resources only when users are actually sending or receiving data) are being developed to provide a greater range of services including mobile e-mail, visual communications, multimedia messaging and location-based services. General Packet Radio Service (GPRS) is one of the principal 2.5G technology platforms that offer 'always-on' connection, higher capacity and packet-based data services. GPRS data transmission rates are, between 30 kbit/s and 40 kbit/s and with EDGE technology 80 kbit/s to 130 kbit/s, depending on the specific usage situation. This enables the delivery of services such as basic mobile Internet access, mobile radio, and location-based services ([9]).

(8) Work is now underway to bring about a third generation (3G) of mobile technology, applications and services to the market ([10]). 3G builds on 2.5G technology, integrating packet- and circuit-switched data transmission. It is technically capable of reaching a speed of 144 kbit/s and will eventually allow transmission rates that are expected to have a practical maximum of 384 kbit/s ([11]). 3G services are mobile communications systems capable of supporting in particular innovative multimedia services, beyond the capability of second generation systems such as GSM, and capable of combining the use of terrestrial and satellite components ([12]).

([8]) In August 2000, the German Government awarded six 3G licences following a frequency auction procedure worth EUR 50,8 billion. The companies awarded the licences were T-Mobil, Vodafone-Mannesmann, E-Plus, Viag Interkom Group, Group 3G and Mobilcom multimedia. Both Group 3G and Mobilcom multimedia have meanwhile ceased their 3G operations, and it is not clear whether their frequencies will be reissued for 3G purposes.

([9]) Other less wide-spread technologies include WAP (Wireless Application Protocol), HSCSD (High-speed circuit switched data) and EDGE (Enhanced Data GSM Environment).

([10]) UMTS (Universal Mobile Telecommunications System) is one of the major new 'third generation' (3G) mobile communications systems being developed within the framework defined by the International Telecommunications Union (ITU) collectively known as IMT-2000.

([11]) The exact transmission rate depends on parameters like the time and location of the call, the number of users within a cell and the applications used, as the available speed will be divided between the different users and applications.

([12]) 'The introduction of third generation mobile communications in the European Union: state of play and the way forward' (Introduction of 3G in the EU), COM (2001) 141 Final (20.3.2001).

(9) Annex I to Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the coordinated introduction of a third-generation mobile and wireless communications system (UMTS) in the Community (the UMTS Decision) ([13]) sets out the characteristics which UMTS must be capable of supporting. These include:

(a) multimedia capabilities, full mobility and low mobility applications in different geographical environments beyond 2G capabilities;

(b) efficient access to Internet, Intranets and other Internet protocol based services;

(c) high quality speech transmission commensurate with that of fixed networks;

(d) service portability across 3G environments; and

(e) operation in one seamless environment including full roaming with GSM as well as between the terrestrial and satellite components of UMTS networks. Given that 3G networks and services are not yet fully available it is not possible to provide a reliable catalogue. However, examples of anticipated services include mobile videoconferencing, mobile video phone/mail, advanced car navigation, digital catalogue shopping and various business to business (B2B) applications ([14]).

(10) The development of 3G in the EU is based on the common UMTS technological platform, on the harmonisation of the radio spectrum and on the definition of a harmonised regulatory environment. These harmonisation objectives were met in part by the general Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services ([15]). This was followed at the end of 1998 by the abovementioned Decision (recital 9) on the coordinated introduction of a third-generation mobile and wireless communication system (UMTS) in the Community ([16]). It required Member States to enable the introduction of UMTS services on their territory by 1 January 2002 and emphasised the role of technical bodies such as the European Conference of Postal and Telecommunications Administrations (CEPT) and Europe Telecommunications Standards Institute (ETSI) in harmonising frequency use and promoting a common and open standard for the provision of compatible UMTS services throughout Europe.

(11) Finally, in March 2001 the Commission published a Communication setting out the state of play and the way forward for the introduction of third generation mobile communications in the EU ([17]). This Communication takes note of the combination of the difficult financial situation of telecommunications operators throughout the EU and of the high infrastructure investment costs involved that lead operators to engage in infrastructure sharing arrangements. It concludes that economically beneficial sharing of network infrastructure should in principle be encouraged, provided the competition rules and other relevant Community law are respected ([18]). In its follow up Communication 'Towards the full roll-out of third generation mobile communications' of 11 June 2002 ([19]), the Commission emphasised that it would continue to work with national administrations towards establishing a best practice approach for network sharing. The Commission published a further Communication about 'Electronic Communications: the Road to the Knowledge Economy' on 11 February 2003 ([20]).

3.2. **Network sharing and national roaming**

(12) 3G Network sharing can take place at a number of different levels and involve varying degrees of cooperation. The degree of independence retained by the operators involved depends on which network elements are being shared and their remaining ability to install separate elements (planning freedom). The basic distinction that is relevant in the context of the Parties' network sharing agreement is that between the Radio Access Network (RAN) and the core or backbone network.

3.2.1. *RAN*

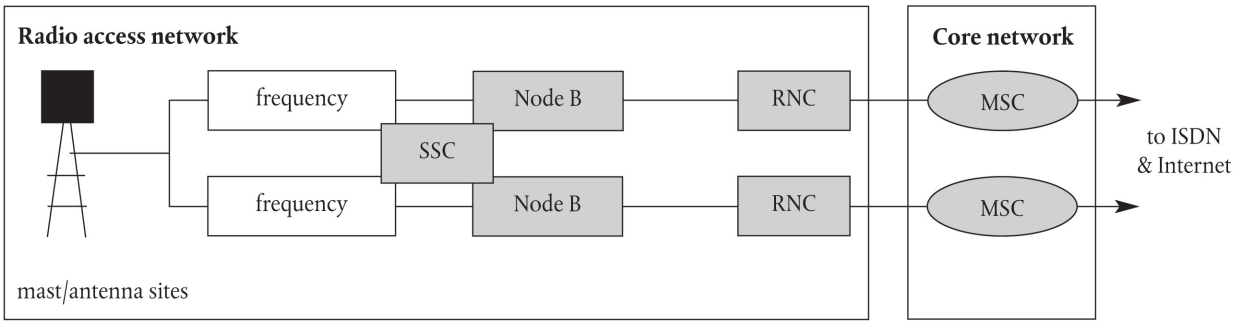
(13) The RAN includes mast/antenna sites, site support cabinets (SSC) and power supply, as well as antennas, combiners and transmission links, Nodes B, namely the base stations that receive and send data across frequencies and control a particular network cell, and the radio network controllers (RNCs) that each control a number of such Nodes B and that are linked to the core network.

3.2.2. *Core network*

(14) The core network is the intelligent part of the network that consists of mobile switching centres (MSCs), various support nodes, services platforms, client home location registers and operation and maintenance centres. It is linked to the fixed ISDN (integrated services digital network) and Internet networks (see figure 1).

([13]) OJ L 17, 22.1.1999, p. 1.
([14]) Cf. http://www.umts-forum.org.
([15]) OJ L 117, 7.5.1997, p. 15. This Directive sets out the procedures associated with the granting of authorisations for the purpose of providing telecommunications services and the conditions attached to such authorisations.
([16]) UMTS Decision, see footnote 13.
([17]) COM (2001) 141 Final (20.3.2001), see footnote 12.
([18]) See footnote 17, paragraph 4.3.
([19]) COM (2002) 301 Final.
([20]) COM (2003) 65 Final.

Figure 1: UMTS Network



(15) Ranked by the increasing degree to which the network is shared it is possible to distinguish between shared use of:

(a) sites, which ranges from sharing individual mast sites up to grid sharing (requiring a uniform layout of networks), and may include site support infrastructure, such as site support cabinets (SSC);

(b) base stations (Nodes B) and antennas;

(c) radio network controllers ('RNCs');

(d) core networks, including mobile switching centres ('MSCs') and various databases;

(e) frequencies.

(16) Finally, national roaming concerns a situation where the cooperating operators do not share any network elements as such but simply use each other's network to provide services to their own customers.

(17) In their notification the Parties use the term 'extended site sharing' for shared use of sites and site infrastructure up to the level of, but not including, Nodes B and RNCs (recital 15, point (a)). They apply the term 'RAN sharing' to common use of the entire radio access network, up to and including Nodes B and RNCs (recital 15, point (a), (b) and (c)). The Parties do not envisage sharing their core networks or frequencies. Their Agreement (as amended) does cover national roaming of O2 Germany on T-Mobile's network namely within the 50 % coverage area, as well as reciprocal roaming of the Parties outside the 50 % coverage areas.

3.3. **The National Regulatory Framework**

(18) In addition to Community law, the applicable national licensing and regulatory requirements must be taken into account in the context of network infrastructure sharing ([21]). Both the general national regulatory framework in Germany and the terms of the Parties' 3G licences set out parameters for network sharing. These include:

(a) network roll-out requirements in terms of effective coverage related to a specific timetable, notably a requirement to cover 25 % of the population by the end of 2003 and 50 % of the population by the end of 2005 that cannot be met by means of national roaming but can be met by shared infrastructure ([22]);

(b) general obligations as regards e.g. site and antenna sharing relating to planning restrictions and environmental concerns;

(c) limitations as regards the extent of network sharing allowed related to for example sharing network intelligence and sensitive customer data.

([21]) A number of national regulatory authorities (NRAs) in the EU issued guidance on the conditions on which infrastructure sharing would be consistent with the national licensing and regulatory requirements. In Germany, the Regulierungsbehörde für Telekommunikation und Post (RegTP) published its Interpretation of the UMTS Award Conditions in light of more recent technological advance, RegTP (6 June 2001), available at www.regtp.de. In May 2001, the Office for telecommunications (Oftel), the UK NRA, published a note for information on '3G mobile infrastructure sharing in the UK', available at http://www.oftel.gov.uk/publications/mobile/infrashare0501.htm. The Dutch and French NRAs have published similar guidance documents, which are available on their websites at http://www.opta.nl/download/concept_notitie_nma_vw_opta_umts_netwerken_190701.pdf and at http://www.art-telecom.fr/dossiers/umts/partage-infras.htm.

([22]) The minimum transmission rate required to meet the coverage obligation is to be specified by RegTP following a further public consultation. Consistent with technical specifications for 3G services, it is expected to be around or in excess of 144 kbit/s.

(19) The German Regulatory Authority for Post and Telecommunications (Regulierungsbehörde für Telekommunikation und Post — RegTP) is the national telecommunications regulatory authority (NRA) responsible for the notified agreement. RegTP published general guidance in June 2001 in which it took a favourable view of infrastructure sharing provided certain conditions were met ([23]).

(20) In particular, RegTP excluded sharing of the core network and the pooling of frequencies, but allowed sharing of sites, masts, antennas, cables and combiners as well as shared used of site support cabinets, and the shared use of logically distinct Node Bs as well as RNCs ([24]), provided that:

(a) each licence holder has independent control of their own logical Node B, respectively RNC;

(b) there is no exchange of data, such as customer data, beyond that required for technical operations;

(c) separation of operation and maintenance centres;

(d) additional own Nodes B respectively own RNCs can be operated to guarantee planning independence and the operator's own Nodes B operated solely by himself are connected to his own logical RNCs;

(e) there is no regional division of coverage areas that rules out overlapping network and coverage areas; namely parties may not agree to each cover only a distinct and different geographical area and rely on roaming on each other's network in those areas where their own network does not have coverage.

(21) On 7 December 2001, RegTP found the Parties' framework agreement to be in line with these regulatory constraints, provided that the Parties respected the requirements of logically independent control of Nodes B and RNCs. RegTP's approval was further subject to reporting obligations concerning the geographical distribution of shared infrastructure, and the meeting of their respective 50 % of population coverage obligations ([25]).

(22) Subject to the principle of the primacy of Community law, the national regulatory framework and the EU competition rules are of parallel and cumulative application. National rules may neither conflict with the EU competition rules nor can compatibility with national rules and regulations prejudice the outcome of an assessment under the EU competition rules. Hence a full assessment of the notified Agreement under the EU competition rules is required.

4. THE AGREEMENT

(23) On 20 September 2001, the Parties entered into the notified Agreement, namely a framework agreement setting out the principal terms for their cooperation on 3G infrastructure in Germany. The Agreement has been subject to amendment by the Parties, in particular in relation to roaming. The Agreement directly affects the position of the Parties in the German markets for (i) sites and site infrastructure for digital mobile communications services, and (ii) wholesale access to roaming for 3G communications services. The Agreement has potential spill-over effects in related markets.

(24) The objectives of the Agreement as amended are to achieve capital expenditure efficiencies and operating expenditure savings which will improve the Parties financial situation better enabling them to position themselves in the market; to expand geographical coverage while limiting the environmental impact, and to achieve faster deployment of 3G network infrastructure and the early launch of 3G services. The Agreement provides the basis for cooperation between the Parties on:

(a) extended site sharing: reciprocal sharing of sites and elements of site infrastructure such as mast sites, site support cabinets (SSC) and power supply, as well as possibly antennas, combiners and transmission links, within a geographical area sufficient to enable the Parties to each attain its regulatory 50 % population coverage obligation by the end of 2005;

(b) radio access network (RAN) sharing: reciprocal sharing of Nodes B (namely the base stations that receive and send data across frequencies and control a particular network cell) and the radio network controllers (RNCs), that each control a number of such Nodes B and that are linked to the core network;

(c) national roaming: O2 Germany will roam on T-Mobile's network — but not vice versa — within the area of O2 Germany's 50 % population coverage obligation between 1 January 2003 and 31 December 2008, subject to the limitations set out in section 4.3.1. For the part of Germany over and above each Party's respective 50 % population coverage obligation, reciprocal national roaming is agreed for the duration of the Agreement.

(25) The Parties will maintain separate core networks and service provision, and will not share their frequencies. The Agreement is not exclusive, to the extent that both Parties can agree on extended site sharing, RAN sharing and national roaming with third parties (clause 1.3). The key provisions of the Agreement are set out in more detail below.

([23]) RegTP (6 June 2001), available at www.regtp.de.

([24]) 'Logically distinct' means that a single physical network element, due to its programming, can perform logically distinct operations for the two networks, as if two separate Nodes B or RCS were involved.

([25]) Letter from RegTP to European Commission, 7.12.2001.

4.1. **Extended site sharing**

(26) The Parties will each construct their own proprietary network infrastructure but will cooperate on the basis of 'extended site sharing' within an area which corresponds to their licence obligations for a population coverage of 50 % by the end of 2005. Under the agreement, 'extended site sharing' involves sharing Common Site Support Cabinets (SSC) and power supply and possibly antennas, combiners and transmission links.

(27) The Agreement specifies rules for the determination of sites that may become the subject of sharing arrangements. Clause 2.1 states that, first, each Party will draw up its own roll-out plans independently; next, the plans are divided into planning periods of [(*)] ([26]) showing the respective areas which T-Mobile and O2 Germany plan to develop. The geographical areas that the Parties consider relevant for their individual network roll-out will be compared periodically and where overlap exists may be identified as infrastructure sharing areas. The Parties' respective local branches at technical level will determine which sites should be subject to extended site sharing based on maximising cost savings.

(28) Clause 3.2 specifically provides that the Parties cannot jointly own or control the extended site sharing elements. However, the Party that owns or controls the particular site-sharing elements must allow their use by the other Party. According to Clause 3.3 a bilateral site framework agreement that remains to be concluded will set out the position on common and beneficial use as well as cost (price) regulation for shared sites. T-Mobile has meanwhile transferred ownership of its sites to the newly founded separate legal entity Deutsche Funkturm GmbH, which has not yet negotiated the terms of the relevant framework agreement with O2 Germany. Because to date such an agreement has not yet been concluded and the Commission has not received details regarding its terms, the Commission reserves its position on this agreement which is in any event not covered by the present Decision.

(29) The Agreement also contains safeguards in relation to the exchange of confidential information. Clause 2.6 provides that only information necessary for the technical realisation of extended site sharing can be exchanged. Under the Agreement, other information, in particular commercially sensitive customer information, cannot be exchanged.

([26]) Part of this text has been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

4.2. **RAN sharing**

(30) Section 4 of the Agreement deals with cooperation in the form of RAN sharing. Under the Agreement, RAN sharing can include additional sharing of Common Physical Nodes B and Common Physical Radio Network Controllers (RNC) — (To remain within the framework set by RegTP, Nodes B and RNCs would have to be logically separate). Clause 4.1 provides that the Parties must carry out a feasibility study into RAN sharing before 30 June 2002. Based on an examination of this feasibility the Parties have for the time being concluded that they will not engage in RAN sharing, but may reconsider RAN sharing in the future. Clause 4.2 states that if RAN sharing is feasible, the Parties will enter into an agreement regulating its implementation as soon as possible. Because so far there is no such agreement the Commission reserves its position on this issue, which is in any event not covered by the present Decision.

4.3. **National roaming**

(31) National roaming is covered in Chapter 3 of the Agreement (Sections 5 to 11) as amended by supplementary agreements of 20 September 2002, 22 January 2003 and 21 May 2003.

4.3.1. *O2 Germany roaming on T-Mobile's network within the 50 % coverage area*

(32) By the amendment of 22 January 2003 to the Agreement of 20 September 2001, the Parties have agreed that T-Mobile will supply O2 Germany (but not vice versa) with national roaming within an area corresponding to a 50 % population coverage obligation between 1 January 2003 and 31 December 2008. For roaming within the 50 % coverage area, O2 Germany will pay [(*)] (see section 4.3.2 below)).

(33) Following discussions with the Commission, the Parties have agreed to limit roaming within the area that is subject to the 50 % population coverage obligation to a strict minimum. Consequently they have identified three separate areas (Areas 1, 2 and 3) within the area that is subject to the 50 % population coverage obligation where roaming will be successively phased out according to an agreed timetable as O2 Germany achieves a network quality and density that allows it to compete effectively with the other licensed network operators. The Parties have amended the Agreement on 21 May 2003 to reflect these changes.

(34) The Areas where roaming will be phased out according to a specific timetable are as follows:

(a) Area 1 comprises [main urban (*)] regions covering approximately [(*)] of the German population, where O2 Germany undertakes not to roam, and T-Mobile undertakes to bar roaming from 31 December 2005 ([27]);

(b) Area 2 comprises [smaller urban (*)] regions [of secondary commercial importance (*)] covering approximately a further [(*)] of the German population, where O2 Germany undertakes not to roam, and T-Mobile undertakes to bar roaming from 31 December 2007 ([28]); and

(c) Area 3 comprises [smaller urban (*)] regions [of lesser commercial importance (*)] covering approximately a final [(*)] of the German population, where O2 Germany undertakes not to roam, and T-Mobile undertakes to bar roaming from 31 December 2008 ([29]).

By way of exception to this rule, in both Area 1 and in Area 2, O2 Germany will continue roaming in so-called 'underground areas' until 31 December 2008. Pursuant to the timetable, O2 Germany is also entitled to roam in underground areas in Area 3 until 31 December 2008 ([30]).

4.3.2. *Reciprocal roaming outside the 50 % coverage area*

(35) Outside the area required to obtain 50 % population coverage, the Parties have agreed terms for reciprocal bulk purchasing of both circuit-switched and package-switched national roaming. O2 Germany commits to purchasing a minimum volume of such roaming services from T-Mobile. T-Mobile obtains a right to purchase roaming services from O2 Germany under the same conditions, but it is not under an obligation to do so.

([27]) Area 1 consists of: [(*)].
([28]) Area 2 consists of: [(*)].
([29]) Area 3 consists of: [(*)].
([30]) 'Underground areas' shall mean any area within the cities or regions within Areas 1 and 2 and 3 which is part of the underground public transport system (including railways and metro), underground shopping centres, underground car parks, tunnels for vehicles and pedestrians and any other comparable underground areas as well as the areas directly above (ground level) but only to the extent underground areas and ground level cannot be technically separated for roaming purposes.

(36) Section 5 of the Agreement sets out the key principles on national roaming. Clause 5.3 provides that the Parties agree not to discriminate against other national or international roaming partners. In addition, neither of the Parties will treat the other Party's customers less favourably than their own customers. Clause 5.6 states that the Parties undertake to ensure that the cooperation on roaming will not restrain service competition between the Parties.

(37) Section 6 of the Agreement deals with national roaming by O2 Germany customers on T-Mobil's 3G network. Clause 6.1 provides that T-Mobile will provide O2 Germany with bulk national roaming for the duration of the Agreement. O2 Germany has agreed to purchase a minimum quantity of roaming services from T-Mobile for a value of [(*)] within three years from the date of launch of the 3G roaming services (Clause 6.5). Parties have provided data based on the experience with O2 Germany roaming on T-Mobile's second generation GSM network to show that this is likely to represent a very small proportion of O2 Germany's requirements. Conversely, Section 7 deals with national roaming by T-Mobil's customers on O2 Germany's 3G network. Clause 7.1 states that T-Mobile has the option but not an obligation to purchase 3G roaming services from O2 Germany. However, if T-mobile purchases national roaming services from O2 Germany, it is subject to the same minimum purchase requirement as O2 Germany (Clause 7.4)

(38) Section 8 of the Agreement sets out specific rules on barring customer use. Clause 8.3 states that the Party providing national roaming has the right to bar subscribers of the other Party from its network. Also, the Party using national roaming can bar its own customers from using the other Party's network. This applies in cases where there are overlapping areas. The agreement also provides information about the location areas for barring and circumstances when the parties will dispense with barring.

(39) Section 10 of the Agreement sets out a two-tier system of pricing for 3G roaming. It provides that prices for circuit-switched 3G roaming (destined for mobile voice telephony services) are based on the respective interconnection termination prices of T-Mobile and O2 Germany. Wholesale prices for packet-switched 3G roaming (destined for mobile data services) are based on a [retail minus pricing model (*)] ([31]) taking into account possible future developments of packet-switched roaming prices and demand.

([31]) [(*)].

(40) Section 11 of the Agreement sets out specific rules on the resale of national roaming capacities to third parties. Clause 11.1.a sets out the general rule that each Party has the right to resell the roaming capacity of the other Party to service providers. This is in accordance with the Parties' obligations under national law and under the terms of their 3G licence to provide access to service providers ([32]). However, the resale of roaming capacity to Mobile Virtual Network Operators (MVNOs) that provide voice services to end users ([33]), and of roaming capacity to other licensed network operators, is subject to the prior approval of the host operator, namely the other Party.

(41) Clause 11.1.b provides that Parties have the right to make national roaming capacities of the respective other Party available to MVNOs for data traffic (data MVNOs), provided that these MVNOs do not use this capacity for the provision of services to end customers that are essentially identical to an end-to-end mobile voice service from a customer's viewpoint (Voice MVNOs). The Parties are also able to provide roaming capacity for voice traffic to 'data MVNOs' acting as service providers.

(42) In addition, Clause 11.1.c provides that the resale of roaming capacity to other licensed network operators or to 'Voice MVNOs' as defined in Clause 11.1.b is subject to consent by the other Party. However, pursuant to Clause 11.2, the prior consent requirement of Clause 11.1.c does not apply if the MVNOs are group companies of the other Party, provided that they respect the different pricing regimes for voice and data services. Moreover, pursuant to Clause 11.3, once a Party itself offers roaming to a third party (not a group company) that is a Voice MVNO and offers services essentially identical to an end-to-end mobile voice service from a customer's viewpoint in the sense of Clause 11.1.b, this Party is obliged to allow the other Party to provide their received national roaming capacities to such Voice MVNOs as well.

4.4. **Duration**

(43) The Agreement will continue in force until 31 December 2011, after which date it will be automatically renewed for a period of two years unless terminated by either Party with two years prior notice.

5. **RELEVANT MARKET**

5.1. **Introduction**

(44) As the Agreement is mainly technical in nature and does not have as its object the restriction of competition, the effect of the Agreement must be analysed. Whether the Agreement is likely to have negative effects on competition depends not only on the nature of the Agreement but also on its economic context, such as the market power of the parties and other factors relating to market structure. This analysis requires a definition of the two relevant wholesale markets that are directly affected by the Agreement, and an identification of a number of other (potential) wholesale and retail markets where effects may be felt.

(45) Telecommunications markets can generally be divided into wholesale and retail markets. Wholesale markets typically consist of the provision of access to networks (or network elements) and of network services to operators of networks and services, and retail markets consist of the provision of communications services to end users ([34]). Within these broad categories narrower markets can be defined not only on the basis of the characteristics of the service concerned and the degree to which it can be substituted by other services based on price, usage and consumer preference, but by an analysis of competitive conditions and the structure of demand and supply ([35]). Given the advantages of mobility and

([32]) Service providers (also called resellers) are entities authorised to offer mobile services directly to end users under their own brand name (dealing with marketing, billing, etc.) based on wholesale airtime purchased on a third party's mobile network. The legal basis for the obligation to provide service providers access for 3G are Section 4 TKV Telecommunications Customer Protection Ordinance of 11 December 1997 (Federal Law Gazette I, p. 2910) last amended by Second Ordinance Telecommunications Customer Protection Ordinance of 27 August 2002 (Federal Gazette I, p. 3365) (Telekommunikations-Kundenschutzverordnung vom 11.12.1997, BGBl. I S. 2910 Zweite Verordnung zur Änderung der TKV vom 27.8.2002, BGBl. I S. 3365), and section 15 of the German 3G licences.

([33]) MVNOs are undertakings with an own mobile network code and an own range of mobile International Mobile Subscriber Identity (IMSI) numbers or an equivalent for 3G, but that do not own a licence to operate wireless frequencies.

([34]) Notice on the application of the competition rules to access agreements in the telecommunications sector, framework, relevant markets and principles (Access Notice), OJ C 265, 22.8.1998, p. 2, point 45; Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (SMP Guidelines), OJ C 165, 11.7.2002, p. 6, point 64.

([35]) Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372/5, 9.12.1997, p. 5. Guidelines on the application of EEC competition rules in the telecommunications sector, OJ C 233, 6.9.1991, p. 2.

the premium paid for it, mobile services are in general not substitutable by fixed services. Mobile and fixed voice services are therefore part of different services markets, as has been determined in a number of Commission decisions ([36]).

(46) The network access and services markets that are primarily concerned by this Decision are:

(a) the market for sites and site infrastructure for digital mobile radiocommunications equipment;

(b) the market for wholesale access to national roaming for 3G communications services.

In addition, the markets for wholesale access to 3G services, as well as the downstream retail markets for 3G services are affected indirectly.

5.2. **Wholesale mobile network access markets**

(47) Access to physical facilities such as sites and site infrastructure such as masts and antennae, as well as ducts, leased lines and rights of way that serve as part of a mobile telecommunications network infrastructure, may constitute access to particular mobile network markets. In addition, there are wholesale network access and services markets for the provision of digital mobile communications services to other operators. These can be divided broadly into:

(a) first, wholesale network services related to interconnection that allow communication to take place between the users of different networks, and;

(b) second, wholesale access services that relate to the use of a host or visited network by customers of other operators.

(48) The wholesale network services related to interconnection include call termination (the wholesale service of completing a call to an end user), call origination (the wholesale service of enabling a call to be originated by an end user), as well as direct interconnection services (the provision of a direct physical link between terminating and originating networks) and transit services (the provision of an indirect link between terminating and originating networks by means of transit across one or more third networks). Access services that relate to the use of a host or visited network by customers of other operators include the wholesale provision of national and international roaming, and the wholesale provision of airtime.

5.3. **Markets directly affected by the Agreement**

5.3.1. *The market for sites and site infrastructure for digital mobile radiocommunications equipment*

Product/infrastructure market

(49) Both 2G and 3G mobile telecommunications networks rely on a cellular network architecture based around antennae that are distributed across the coverage area, allowing radio signals to be received from and transmitted to end users within a certain cell radius ([37]). The operators of 2G and 3G mobile telecommunications networks require sites for the location of these antennas and the related site infrastructure such as masts, site support cabinets, power supply, combiners and transmission links.

(50) Acquiring (either purchasing or, more commonly, leasing) such sites requires agreement with the site owners and planning permission from local authorities, and in some cases approval from regulatory authorities to limit the risk of radio frequency interference. Although the number of properties that can be converted into sites for digital mobile communications equipment is in theory unlimited, in practice the number of suitable sites is limited due to planning regulations, health or environmental considerations or space constraints in hot spots (e.g. in city centres, airport and railway terminals and in underground areas). To be considered a site, a particular property must therefore be usable as such from a technical point of view, must be made available in accordance with regulatory constraints, and must fit into the planned network architecture spaced across the coverage territory according to capacity needs.

([36]) SMP Guidelines, paragraph 66. Cf Commission Decision 98/2001/EC in Case No COMP/M.1439 — Telia/Telenor, OJ L 40 9.2.2001, p. 1; Commission Decision of 12 April 2000 in Case No COMP/M.1795 — Vodafone Airtouch/Mannesmann, OJ L 40, 9.2.2001, p. 1; Commission Decision of 20 September 2001 in Case No COMP/M.2574 — Pirelli/Edizone/Olivetti/Telecom Italia, OJ C 325, 21.11.2001, p. 12; Commission Decision of 10 July 2002 in Case No COMP/M.2803 — Telia/Sonera, OJ C 201, 24.8.2002, p. 19.

([37]) Because 2.5G is based on an overlay of existing 2G networks and in Germany is provided by the four existing 2G operators (and their service providers) this is not analysed separately.

(51) From a demand perspective, sites are at present required primarily by the four operators that hold 3G licences in Germany and are planning 3G network roll-out, all four of which also operate 2G networks ([38]). In principle 2G and 3G sites are interchangeable, although due to the nature of the different frequencies used and the added capacity required for 3G services, the density of a 3G network is greater, and requires up to twice as many sites as a 2G network. Only a limited part of the demand for 3G sites can therefore be met by using existing 2G sites. Finally, unlike 2G networks, which are already fully rolled out, the roll-out of 3G networks in Germany is still in its planning stages. Given regulatory roll-out requirements of 25 % population coverage by the end of 2003 and 50 % population coverage by the end of 2005, the initial demand for sites is highest in urban and other densely populated areas. Although there is some room for substitution between various types of sites (e.g. between roof-top sites and mast sites, or between multiple sites serving smaller cells, such as micro or pico cells and single sites serving larger macro cells) there are no other products that can substitute for 2G and 3G sites and site infrastructure.

(52) From a supply perspective, access to 2G and 3G sites and site infrastructure can firstly be provided by 2G and 3G network operators that have located, acquired and developed sites for the purposes of operating their own networks. This is because in principle sites can be shared between multiple operators, although there are technical limits on the number of operators that can share a particular site, in most cases up to three ([39]), depending on the lay-out of the specific site. There appear to be economies of scope involved at the supply side, because network operators are likely to prefer dealing with parties that can provide them with the largest possible number of sites across the largest possible number of locations in order to minimise search costs and to minimise transaction costs. Operators may prefer 'extended' site sharing with other operators covering elements of site infrastructure, thereby further reducing their costs. Finally, it is likely that in hot spots such as city centres many of the most favourable sites have already been developed and are therefore not always available to market entrants.

([38]) Sites are also required by e.g. digital broadcasters and will be required by providers of TETRA (terrestrial trunked radio) if these services take off in Germany. So far the Parties only share sites with other 2G/2.5G operators.

([39]) A breakdown of the multiple usage of sites can be found on http://www.regtp.de.

(53) There is limited scope for supply by operators of broadcasting networks. Nevertheless, there is a tendency for mobile operators to utilise broadcast structures where they are suitable for the local requirements of the service. Broadcast transmission equipment is located on sites affording a much higher level of geographical coverage when compared to the coverage requirements of cellular systems. Consequently, broadcast sites tend to be tall structures in elevated locations that transmit at high powers (tens of kilowatts) in order to achieve optimal population coverage using a limited number of sites. In view of capacity considerations, mobile radio networks are cellular in nature, each site providing sufficient but limited coverage, reducing inter-cell interference and allowing the frequency allocations to be re-used in other areas. The size of each cell may range from a few hundred metres to several kilometres, the actual range determined by the level of network capacity required. Site height and transmitted power are the main factors in controlling cell size with typical powers of tens of watts and antenna heights between 10 and 20 meters.

(54) There has been market entry in Germany by independent companies that specialise in the location, acquisition and provision of sites for use by third parties. Other parties that control sites, such as public authorities or utilities can likewise enter the market and have already done so in Germany. Moreover, operators have historically also acquired and leased individual sites on a commercial basis directly from the site owners, and continue to do so. Apart from the general planning permission constraints, health rules and requirements to minimise electromagnetic interference mentioned above there are no serious legal, statutory or other regulatory requirements that could defeat a time-efficient entry into the market and as a result discourage supply-side substitution. No significant investments or scarce technical expertise are required to enter the market. Market entry therefore remains possible.

(55) Based on the above analysis of supply and demand it should be concluded that there is a market for sites and site infrastructure for digital mobile radiocommunications equipment.

Geographical market

(56) Based on the structure of demand, which is driven by nationally licensed operators, and because the relevant planning rules are guided by national law, the market is national, namely Germany.

5.3.2. *Wholesale market for access to national roaming for 3G communications services*

Product/service market

(57) Mobile roaming takes place when subscribers use their mobile telephone handset, or more specifically the SIM (subscriber identification module) card that identifies the subscribers, on a different mobile network (the host or visited network) than that to which they subscribe and which issued their SIM card (the home network). Roaming can be either national or international. In both cases it is based on agreements between the home network operator and the visited network operator for the provision of wholesale roaming access to the visited network which is then passed on as a retail service by the home network to its subscribers. However, the market for national roaming is distinct from that for international roaming, *inter alia*, because it does not involve agreements between foreign operators, because it is not based on the standard arrangements developed within the GSM Association ([40]), and because the prices are significantly different.

(58) Notwithstanding a possible initial overlap between 2G, 2.5G and 3G retail services, from a demand perspective wholesale access to national roaming for 3G communications services will be distinct from 2G or 2.5G roaming, because the range of both voice and data services that can be provided based on 3G roaming is broader and different, given that significantly higher transmission speeds will be available (namely in practice from 144 up to 384 kbit/s for 3G versus between 20 and 60 kbit/s for 2.5G and between 9 and 14 kbit/s for 2G). A more complete discussion of the relevant voice and data services is provided in a separate section below.

(59) From a supply perspective, only operators of 3G networks, or other parties able to provide the relevant type of access to the 3G networks of such operators, will be able to supply wholesale access to national roaming for 3G services. Given licensing requirements, the entry barriers, aside from secondary entry based on access rights to an existing 3G network, are absolute. Wholesale access to national roaming for 3G communications services therefore constitutes a distinct product/service market.

Geographical market

(60) Given national licensing of 3G networks, and given pricing differences between national and international roaming, the relevant market is national, namely Germany.

5.4. Other potentially affected wholesale and retail markets

5.4.1. *Potentially affected wholesale markets*

Product/service market

(61) There are a number of other possible wholesale markets for 3G network services and network access that may be affected by the Agreement such as the market for the provision of wholesale airtime access to service providers, which exists in Germany based on regulatory obligations. Wholesale airtime access is similar to national roaming because it likewise concerns the wholesale provision of network access and minutes (airtime) by a host network. It is supplied to service providers by licensed mobile operators in Germany as a condition of the latters' licences ([41]). The difference between the two forms of access is that a mobile network operator relying on national roaming can itself determine the range of services available to its subscribers, and can provide services that are not available to customers of the host network. A service provider, however, can only provide simple resale of the range of services offered by the network operator that is providing it with wholesale airtime.

(62) Another possible wholesale market is the market for call origination services where providers of carrier selection services purchase the right to obtain access to mobile networks in order to originate calls that they terminate under their own responsibility. This market does not presently appear to exist in Germany but exists in other Member States such as the United Kingdom. It is possible that in addition, new forms of wholesale access to 3G networks and services may develop that will come to constitute separate relevant markets.

([40]) The GSM Association consists of over 690 different 2 and 3G mobile network operators, manufacturers and suppliers who collectively develop technical platforms to make wireless services work seamlessly, with a focus on roaming and inter-operability. See http://www.gsmworld.com.

([41]) Section 4 TKV Telecommunications Customer Protection Ordinance of 11 December 1997 (Federal Law Gazette I, p. 2910) last amended by Second Ordinance Telecommunications Customer Protection Ordinance of 27 August 2002 (Federal Gazette I, p. 3365) (Telekommunikations-Kundenschutzverordnung vom 11.12.1997, BGBl. I S. 2910 Zweite Verordnung zur Änderung der TKV vom 27.8.2002, BGBl. I S. 3365); and by section 15 of the German 3G licences.

(63) Wholesale 3G services network services and network access are likely to be distinct from network services and access for 2G or 2.5G services, because the range of services that can be provided based on 3G networks is broader and different, given the availability of significantly higher transmission speeds. However given the degree of development of 3G wholesale markets which are still emerging, it is too early to assess in detail the demand side for network services and access on commercial terms in such markets, with the exception of demand from service providers for access to wholesale airtime consistent with the regulatory obligations of the 3G network operators. From a supply side these markets are logically limited to 3G network operators and to any other parties that may obtain a right to provide the relevant degree of access to 3G networks.

Geographical market

(64) Given national licensing and pricing patterns, the geographic scope of such wholesale markets is likely to be national ([42]).

(65) Because for the purposes of the present decision it is not necessary to define these markets more closely, their definition will be left open.

5.4.2. *Potentially affected retail markets*

(66) Whereas the cooperation covered by the Agreement is limited to site sharing and national roaming at wholesale network level, the effects of this cooperation could be felt in the downstream retail services markets where the Parties are active independently of each other. Within the area of mobile retail services, voice and data services have so far been offered in a bundled manner, suggesting they may be part of the same market. The Parties believe that all network operators are likely to offer 'seamless' 2G and 3G voice and data services by providing both types of services on a single SIM card. However, the balance between voice and data services is expected to shift fundamentally: whereas 2G data services are largely limited to fax and SMS, and voice services typically account for over 90 % of 2G mobile operators' revenues, for 3G networks, with services like teleshopping, video telephony and video conferencing, it is expected that eventually between 50 % and two thirds of revenue may be generated by data services. It is therefore useful to analyse digital mobile voice telephony services and digital mobile data services separately. At least initially this distinction largely corresponds with that between circuit-switched and packet-switched services.

Digital mobile voice services

(67) Concerning mobile voice telephony markets the Commission has so far generally not distinguished between different technologies. Most Decisions have determined that both analogue and digital GSM 900 and 1800 are part of the same mobile voice telephony market, while testing narrower market definitions to ensure that no dominant positions arose on any market definition ([43]). However, as analogue mobile telephony was phased out in Germany on 1 January 2000, the services concerned by the Agreement are digital mobile voice telephony. So far, the Commission has not defined distinct markets for 2G, 2.5G and 3G retail services ([44]).

(68) Over time however industry sources anticipate that 'rich voice over 3G networks' services may develop that consist of voice services integrated with data services such as consumer videophones and multimedia conferencing that go beyond the capacity of 2G and 2.5G networks. Hence it is possible that a distinct retail market for 3G voice services will develop, or indeed that 3G voice and data services will merge into a single market.

([42]) However cf Commission Decision of 4 October 2001 in Case No COMP/M.2898 TDC/CMG/MIGway JV, OJ C 16, 19.1.2002, p. 16, which identifies EU-wide markets for connectivity to the international signalling network and for wholesale access (SMS) to mobile telephony infrastructure.

([43]) See Commission Decision of 21 May 1999 in Case No IV/M.1430 — Vodafone/Airtouch, OJ C 295, 15.10.1999, p. 2; Commission Decision of 21 May 1999 in Case No COMP/JV.17 — Mannesmann/Bell Atlantic/Omnitel, OJ C 11, 14.1.2000, p. 4; Commission Decision 98/2001/EC of 13 November 1999 in Case No COMP/M.1439 — Telia/Telenor, OJ L 40, 9.2.2001, p. 1; Commission Decision of 20 December 1999 in Case No COMP/M.1760 — Mannesmann/Orange OJ C 139, 18.5.2000, p. 15; Commission Decision of 12 April 2000 in Case No COMP/M.1795 — Vodafone Airtouch/Mannesmann, OJ C 141, 19.5.2000, p. 19; Commission Decision of 4 August 2000 in Case No COMP/M.2053 — Telenor/BellSouth/Sonofon, OJ C 295, 18.10.2000, p. 11; Commission Decision of 11 August 2000 in Case No COMP/M.2016 — France Telecom/Orange, OJ C 261, 12.9.2000, p. 6; Commission Decision of 25 September 2000 in Case No COMP/M.2130 — Belgacom/Tele Danmark/T-Mobile International/Ben Nederland Holding, OJ C 362, 18.12.2001, p. 6.

([44]) Commission Decision of 12 April 2000 in Case No COMP/M.1795 — Vodafone Airtouch/Mannesmann, OJ C 141, 19.5.2000, p. 19; Commission Decision of 31 July 2000 in Case No COMP/M.1954 — ACS/Sonera Vivendi/Xfera, OJ C 234, 18.8.2000, p. 6; Commission Decision of 25 September 2000 in Case No COMP/M.2130 — Belgacom/Tele Danmark/T-Mobile International/Ben Nederland Holding, OJ C 362, 18.12.2001, p. 6.

Developments in the quality and the scope of the voice services concerned brought about by 3G technology are likely to enable 3G voice services to command a price premium. Moreover, they are likely to lead to one-way substitution between 2G services on the one hand, and 3G services on the other hand (namely users will substitute 3G services for 2G services, but not vice versa), which would be evidence of the existence of separate markets. For the purposes of the present Decision however, it is not necessary to conclude whether 2G and 3G voice services should be considered separate product markets. The relevant product market definition is therefore left open.

Digital mobile data services

(69) A fundamental difference between 2G data services on the one hand and 2.5 and 3G data services on the other is that the former is circuit-switched, whereas the latter are packet-switched, namely based on a different technology with different and increased technical capabilities. Because services and content available over 3G networks are expected to be considerably better than 2G both as concerns data speeds and the range of services that is consequently enabled, any substitutability between 2G and 3G is likely to be one way. This leads to the conclusion that 2G and 3G services are likely to be separate markets. Although it appears clear that there will be some overlap between 2.5G and 3G services as 2.5G allows e.g. mobile e-mail, multi-media messaging and continuous Internet access, it does not have data transmission rates that are sufficient to provide the high end of data services that are expected to emerge on 3G networks. It therefore appears that there may be an emerging market for the provision of 3G mobile data retail services.

(70) Based on the distinguishing factor of mobility, the Commission has so far considered that mobile and fixed data services are in separate markets ([45]). However the highest bandwidth 3G data services are likely to be deliverable only under conditions of optimal coverage and reduced to very low or no mobility. At the same time wireless local area network services (WLAN) are developing that provide data communications including broadband Internet access allowing limited mobility within a circumscribed area (such as within buildings or at public locations). It is not excluded that a similar measure of limited mobility will in future become the norm for all or most high bandwidth data services. Consequently, it is an open question whether services like WLAN will be a complement to or a substitute for 3G services and as a result the distinction between fixed and mobile data services will break down and a market for broadband wireless data communications may emerge.

(71) Because 2.5G services are still emerging, and as 3G services are presently only at the planning stages, it is not possible to determine accurately whether they are in the same market or in different markets, whether digital mobile voice and data services are in the same market, nor whether certain 3G services are in the same market as broadband data services like WLAN. However, for the purposes of the present Decision it is not necessary to conclude on whether 2G, 2.5G and 3G data services and/or voice services, respectively broadband wireless data services should be considered separate product markets. The relevant product market definition is therefore left open.

Geographic markets

(72) Given the fact that retail pricing and services offers of digital mobile telephony are currently national, markets remain national in scope, with the exception of the emerging market for the provision of seamless pan-European mobile telecommunications services to internationally mobile customers that the Commission first identified in the Vodafone/Mannesmann Decision ([46]). International roaming services are not a substitute given the high prices and limited functionality of international roaming ([47]). In addition, network operators have generally refused to allow permanent roaming based on international roaming access, namely allowing a customer of a foreign network to permanently roam on their own network. Consequently the market or markets identified above are national.

([45]) In relation to dial-up access to Internet via mobile handsets and via fixed means. Cf. Commission Decision of 20 July 2000 in Case COMP/JV 48 — Vodafone/Vivendi/Canal+, http://europa.eu.int/comm/competition/mergers/cases/.

([46]) See Commission Decision of 12 April 2000 in Case No COMP/M.1795 — Vodafone Airtouch/Mannesmann, OJ C 141, 19.5.2000, p. 19; Commission Decision of 11 August 2000 in Case No COMP/M.2016 — France Telecom/Orange, OJ C 261, 12.9.2000, p. 6.

([47]) See Commission Decision of 22 June 1998 in Case No IV/JV.2 — ENEL/FT/DT, OJ C 178, 23.6.1999, p. 15; Commission Decision of 21 May 1999 in Case No IV/M.1430 — Vodafone/Airtouch, OJ C 295, 15.10.1999, p. 2; Commission Decision 98/2001/EC of 13 November 1999 in Case No COMP/M.1439 — Telia/Telenor, OJ L 40, 9.2.2001, p. 1.

5.5. **Market structure**

5.5.1. *The market for sites and site infrastructure for digital mobile radiocommunications equipment*

(73) Although operators are likely to prefer to deal with parties who can provide a large number of sites at the same time, there are no major entry barriers, limited investment or technical expertise is required, and owners of individual sites can trade directly with mobile network operators. Actual or potential competitors in this market include the other licensed operators for 2G and/or 3G networks and services in Germany, railway and broadcasting operators, power utilities, and specialised companies (tower companies) acquiring and offering access to sites, such as New Radio Tower, Plan+Design Netcare AG and Tessag SAG Abel Kommunikationstechnik GmbH & Co. Kg. T-Mobile has recently transferred its activities regarding the location, acquisition and leasing, including sharing, of sites to a separate legal entity, Deutsche Funkturm GmbH. Of the around [40 000 to 70 000 (*)] existing sites some [10 000 to 20 000 (*)] are estimated to be held by T-Mobile, [10 000 to 20 000 (*)] by D2 Vodafone, [5 000 to 15 000 (*)] by E-Plus and [5 000 to 15 000 (*)] by O2 Germany. [2 000 to 6 000 (*)] sites are estimated to be held by the German Railways, [2 000 to 6 000 (*)] by broadcaster ARD and some [2 000 to 6 000 (*)] by others including Mobilcom, power utilities, and tower companies.

5.5.2. *Wholesale access to national roaming for 3G communications services*

(74) In Germany, 2G national roaming is presently limited to O2 Germany's customers roaming on T-Mobile's network ([48]). T-Mobile consequently has a 100 % market share in the market for wholesale 2G national roaming in Germany. Because in practice 3G roaming will mainly result from O2 Germany's customers roaming on T-Mobile's network, T-Mobile is likely to have a similarly high market share in the market for wholesale 3G national roaming. However T-Mobile is subject to potential competition from the other 3G network operators who could offer national roaming at little or no additional cost, albeit possibly subject to capacity constraints.

(75) There are high entry barriers due to formal licensing requirements, the limited number of available licences, and the high costs associated both with the acquisition of a 3G licence in Germany and with investments in 3G network infrastructure. The opportunities for market entry at network operator level are limited, as it is not foreseen that new licences will be issued or that the licences of Group 3G and Mobilcom, which will not roll-out their 3G networks, will be reissued. Although it cannot be excluded that the licences of Group 3G and Mobilcom will be transferred to another undertaking either with approval from the NRA, or by means of a takeover of these undertakings, this is an unlikely scenario given the present investment climate. Hence, the main actual or potential competitors in wholesale access and services markets are the two other licencees that plan to roll-out 3G networks and services in Germany and potential competitors may be third parties reselling access to and wholesale roaming services on the network of these other operators or on the Parties' networks.

5.5.3. *3G retail services*

(76) There are six operators that have been licensed to use 3G frequency rights and provide 3G networks and services in Germany. Apart from T-Mobile and O2 Germany this concerns D2 Vodafone, E-Plus, Mobilcom and Group 3G. However, both Group 3G/Quam and Mobilcom have written off the value of their 3G assets and have abandoned their plans to enter 3G markets in Germany as network operators although Mobilcom may remain active as a service provider ([49]). The main competitors in 3G retail markets are therefore D2 Vodafone and E-Plus and potentially service providers such as Mobilcom and Debitel, who purchase wholesale airtime for resale from network operators as well as any mobile virtual network operators (MVNOs) that may emerge in this market.

(77) Because 3G networks and services have not yet been rolled out, no accurate estimate of market shares or assessment of the substitutability between 2G and 3G services can at present be provided. If the estimated 2002 market shares for 2G retail services are nevertheless taken as a proxy for market share in 3G markets, including figures for customers of service providers active on their networks, T-Mobile had a 41,7 % market share and O2 Germany a 7,8 % market share against 38,3 % for D2 Vodafone and 12,2 % for E-Plus. If only own subscribers are counted, T-Mobile had a market share of 29 %, against 7,5 % for O2 Germany, 28 % for D2 Vodafone, and 7 % for E-Plus, and in total 29 % of subscribers are divided between more than 10 different service providers, led by Debitel with a market share of 12,7 % and Mobilcom with 8,8 %. Group 3G is not active in 2G markets in Germany.

([48]) The relevant agreement was the subject of a notification in Case COMP/C1/37.500 VIAG Interkom + T-Mobil, which was closed by means of an administrative letter of 13 July 1999.

([49]) Cf http://www.quam.de: 'Quam stellt operatives Geschäft ein', Quam (15 October 2002); http://www.mobilcom.de: 'Q3/2002: MobilCom schreibt UMTS-Vermögen vollständig ab', MobilCom AG (28 November 2002).

6. ARGUMENTS OF THE PARTIES

(78) The Parties primarily explain the need for their agreement on 3G network sharing in financial terms. More specifically they claim that network sharing is necessary because:

(a) 3G network infrastructure is more expensive than its predecessors, given the much higher antenna density required, namely up to twice as high as 2G GSM networks;

(b) since 3G licences were awarded, the expectations of 3G services revenue have been revised downward; and

(c) due to the general downturn of the mobile telecommunications industry their cost of raising capital has increased.

In the notification the Parties stated that as a result of the Agreement, they envisaged a reduction of up to [15 to 35 % (*)] of their investments in network infrastructure with further savings on network operating costs. Subsequently the Parties have reduced their estimates of the cost savings.

6.1. Article 81(1) EC/Article 53(1) EEA

(79) The Parties argue the Agreement does not have the object or effect of appreciably restricting competition within the common market contrary to Article 81(1) EC/53(1) EEA, as their prospective site-sharing and possible RAN-sharing will not result in the sharing of core networks or frequencies, and because the Agreement requires the Parties to maintain full competition at the service and retail level. In addition, network planning, design and operations will remain independent and any disclosure of technical information will be limited to the minimum necessary.

6.2. Article 81(3) EC/Article 53(3) EEA

(80) The main potential restriction of competition concerns the limitations on resale of roaming capacity for the provision of voice services to MVNOs. If the Agreement is considered to restrict competition, the Parties argue in the alternative, that it is exemptable under Article 81(3) EC/53(3) EEA. In view of the large licence costs incurred followed by a significant decrease in the commercial value of 3G spectrum the Parties argue that infrastructure sharing will enable them to reduce capital and operating expenditure by reducing their investments in network infrastructure and network operating costs. O2 Germany, the main beneficiary of national roaming under the Agreement, estimates that as a result of the Agreement it will save [15 to 35 % (*)] of its 3G network roll-out costs predominantly due to roaming. According to the Parties, this is necessary to alleviate some of the burden of the simultaneous opening of 3G market access in the EU. Further, the Parties argue that the approach adopted is in line with the policy adopted by RegTP (the German NRA) as well as by other NRAs such as Oftel in the UK. In addition, they argue infrastructure sharing is required due to planning restrictions and to meet environmental concerns.

(81) The Parties argue that consumers will ultimately benefit through the delivery of faster, more innovative 3G services at lower prices. The Parties will as a result of their cooperation not produce common or standardised services to end users but will continue to compete directly on content applications, retail pricing, wholesale pricing, terms and conditions of service, channel to market and customer care services and marketing. Hence they conclude that as a result of the Agreement competition will not merely be preserved but will be increased in the markets for 3G networks and services in Germany. Finally, the Parties argue that because it is essential to protect their investments that they retain ultimate control over who has access to their network, the Agreement would not have been concluded without the restriction on resale to Voice MVNOs.

7. COMMENTS FROM THIRD PARTIES

(82) The initial notice ([50]) published by the Commission upon receiving the notification in February 2002 and the subsequent Notice pursuant to Article 19(3) of Regulation No 17 ([51]) gave rise to comments from the German competition authority, the Bundeskartellamt (BKartA), as well as from five different market parties representing mobile network operators as well as service providers and operators on related markets in Germany. Although some parties expressed their support for network sharing, all were critical of the Agreement in its current form. Following the Parties' notification of an amendment to the Agreement concerning national roaming, the BKartA and the market parties that commented on the Notice pursuant to Article 19(3) of Regulation No 17 have been given a further opportunity to react to these changes.

7.1. Comments by the BKartA

(83) The BKartA believes that for UMTS, competition based on network quality and transmission capacity will be especially important and depends on the degree of infrastructure competition. It would therefore tend to see a restriction of competition in any form of network sharing activity, unless infrastructure based competition is not possible for practical or legal reasons. In this context the BKartA would also take e.g. environmental concerns and the financial situation of the undertakings involved into consideration. It notes that in Germany

([50]) OJ C 53, 28.2.2002, p. 18.
([51]) OJ C 189, 9.8.2002, p. 22.

obtaining planning permission for sites is increasingly difficult and forces operators to rely on site sharing. It also notes that the financial situation of mobile operators may require network sharing in order to enable market entry.

(84) Consequently, the BKartA is of the opinion that there is no restriction of competition in so far as site sharing is necessary in order to fulfil the Parties' licence obligations (notably the 50 % population coverage requirement by 2005) and consequently is necessary to enable market entry. The BKartA finds RAN sharing, which it does not consider necessary to meet licence obligations, a restriction of competition that would be acceptable only in so far as it is necessary to enable market entry. Concerning site sharing both after 2005 and beyond the 50 % population coverage requirement, and regarding RAN sharing the BKartA assumes that these involve restrictions of competition but may merit exemption.

(85) However, the BKartA does not consider that the limitations on resale of roaming capacity to MVNOs in Article 11 of the Agreement are exemptable because in its view they have the effect of price coordination between competitors. The BKartA's submission does not specifically address national roaming, and it has not provided further comments in relation to the Parties amendments of the Agreement concerning roaming within the territory covered by the 50 % population coverage requirement.

7.2. **Comments from market parties**

(86) One market party objected as a matter of principle to national roaming which it considers to be a restriction of network competition. It also objected to extended site sharing and RAN sharing, claiming the result will be a degree of harmonisation of networks such as to make them indistinguishable. As a result, it claimed, not just competition on network quality will to a large extent be eliminated, but services competition as well. It added that it has not seen any evidence that as a result of the Agreement the Parties are engaging in a more rapid 3G network rollout.

(87) A second market party favoured network sharing as a means to control costs and facilitate market entry as a matter of principle, but requested that non-exclusivity of the Agreement should be backed up by a commitment from the Parties on the availability of sufficient network capacity to accommodate third parties.

(88) A third market party claimed that the network sharing agreement could enable the Parties to utilise their resulting cost savings to enter the market for paging and emergency instant messaging services as well as related markets for 3G services and squeeze smaller competitors out of these markets.

(89) Two market parties raised objections against Clause 11 of the Agreement, arguing that its requirement of prior approval by the operator of the host network for the resale of roaming capacity for the provision of voice services by MVNOs led to a restriction of competition on the retail market or markets for 3G services.

(90) All comments received have been carefully reviewed and to the extent that the third party comments reflected genuine competition concerns, the Commission's reasoning on the concerns raised is presented in the legal assessment below.

8. **RESTRICTIONS OF COMPETITION**

(91) Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement prohibit agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Commission can exempt agreements restricting competition contrary to Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement provided the conditions set out in Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement are met.

(92) The notified Agreement is a horizontal cooperation agreement between two competitors that also involves certain vertical aspects. The Agreement does not have the object of restricting competition by means of price fixing, output limitations or the sharing of markets or customers, but it may have the effect of restricting competition given that T-Mobile and O2 Germany are competitors for both 2G and 3G digital mobile networks and services.

(93) The Agreement between T-Mobile and O2 Germany involves cooperation in the roll-out of the Parties 3G networks, principally via (i) site sharing and (ii) national roaming. Specifically the Parties intend to cooperate in the planning, acquiring, building, deploying and sharing of 3G sites as well as through the provision of roaming services. As a result the Parties will cooperate extensively in the roll-out of their 3G mobile networks. Such far-reaching cooperation between two players that affects markets with only a limited number of competitors and markets with high, if not absolute, barriers to entry raises competition concerns. In particular, there is a risk that the Agreement could (i) reduce network competition in Germany and (ii) could result in spill-over effects in services markets. In addition, any restrictive provisions, such as restrictions on resale, will have to be examined.

8.1. Applicability of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement

(94) Because site sharing, RAN sharing and national roaming should be seen as distinct forms of cooperation with effects in different markets, they are analysed separately.

8.1.1. *Extended site sharing*

(95) Site sharing is in principle encouraged as a matter of public policy both at EU and at national level. In addition national authorities can impose facility sharing in particular where competitors lack viable alternatives. Article 11 of the European Parliament and Council Directive 97/33/EC of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (Interconnection Directive) requires that national regulatory authorities are empowered to encourage and impose collocation and facility sharing ([52]), and has been implemented in Germany by means of section 33 of the German Telecommunications Act (TKG), which provides that third parties may claim access to essential facilities of dominant operators ([53]). Under the new regulatory framework recital 23 of the European Parliament and Council Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ([54]) states that 'Facility sharing can be of benefit for town planning, public health or environmental reasons, and should be encouraged by national regulatory authorities on the basis of voluntary agreements'. Article 12 of the Framework Directive requires that national regulatory authorities are empowered to impose facility sharing where undertakings are deprived of access to viable alternatives because of the need to protect the environment, public health, security, or to meet town and country planning objectives. Hence sector-specific regulation can provide a solution if alternative sites are not available and competitors do not manage to negotiate access to necessary sites and/or site infrastructure on commercial terms.

(96) Site sharing based on bilateral agreements is common practice between all operators in Germany for 2G and is likely to be continued in 3G. There are existing framework agreements between T-Mobile, D2 Vodafone and E-Plus that concern the use of joint sites. In addition, site sharing is promoted in Germany as a matter of public policy aiming to minimise the total number of sites required due to environmental and health concerns. Consequently on 9 July 2001 general agreement has been concluded between, on the one hand, all mobile network operators and, on the other hand, the associations of the municipalities, with the objective of maximising the use of shared sites ([55]). As a result of this agreement mobile network operators in Germany exchange information on a regional basis regarding sites needed in particular municipalities in order to achieve the maximum proportion possible of shared sites.

(97) The market for sites and site infrastructure for digital mobile radiocommunications equipment was defined above (Recital 49 et seq.). The Parties estimate that so far around [40 000 to 70 000 (*)] sites have been acquired for 2G networks in Germany of which a sizeable proportion can be used for 3G networks. So far overall in the German market, 64 % of sites are used by only one operator, 20 % by two operators, and 16 % by three or more operators ([56]). Because 3G networks will initially concentrate on urban areas in order to reach the required population coverage it is likely that the percentage of sites shared for 3G could be higher than for 2G. The distribution of the sites that have already been deployed between the network operators is estimated as follows: [10 000 to 20 000 (*)] are estimated to be held by T-Mobile, [10 000 to 20 000 (*)] by D2 Vodafone, [5 000 to 15 000 (*)] by E-Plus and [5 000 to 15 000 (*)] by O2 Germany. It is estimated that at least 20 000 new sites will be acquired for 3G networks. In addition to its stock of [10 000 to 20 000 (*)] sites, T-Mobile plans to add [(*)] for its 3G network. A proportion of the sites added will be shared: in their notification the Parties claimed that they anticipate sharing up to [20 to 35 % (*)] of their 3G sites under the Agreement. More recent information provided by the Parties shows that O2 Germany now expects to share up to [40 to 55 % (*)] of its 2G and 3G sites with all other operators including T-Mobile, and [15 to 30 % (*)] with T-Mobile alone. T-Mobile now expects to share [(*)] of mast sites and [(*)] of rooftop sites with all three other operators.

([52]) OJ L 199, 26.7.1997, p. 32.

([53]) Telecommunications Act (TKG) of 25 July 1996 (Federal Law Gazette I, p. 1120) as last amended by First Act for revision of the Telecommunications Act of 21 October 2002 (Federal Law Gazette I, p. 4186). (Telekommunikationsgezetz vom 25. Juli 1996, BGBl. I, S. 1120; Änderungsgesetz zum TKG — Kleine Novelle vom 25.10.2002, BGBl. I S. 4186).

([54]) OJ L 108, 24.4.2002, p. 33.

([55]) Vereinbarung über den Informationsaustausch und die Beteiligung der Kommunen beim Ausbau der Mobilfunknetze zwischen Deutscher Städtetag, Deutscher Landeskreistag, Deutscher Städte- und Gemeindebund und DeTeMobil Deutsche Telekom Mobilnet GmbH, E-Plus Mobilfunk GmbH & Co KG, Group 3G, Mannesmann Mobilfunk GmbH, MobilCom Multimedia GmbH, VIAG Interkom GmbH & Co.

([56]) Based on data of RegTP for May 2001 across a total pool of 39 690 sites.

(98) The market is highly concentrated and at present the Parties jointly have a market share of around 45 %. Apart from the Parties, two other parties have obtained licences that enable them to develop their own networks, of which at least one, D2 Vodafone, already has a very strong position in 2G markets. These parties are likewise present in the market for sites and site infrastructure for digital mobile radiocommunications equipment. However, although the large majority of sites in Germany are currently held by mobile network operators, a number of specialised tower companies are also entering the German market, and individual sites can also be obtained directly from their owners. Moreover, in principle, site sharing does not reduce the number of sites available to other network operators: as it reduces the number of sites required individually by the sharing operators it increases the proportion of sites out of the total pool that are available for other operators.

(99) On the demand side, the market is even more concentrated, as it is limited to the four licensed 2G/3G operators that remain active in the German market. The parties present on the demand side are also present on the supply side and in principle have the ability to acquire sites for their own network needs completely independently from the Parties and from any other operators if they so desire. Because the Parties are likely to request access to sites controlled by the other 2G and 3G operators there is likely to be countervailing bargaining power.

(100) Moreover third party access to sites controlled by the Parties is promoted by public policy and, as explained above, by the ability of the NRA to impose site sharing where no viable alternatives exist. Finally, the Agreement does not limit the Parties' commercial freedom to engage in site sharing with third parties and both Parties plan to continue actively sharing sites with third parties. Consequently the Agreement does not appear to have the effect of foreclosing competition in the market for sites and site infrastructure for digital mobile radiocommunications equipment. It remains to be examined whether as a result of site-sharing Parties are likely, given an increase in the similarity of their cost-structures, to find the scope for distinguishing their retail services offers reduced, or whether, as a result of site-sharing, they are likely to coordinate their activities in other markets.

(101) Because the percentage of total costs represented by the shared sites is relatively small, the Parties' anticipated cost savings due to site sharing are limited. O2 Germany estimates that its cost savings due to site sharing alone will only amount to [7 to 17 % (*)] of its total savings under the Agreement of [15 to 35 % (*)] of network roll-out costs, namely its savings based on site sharing will amount to [less than 5 % (*)] of its total savings. In relation to 2G sites, T-Mobile does not expect that there will be any additional cost savings due to the existing 2G site sharing arrangements in place. Instead the Parties see the benefits from site sharing in terms of faster planning and implementation due to advance establishment of radio plans based on earlier site information than would otherwise be available. The Parties will in any event not own or control sites in common, but will compete with each other and with other network operators for the acquisition of own sites and will each give rights of use to the other Party. They do not therefore as a result of the Agreement have a high proportion of their total costs in common. Consequently, site sharing does not result in similarity in the Parties' cost structure that could affect their ability to compete effectively with each other in downstream network or services markets.

(102) Nor do there appear to be any significant effects on competition in any other network markets or services markets. The depth of cooperation on site sharing is consistent with the assessment of the NRA, RegTP, concerning the minimum degree of independence required to allow independent control of networks and services by the respective Parties. In particular the Parties retain independent control over their core networks including all intelligent parts of the network and the services platforms that determine the nature and the range of services provided. The Parties also retain independent control over their radio planning and the freedom to add sites, including non-shared sites, in order to increase their network coverage and capacity, which appear to be the main competitive parameters at network level, and which are likely to have an important impact on the level of services competition. Because site sharing will reduce search costs and will eventually allow greater network density it can improve network competition, and thereby services competition, both between the Parties and with third parties. Therefore the site sharing between the Parties set out in the Agreement as notified does not lead to restrictions of competition.

(103) For the purposes of site sharing the Parties have stated that they will exchange information necessary for the common roll-out of sites, comprising technical information and location data for individual sites, namely

disclosing which Party wants to build out where. The Parties state that there will be no additional exchange of information on the expected build-out of 3G networks. Clause 2.6 of the Agreement provides that competition sensitive information is not exchanged between the Parties beyond the minimum information necessary to allow network planning. The exchange of this technical information is limited to what is necessary to enable a form of cooperation between the Parties that is not considered restrictive of competition. Therefore it does not itself constitute a restriction of competition either.

8.1.2. *RAN sharing*

(104) Although the Agreement provides for the possibility to examine the potential for RAN sharing between the Parties, RAN sharing is not presently foreseen. Moreover the modalities for RAN sharing between the Parties are not covered in sufficient detail by the notification to allow the Commission to make an analysis under Article 81 EC/Article 53 EEA. It is therefore not covered by the present Decision.

8.1.3. *National roaming*

O2 Germany roaming on T-Mobile's network within the 50 % coverage area

(105) By amendments of 20 September 2002 and 22 January 2003 to the notified Agreement, the Parties have agreed that O2 Germany will be able to purchase wholesale national roaming rights on T-Mobile's 3G networks between 1 January 2003 and 31 December 2008. This means that during this time-period O2 Germany will be purchasing wholesale national roaming services from T-Mobile within the area where O2 Germany has a regulatory obligation to cover 50 % of the German population via its own network. T-Mobile will not have a similar right to purchase wholesale national roaming on O2's network in this area. Following discussions with the Commission, the Parties have agreed to limit the duration of roaming within the area that is subject to the 50 % population coverage obligation based on the definition of three separate area (Areas 1, 2 and 3). Roaming will be successively phased out in these areas according to the timetable set out in Section 4.3.1 above and which are incorporated in the Agreement by the Parties' amendment of 21 May 2003.

Reciprocal roaming outside the 50 % coverage area

(106) The Agreement as originally notified provides for reciprocal right of wholesale 3G national roaming between T-Mobile and O2 Germany outside the area of the 50 % population coverage requirement. In practice, T-Mobile intends to cover [(*)] of the German population with its 3G network by the end of 2006, and to provide further coverage as a function of demand, whereas O2 Germany intends to [(*)]. Given that T-Mobile's network will be more extensive, and given the advantages for a network operator in using its own network in terms of control over costs and parameters such as network quality and transmission rates, it is likely that there will be little roaming by T-Mobile or its customers on O2 Germany's network, if any. Therefore national roaming under the Agreement will predominantly involve O2 Germany roaming on T-Mobile's network, not vice versa.

Competitive Effects

Effects on wholesale markets

(107) The market for wholesale national roaming access for 3G communications services was defined above (recital 57 and following). National roaming between network operators who are licensed to roll-out and operate their own competing digital mobile networks by definition restricts competition between these operators in all related network markets on key parameters such as coverage, quality and transmission rates. It restricts competition on scope and on speed of coverage because instead of rolling out its own network to obtain the maximum degree of coverage of territory and population within the shortest period of time, a roaming operator will rely for its roamed traffic on the degree of coverage achieved by the network of the visited operator. National roaming also restricts competition on network quality and on transmission rates, because the roaming operator will be restricted by the network quality and the transmission rates available to it on the visited network that are a function of the technical and commercial choices made by the operator of the visited network. Finally, based on the Agreement, national roaming will be charged at wholesale rates, for voice communications at the level of call termination rates, and for data services on a [retail minus pricing model (*)]. In the case of O2 Germany, national roaming will account for [(*)]. Consequently the wholesale rates that it will be able to charge to purchasers of its own wholesale network and access services will be constrained by the wholesale rates it has to pay to T-Mobile.

(108) The effects of such restrictions will be more serious in areas where there is a clear economic case for the roll-out of parallel competitive networks — notably in core urban areas — and where therefore competition is more restricted by roaming. The effects will be less serious where the economic incentives for roll-out are less developed, as may be the case in built-up areas of secondary commercial importance and in particular in rural and remote areas.

(109) Given the resulting constraints on the ability of O2 Germany and T-Mobile to compete on coverage, on quality, on transmission rates, and on wholesale prices, 3G national roaming between O2 Germany and T-Mobile has an impact on competition in all 3G network markets in Germany including the market for wholesale national roaming access for 3G communications services and the market for wholesale airtime access to 3G services.

(110) As 3G markets are emerging markets there is no market share information available. However, in the market for wholesale national roaming access for 3G communications services, there are in Germany only four licensed operators that have the ability to roll-out networks. Entry barriers due to licensing requirements and investment requirements are very high if not absolute ([57]). Hence, it is clear that cooperation between two of only four parties in the market, even if one of these two (O2 Germany) does not presently intend to roll-out a network beyond [(*)], is capable of restricting competition in a manner that is appreciable. The Agreement on national roaming (as amended) therefore constitutes a restriction of competition in the sense of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement.

Effects on retail markets

(111) In addition the question should be examined whether the Agreement on wholesale 3G roaming access restricts competition for 3G retail services. National roaming at wholesale level will lead to a greater uniformity of conditions at retail level, given the fact that the underlying network coverage, quality and transmission speeds are likely to be similar. Transmission speeds will determine to a significant extent the types of service that a particular operator will be able to provide. In addition, the timing of the introduction of particular services will be determined by the moment when certain transmission speeds are reliably available at network level, and the latter will have to be coordinated for purposes of national roaming. Finally, as operators using wholesale national 3G roaming will have to pay charges for wholesale access that for data services will be based on a [retail minus pricing model (*)] the scope for price competition will as a result be limited. The [(*)] pricing system itself could give rise to a risk of coordination on retail price levels.

(112) It is therefore likely that the cooperation between the Parties on wholesale 3G national roaming will have effects on competition between the Parties in downstream retail markets. Although the number of parties present in these retail markets will be greater than that of those operating at network level and there is no precise market share information available, if the combined market share of the Parties for 2G are used as a proxy, this market share is 36,5 % (T-Mobile 29 %; O2 Germany 7,5 %) if only own customers are counted, and it is 49,5 % (T-Mobile 41,7 %; O2 Germany 7,8 %) if the end customers of service providers active on the Parties' networks are counted. Consequently, the Parties combined market share of the markets for 3G retail services is under any plausible market development likely to exceed 10 %, and the restriction is therefore appreciable.

Minimum purchasing requirement

(113) The Agreement on 3G national roaming is non-exclusive, but envisages a minimum purchasing requirement by O2 Germany of [(*)] Euro from T-Mobile within three years from the date of launch of the relevant 3G roaming services. The amendments of the Agreement that enable roaming of O2 Germany on the network of T-Mobile within the 50 % population coverage area provide for a [payment by O2 Germany to T-Mobile (*)]. Although this is not a minimum purchasing requirement it may similarly have the effects of concentrating O2 Germany's purchases of 3G national roaming access on T-Mobile's network.

(114) However, neither the minimum purchasing requirement nor the fixed payment need be analysed further in terms of possible foreclosure. The sale of wholesale 3G roaming access between licensed 3G network operators has been identified as a restriction of competition. Therefore, potential obstacles to other licensed 3G network providing this form of cooperation cannot be interpreted as constituting a further restriction of competition in their own right. On the contrary, should one of the Parties conclude an agreement to purchase significant volumes of national roaming access from one or both of the other licensed 3G network operators, this would require an analysis under the competition rules.

Resale to MVNOs

(115) Clause 11(c) of the Agreement limits the ability of the Parties to resell roaming access rights to third parties, notably it requires the prior approval of the other Party for any resale of roaming capacity to MVNOs that would offer voice telephony services to end-users. Because this clause concerns the resale of access rights the restraints involved are vertical in nature. However Article 2(4) of Commission Regulation 2790/1999 on the application of Article 81(3) of the EC Treaty to categories of vertical

([57]) See section 5.5.2.

agreements states that the block exemption does not apply to reciprocal vertical agreements between competing undertakings ([58]).

(116) Therefore this restriction must be assessed both as regards possible collusion effects in line with the Guidelines on horizontal cooperation as well as, as regards their vertical dimension, with the Guidelines on vertical restraints. An analysis based on the Guidelines on horizontal cooperation shows that limiting the type of customers to which the buyer may sell the contract services limits output and therefore constitutes a restriction of competition under Article 81(1) EC/53(1) EEA that requires individual analysis under Article 81(3) EC/53(3) EEA ([59]). Hence the provisions of Article 81(3) EC/53(3) EEA must be applied to the restrictions on resale to 'Voice MVNOs' to establish whether any efficiencies exist that compensate for the restrictions of competition involved.

Restriction on resale to other network operators

(117) By requiring prior approval from the operator of the visited network, Clause 11(c) of the Agreement also limits the resale of roaming rights to other licensed network operators. The Parties have argued that this restriction is necessary to enable planning for network capacity and to guarantee quality of service. However, it is not necessary to enter into an analysis of these arguments. The sale of wholesale 3G roaming access between licensed 3G network operators has been identified as a restriction on competition in its own right. Therefore a limit on other licensed 3G network operators joining in this form of cooperation cannot be interpreted as constituting a restriction of competition. On the contrary, should one of the Parties conclude an agreement to resell significant volumes of national roaming access to one or both of the other licensed 3G network operators, this would require an analysis under the competition rules.

Information exchange for purposes of national roaming

(118) Clause 2.6 in the Agreement bars the Parties from exchanging 'competitively relevant information'. In this context the Parties have declared that they will not exchange information about anticipated future capacity requirements, namely about customer numbers and their specific requirements.

(119) The Parties will however exchange certain key technical data that are strictly necessary to provide a seamless roaming service, notably channel numbers, customer identification (CID) and interconnect identification information. Seamless roaming depends on a 'seamless handover' between the two networks involved, namely taking place without the customer having to manually log onto the other network when changing networks. To allow seamless handover between cells the relevant radio-network parameters must be made known to the visited network, namely the cell identity, its geographic location coordinates, antenna height, type of antenna, direction of the main radio beam, cable attenuation and node B performance. As this information is strictly necessary to national roaming, this information exchange does not constitute a restriction of competition under Article 81(1) EC/53(1) EEA that requires individual analysis.

8.2. **Effect on trade between EEA States**

(120) The conditions for access to 3G infrastructure and wholesale services of mobile network operators affect trade between EEA States. This is because the services provided over telecommunications networks are traded throughout the EEA — e.g. wholesale termination of international calls and wholesale access to 3G international roaming — and the conditions for access to telecommunications infrastructure and wholesale services determine the ability of other operators, service providers and MVNOs who require such access to provide their own services ([60]). The conditions for network sharing will also affect purchases of network equipment from producers of network equipment located in different EEA States. In addition investment and market entry in 3G networks and services is increasingly cross-border within the EEA. Therefore the conditions for access to 3G infrastructure and wholesale services significantly affect not only the climate for investment including investment between EEA States in 3G infrastructure and services, but also affect the conditions for market entry, including such entry by operators, service providers, MVNOs and content providers from other EEA States.

([58]) OJ L 336, 29.12.1999, p. 21. See Commission Notice, Guidelines on vertical restraints, OJ C 291, 13.10.2000, p. 1, point 52.

([59]) Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2002, p. 2, point 25.

([60]) Cf. Access Notice paragraphs 144-148.

8.3. Application of Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement

(121) As analysed above, the Clauses of the Agreement (as amended) on national roaming fall within Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement as the national roaming arrangement between the Parties has an appreciable effect on competition and affects trade between EEA States. An agreement that violates Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement can be exempted provided that it meets the following conditions set out in Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement:

(a) it must contribute to improving the production or distribution of goods or services and promote technical or economic progress;

(b) it must allow consumers a fair share of the resulting benefit;

(c) it must not impose on the undertaking concerned restrictions which are not indispensable to the attainment of these objectives;

(d) it must not afford the undertaking concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

8.3.1. *Contribution of the Agreement to improving production or distribution and promoting technical or economic progress*

(122) Access to 3G national roaming will allow the roaming Party to provide better coverage, quality and transmission rates for 3G wholesale and retail services more rapidly. Selling access to roaming will provide the host network operator with additional resources to invest into its network and will allow it to use its network capacity more fully at an earlier stage than would otherwise have been the case, and therefore more efficiently. Even if in practice only one of the Parties were to exercise its roaming rights under the Agreement, its use of their joint networks would give it access to a greater network density and a more extended footprint than it would be able to provide individually, making both its wholesale and its retail services more attractive to users. The competition arising from at least two other operators at network level will ensure that the Parties' incentive to realise greater density and a more extended footprint in line with commercial take-up of 3G services is maintained and that they do not merely economise on their network costs. Given competition from these other operators as well as from a number of service providers and possibly MVNOs at retail level, the Parties will also individually continue to have an incentive to provide a wider range and better quality of services.

O2 Germany roaming on T-Mobile's 3G network within the 50 % coverage area

(123) O2 Germany's roaming on T-Mobile's 3G network within the area that is subject to the regulatory obligation of providing 50 % population coverage by the deadline of 31 December 2005, is likely to lead to greater choice and increased competitiveness at both wholesale and retail level. In particular, mobile roaming by O2 Germany on T-Mobile's network within this area will allow O2 Germany from the outset to offer better coverage, quality and transmission rates for its services than it would be able to do on a stand-alone basis during its roll-out phase in competition with the other providers of 3G wholesale and retail services.

(124) O2 Germany's network will meet regulatory requirements by 31 December 2005. However as the smallest operator in the German mobile market with a small share of the 2G market (about 8 %) it is unlikely to be in a position to quickly build out a high quality network covering a sufficient area to enable the company to compete effectively from the outset against other established licensed operators of 3G networks and services in Germany. Due to important first-mover advantages, this is likely to limit its ability to compete effectively and may affect the overall competitiveness of the German market. There are therefore economic benefits in this instance from allowing O2 Germany to roam even within major urban centres for a short period of time until it has built out an effective network. Roaming at the outset will also allow O2 Germany to launch 3G services earlier thereby generating additional revenue for the company. This will help the company finance the roll-out of its 3G network which will enable it to reduce its reliance on roaming on T-Mobile's network.

(125) In addition, if O2 Germany is able to focus its network investments in the areas of greatest demand, namely the main urban centres whilst relying on roaming in conurbations of secondary economic importance for a longer but still limited period of time, it will be able to provide better wholesale and retail services, including on its own network, than would otherwise have been the case. In underground areas, roaming access is necessary in order to allow uninterrupted coverage in areas of strategic importance to the consumer but safety rules and building permission requirements limit O2 Germany's ability to quickly set up separate networks in such locations. A longer exemption can therefore be justified for these specific areas.

Reciprocal roaming outside the 50 % coverage area

(126) Mobile roaming of O2 Germany on T-Mobile's network outside the area subject to the regulatory obligation of providing 50 % population coverage by 31 December 2005 will allow in particular O2 Germany to become active as a competitor offering nationwide coverage on 3G retail markets. The Parties have provided evidence to demonstrate that without the Agreement it is unlikely that within current planning timeframes, O2 Germany would have been able to offer coverage beyond [(*)]. It should also be noted that in 2G mobile markets, which O2 Germany likewise entered by initially relying to a significant extent on national roaming on T-Mobile's network, O2 Germany has now achieved its own near nationwide network coverage well in excess of its licence requirements by building-out its network in line with market demand for its services.

(127) As a result of the Agreement, O2 Germany will also be able to resell, outside the areas covered by its licence obligations, nationwide roaming access to data MVNOs and nationwide wholesale 3G airtime to service providers. The Agreement thereby promotes competition in the markets for 3G national roaming, for wholesale airtime, and at retail level, and consequently contributes to the production and distribution of these services. Because the 3G services concerned are expected to constitute a broad range of new technologically advanced products of enhanced quality and functionality compared to 2G services, the Agreement also promotes technical and economic progress.

(128) The Agreement on national roaming allows the Parties, in particular T-Mobile, to make a more intensive and therefore more efficient use of their network, especially in less densely populated areas. By allowing T-Mobile to derive greater economic benefits from its investments in infrastructure, roaming therefore adds to the incentives to provide more comprehensive network coverage, at better quality and higher transmission rates. This likewise contributes to the production and distribution of the services concerned, and to technical and economic progress.

8.3.2. *Fair share of the benefits resulting from the Agreement to end users*

(129) By enabling O2 Germany first, to compete more effectively during its roll-out phase, and second, to emerge as a nationwide provider of 3G wholesale and retail services (or in any event as a provider offering the broadest geographical scope likely to be available at that time) the Agreement on 3G national roaming will enhance competition both in digital mobile network and services markets. Competition will develop more quickly and competitors will have incentives to introduce new services into the market and will be under greater pressure to reduce prices as the result of enhanced market entry with wider coverage based on 3G national roaming access between the Parties. This is likely to enable consumers to benefit earlier from a greater range of new and technically advanced 3G services that are expected to be enhanced in quality and range of choice as compared to 2G services, and it makes price-competition more likely.

(130) The Parties have provided a clear indication of the potential benefits to consumers of enhanced market entry in terms of price developments. They have submitted evidence that market entry of the third and fourth operators in 2G mobile markets in Germany led to annual reductions in the mobile retail price index of around 20 %. At the time, O2 Germany's entry into the 2G mobile market as the fourth nationwide operator was dependent to a significant extent on the supply of national roaming by T-Mobile. In addition, as a result of increased competition at retail level, any cost-saving benefits of the increased competition on nationwide national roaming access available to data MVNOs, and on resale of wholesale airtime for nationwide services to service providers (or MVNOs acting as service providers) are likely to be passed on to end-users.

8.3.3. *Indispensability of the restrictions involved*

National roaming

(131) The clauses in the Agreement (as amended) that provide for national roaming are indispensable to the benefits just discussed.

(132) As regards roaming within the 50 % coverage area, it should be noted that the specific characteristics of German geography and its pattern of population distribution mean that compared to other Member States such as the United Kingdom there are a larger number of urban centres in Germany with a relatively smaller number of inhabitants to cover. Moreover the overall population of Germany is significantly larger than that of the United Kingdom or any other Member State. Given that the business case for 3G networks does not at present justify uniform nationwide coverage, but that in line with the expected development of market demand, coverage will spread more gradually from urban centres and possibly main transportation axes. This means that covering a significant percentage of the German urban population requires comparatively large investments. Even investments concentrated on the most densely populated areas still require a relatively large number of geographically separate areas of network coverage to be built out and connected.

(133) Finally O2 Germany as the fourth network operator to enter GSM markets in Germany is a player with a relatively small existing customer base which consequently has more limited access to financial resources than the more established operators. Because O2 Germany has fewer existing customers on its 2G network, it also has considerable spare capacity available for voice services, reducing the business case for investments in its 3G network for any purpose other than to enable higher bandwidth services, requiring a high network density. Hence O2 Germany's roaming on T-Mobile's 3G network even in the main urban areas for a limited period of time is considered proportionate and indispensable, where this might not necessarily be the case for operators with more established market positions.

Restriction on resale to Voice MVNOs

(134) The Parties wish to exercise prior control over who has wholesale access to their 3G networks outside those categories mandated by national law and regulation — notably the provision of wholesale airtime to service providers — and except MVNOs that provide data services or act as service providers for voice services. Therefore they require prior consent from the host operator before allowing the resale of roaming access to Voice MVNOs, namely MVNOs providing voice telephony or equivalent services. By restricting the resale of roaming access for the provision of voice services to MVNOs that have not invested in 3G network licences or infrastructure, the Parties intend to protect their own ability to roll-out 3G networks and to safeguard their investments, enabling them to offer technically advanced 3G services to end users.

(135) Without the ability to control access to their networks and thereby, *inter alia*, to protect their investments from the erosion of retail prices for voice services by Voice MVNOs based on the resale of roaming capacity, the Parties would not offer each other such roaming capacity at all. This is credible because the Parties have provided calculations to demonstrate that any revenues foregone at wholesale level as a result of denying each other roaming access would be compensated by avoiding the revenue losses at retail level that would otherwise result. Without access to national roaming for 3G services on T-Mobile's network, O2 Germany would be a less effective competitor during its roll-out phase and would be unlikely to enter 3G wholesale and retail markets as a nationwide competitor (or in any event as a competitor offering the broadest geographical scope that is likely to be available at that time). Moreover the efficiencies gained from T-Mobile selling excess capacity on its network to O2 Germany would be lost. Likewise the other benefits in terms of increased scope for competition based on O2 Germany's enhanced market entry and based on the increased network coverage quality and transmission rates would be lost. The restriction therefore is necessary to the Agreement, and to its benefits.

(136) The restriction in no way affects the Parties' freedom to offer wholesale access to their own networks to any other party. Furthermore it is limited in scope to the effect that the Agreement does allow resale of wholesale access for 3G voice services to service providers and MVNOs acting as service providers, and allows the resale of wholesale access to national roaming for 3G data services to MVNOs without any restrictions, whereas data services are expected to be at the heart of 3G retail markets. Competition is thus affected only in 3G voice markets. In this sense the restriction is proportional to its objective. Therefore, at present no less restrictive means than a limitation on resale of roaming capacity for voice services to MVNOs are available that would lead to the same substantive result.

No elimination of competition in respect of a substantial part of goods and services concerned

(137) As was set out above, the competition between the four licensed operators of 3G networks and services that intend to roll-out 3G networks in Germany and between service providers, as well as by MVNOs other than those based on the resale of roaming capacity for voice services, is enhanced by the present Agreement.

(138) The Agreement also leaves scope for effective competition between the Parties. In spite of relying on roaming for part of its coverage, the home network operator will control its own core network, enabling it to offer differentiated services. In addition, Clause 5.6 of the Agreement provides that in order to guarantee services competition between the Parties, they each have to ensure that roaming customers can only have access to the services portfolio and network access to third parties that is available on the home network, and that they should not have access to the services offered on the visited network, or have network access to third parties via the visited network.

(139) The ability of the home network operator to retain control over the traffic generated by its customers outside the home network, and to provide access to services that are not available on the host network, is improved by the use of the CAMEL (Customised Application for Mobile network Enhanced Logic) technology, including by means of call-back features. This is illustrated by the current availability of different location-based 2G services for O2 Germany's users roaming on the T-Mobile network than those available for T-Mobile users on the same network. For 3G retail services, the control over the services available to end users while roaming will increase because for all data transfers users will be connected to the packet data network via their home network.

(140) In addition, the responsibility for pricing and billing remains with the home operator. Although detailed billing data is provided by the host operator to the home operator, there is no direct relationship between the commercial conditions for the wholesale roaming offer and for the specific retail services that are based on this offer. An example is the 'click-based' billing that is offered by O2 Germany, but not by T-Mobile, for its 2.5G services.

(141) The wholesale costs of 3G roaming are only a transport cost, albeit a significant one, in addition to which there are content costs, which for content-rich 3G data services are expected to increase in significance in relation to transport costs over time. For the core network the costs of the operators will differ based on their choice of equipment suppliers, mode of transmission within the core network (for instance based either on fixed leased lines or on a wireless micro wave network), the relationship between the number of users and available capacity, operational costs and maintenance and operations. Finally, given the existence of a margin between the applicable wholesale rates and anticipated retail rates, and given that most traffic will not be roamed, it is likely that the scope for a significant degree of price differentiation remains.

(142) Hence, the elimination of competition from MVNOs based on the resale of roaming capacity for voice services by the Parties is compensated substantially by the overall pro-competitive effects of the notified Agreement, and effective competition between the Parties remains possible. Competition is therefore not eliminated for a substantial part of any of the markets identified as affected by the Agreement.

8.3.4. *Conclusion*

It is the Commission's conclusion that all the conditions for an individual exemption pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement are met in respect of the restrictions of competition related to the Agreement on wholesale national 3G roaming between the Parties and to the restriction on resale of roaming capacity to MVNOs.

8.4. **Duration of the exemption**

(143) Pursuant to Article 8 of Regulation No 17 and to Protocol 21 of the EEA Agreement respectively, the Commission shall issue a decision pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement for a specified period, and may attach conditions and/or obligations.

(144) Given that the markets affected by the restrictions in the Agreement are emerging markets, the likely effects of the restrictions cannot be evaluated for a period that substantially exceeds five years, and therefore in any event not beyond 31 December 2008. Pursuant to Article 6 of Regulation No 17, a decision pursuant to Article 81(3) of the EC Treaty cannot take effect from an earlier date than the date of notification. Accordingly, the exemption shall have effect from 6 February 2002. The duration for each part of the exemption is justified below (recital 145 and following).

O2 Germany roaming on T-Mobile's network within the 50 % coverage area

(145) The 50 % population coverage obligation concerns the urban areas with the greatest potential for infrastructure competition. Therefore an exemption for roaming in this area can only be justified for such time as the cooperation helps to promote competition during the initial roll-out phase of the network and to promote the commercial launch and early take-up of 3G retail services.

(146) In order to ensure that O2 Germany's incentives to build out its own high quality network are maintained, the duration of the exemption is based on phasing out roaming within the 50 % population coverage area according to a fixed timetable. This timetable applies to Areas 1, 2 and 3 as set out in section 4.3.1 above. This phasing out starts on 31 December 2005 with Area 1, which covers main urban areas accounting for approximately [(*)] of the German population. Next, roaming is phased out by 31 December 2007 in Area 2 which accounts for approximately a further [(*)] of the German population and by 31 December 2008 in Area 3, which accounts for approximately [(*)] of the German population. The cities and regions in Areas 2 and 3 cover smaller urban conurbations of secondary commercial importance. As regards underground areas, O2 Germany is entitled to continue roaming until 31 December 2008. Barring significant unanticipated changes to the commercial or regulatory environment, the economic justification for applying Article 81(3) EC/Article 53(3) EEA to roaming in the 50 % population coverage area thereafter will cease to exist after 31 December 2008.

(147) After expiry of each of the dates specified in Section 4.3.1 and following advance notice to the Parties, the Commission will reveal, in an appropriate form, the lists of cities and regions in Areas 1, 2 and 3 respectively.

Reciprocal roaming outside the 50 % coverage area

(148) As the area over and above that which is subject to the regulatory obligation of 50 % population coverage covers less densely populated and commercially less attractive areas of the Germany, an exemption for roaming in this area can be justified for a longer period, in particular to the extent that the Parties are going beyond their regulatory obligations to cover some of the commercially less attractive rural and remote parts of Germany.

(149) However, the markets affected by the restrictions in the Agreement are emerging markets and therefore the likely effects of those restrictions cannot be evaluated for a period that substantially exceeds five years. Consequently the Commission considers it appropriate to grant an exemption until 31 December 2008. This does not exclude that the commercial and regulatory situation prevailing at the end of that period may be such that Article 81(3) of the EC Treaty/Article 53(3) of the EEA Agreement continue to apply to roaming across parts of the area over and above that which is subject to the regulatory obligation of 50 % population coverage.

Restriction on resale to Voice MVNOs

(150) The restriction on resale to Voice MVNOs is closely linked to the provision of roaming, as without the provision of roaming the resale restriction would serve no purpose and without the resale restriction the sale of roaming rights would not have been agreed between the Parties. In order to preserve the logic of the resale restriction and commercial balance between the Parties as set out in their Agreement, this link must be maintained as concerns the duration of the exemption. Hence the Commission considers it appropriate to grant an exemption for the restriction on resale to Voice MVNOs until 31 December 2008.

(151) This Decision is without prejudice to the application of Article 82 of the EC Treaty and Article 54 of the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

Based on the facts in its possession, the Commission has no grounds for action pursuant to Article 81(1) of the EC Treaty or Article 53(1) of the EEA Agreement in respect of the provisions of the Agreement of 20 September 2001 and by supplementary agreements of 20 September 2002, 22 January 2003 and 21 May 2003 that relate to (extended) site sharing between T-Mobile and O2 Germany, with respect to the information exchanged necessary to enable site sharing, and with respect to the restriction in the Agreement on the resale of national roaming to other licensed network operators.

Article 2

Pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement and subject to Articles 3 and 4 of this Decision, the provisions of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement are hereby declared inapplicable to the supply of 3G national roaming by T-Mobile to O2 Germany, within the area subject to the regulatory obligation of providing 50 % population coverage by 31 December 2005 for the following periods:

(a) from 6 February 2002 until 31 December 2005 in respect of the cities listed in Area 1 ([61]), except in the underground areas;

(b) from 6 February 2002 until 31 December 2007 in respect of the regions listed in Area 2 ([62]), except in the underground areas;

(c) from 6 February 2002 until 31 December 2008 in respect of the regions listed in Area 3 ([63]) and in any underground areas in the cities and regions listed in Areas 1, 2, and 3.

'Underground areas' shall mean any area within the cities and regions listed in Areas 1, 2 and 3 which is part of the underground public transport system (including railways and metro), underground shopping centres, underground car parks, tunnels for vehicles and pedestrians and any other comparable underground areas as well as the areas directly above (ground level) but only to the extent underground areas and ground level cannot be technically separated for roaming purposes.

Article 3

Pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, the provisions of Articles 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement are hereby declared inapplicable, from 6 February 2002 until 31 December 2008 to:

(a) The provision of 3G national roaming between T-Mobile and O2 Germany outside the area subject to the regulatory obligation of providing 50 % population coverage by 31 December 2005, as set out in Chapter 3 of the Agreement (Sections 5 to 11);

([61]) Area 1 comprises [main urban (*)] regions covering approximately [(*)] of the German population, where O2 undertakes not to roam, and T-Mobile undertakes to bar roaming, from 31 December 2005 onward. Area 1 consists of: [(*)].

([62]) Area 2 comprises [smaller urban (*)] regions [of secondary commercial importance (*)] covering approximately a further [(*)] of the German population, where O2 undertakes not to roam, and T-Mobile undertakes to bar roaming, from 31 December 2007. Area 2 consists of: [(*)].

([63]) Area 3 comprises [smaller urban (*)] regions [of lesser commercial importance (*)] covering approximately a final [(*)] of the German population, where O2 undertakes not to roam, and T-Mobile undertakes to bar roaming, from 31 December 2008. Area 3 consists of: [(*)].

(b) The restriction on the resale of 3G national roaming rights to MVNOs in Clauses 11.1.b and 11.1.c of the Agreement.

Article 4

This Decision is addressed to

T-Mobile Deutschland
Landgrabenweg 151
D-53227 Bonn

And

O2 Germany & Co OHG
Georg Brauchle Ring 23-25
D-80992 München

Done at Brussels, 16 July 2003.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 16 October 2003

relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Cases COMP D3/35470 — ARA and COMP D3/35473 — ARGEV, ARO)

(notified under document number C(2003) 3703)

(Only the German text is authentic)

(Text with EEA relevance)

(2004/208/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to the Act concerning the accession of Austria, Finland and Sweden,

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 1/2003 [2], and in particular Articles 2, 6 and 8 thereof,

Having regard to the applications for negative clearance or exemption of the agreements underlying the ARA system which were entered into by Alstoff Recycling Austria AG (ARA) and ARGEV Verpackungsverwertungs-Gesellschaft mbH (ARGEV) on 30 June 1994 and by ARA, ARGEV and Altpapier-Recycling-Organisations GmbH (ARO) on 31 August 2001,

Having regard to the complaint submitted by FRS Folien-Rücknahme-Service GmbH & Co KG and Raiffeisen Umweltgesellschaft mbH on 8 May 1996 alleging infringements of Articles 81 and 82 of the EC Treaty and asking the Commission to put an end to the infringements, a complaint which was taken up and elaborated on by EVA Erfassen und Verwerten von Altstoffen GmbH on 27 April 2000,

Having regard to the decision of 24 July 2002 to initiate proceedings in this case,

Having given the third parties concerned the opportunity to make known their views in accordance with Article 19(3) of Regulation No 17 [3],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case [4],

Whereas:

FACTS

I. INTRODUCTION

(1) On 30 June 1994 Altstoff Recycling Austria AG (ARA) and ARGEV Verpackungsverwertungs-Gesellschaft mbH (ARGEV), both with their registered offices in Vienna, notified various agreements to the EFTA Surveillance Authority seeking negative clearance or alternatively exemption from the ban on restrictive practices.

(2) In a letter dated 21 March 1995 EFTA transferred responsibility for examining these notified agreements to the Commission.

(3) ARA organises a countrywide collection and recycling system for packaging in Austria. The system is designed to meet the requirements laid down in the ordinance of the Federal Minister for the Environment, Youth and Family Affairs on the avoidance and recycling of packaging waste and certain waste goods and the establishment of collection and recycling systems [5] (*Verpack VO* — Packaging Ordinance). To this end, ARA concludes waste disposal contracts with sectoral recycling companies (*Branchenrecyclinggesellschaften* — BRGs), assigning to them the task of organising the collection, sorting, transport and recycling of packaging. The BRGs, of which ARGEV is one, are each responsible for specific packaging materials or categories of material. They in turn conclude contracts with undertakings or local authorities, which then do the actual collection, sorting, transport and recycling. ARA and the BRGs together form the ARA system.

[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 1, 4.1.2003, p. 1.
[3] OJ C 252, 19.10.2002, p. 2.
[4] OJ C 64, 12.3.2004.
[5] BGB1. No 648/1996.

(4) By letter dated 28 August 2001, ARA notified further agreements to the Commission with a view to obtaining negative clearance or exemption. ARA and ARGEV also sought to have their notifications joined. At the same time Altpapier-Recycling-Organisations GmbH (ARO) indicated that it was becoming a party to the notification as it, too, wished to notify agreements.

(5) The notification concerns agreements which together form the basis of the way that the ARA system operates.

(6) On 8 May 1996 FRS Folien-Rücknahme-Service GmbH & Co KG and Raiffeisen Umweltgesellschaft mbH lodged a complaint with the Commission (COMP/A.36011/D3) against the planned formation of a joint venture to set up a collection and recycling system for packaging. However, the original complainants did not pursue their complaint, having abandoned their intention to take part in setting up the system. In a letter dated 27 April 2000 the newly formed joint venture EVA Erfassen und Verwerten von Altstoffen GmbH (EVA), with its registered offices in Vienna, took up and elaborated on the complaint against the companies in the ARA system as a new complainant, citing the aspects complained of by the previous complainants. EVA is now a wholly owned subsidiary of INTERSEROH Aktiengesellschaft zur Verwertung von Sekundärrohstoffen, with its registered offices in Cologne.

(7) In addition, on 24 March 1994 the Federal Chamber of Wage and Salary-earners (Bundeskammer für Arbeiter und Angestellte) lodged a complaint with the EFTA Surveillance Authority and — when the case was handed over to the European Commission — wrote to the Commission Directorate-General for Competition on 19 February 1996 citing the above complaint and submitted a statement on the ARA system, which it later expanded, notably in its letter of 22 March 2002.

II. THE PARTIES

(8) The ARA system is a countrywide system in Austria for the collection and recycling of all packaging materials and packaging (except bio packaging) from households, businesses and industries that are subject to the Packaging Ordinance. It was set up in 1993 on the initiative of Austrian business and industry in order to implement the Packaging Ordinance. It is a non-profit system and consists of ARA and eight economically independent BRGs.

(9) ARA, together with the BRGs, organises and coordinates the collection, sorting and recycling of transport and sales packaging in Austria. It offers its services to all Austrian and foreign businesses directly concerned by the Packaging Ordinance.

1. ARA

(10) ARA is a public limited company (AG), privately owned, founded in 1993. The owner and sole shareholder is the Altstoff Recycling Austria Verein (ARA Association). Any undertaking or association of undertakings directly affected by the Packaging Ordinance can become a member. This includes firms in the packaging industry, the bottling and packing industry and the retail trade. To avoid conflicts of interest, firms in the waste disposal and recycling sector are excluded from membership. The ARA Association comprises three constituencies reflecting the interest groups of undertakings affected by the Packaging Ordinance: bottlers/packers/importers, retailers, and the packaging industry. The constituencies are represented equally on the Association's executive board, which also forms ARA's supervisory board. The ARA Association currently has about 240 members.

2. The BRGs

(11) ARA does not take back or recycle used packaging itself. Instead it relies on the BRGs, with whom it has concluded 'waste disposal contracts'. Under these contracts the BRGs undertake to ensure the collection, sorting and/or recycling of used packaging under the terms of the Packaging Ordinance.

(12) The following companies in the ARA system have registered with the Austrian ministry responsible as system operators pursuant to Section 45(11) or Section 7a of the Waste Management Act (*Abfallwirtschaftsgesetz* [6] — AWG): ARGEV for metal packaging (ferrous, aluminium) and for 'light packaging' (wood, ceramics, plastics, bonded materials, textile fibre), Österreichischer Kunststoff Kreislauf AG (ÖKK) for plastic and textile-fibre packaging, ARO for packaging made of paper, cardboard, paperboard or corrugated board, and Austria Glas Recycling GmbH (AGR) for glass packaging.

(13) By a decision pursuant to Section 7e of the Waste Management Act the Austrian ministry responsible has established the existence of a monopoly or near monopoly position in the case of ARO, ÖKK, ARGEV and AGR and in the case of Öko-Box Sammel GmbH, which cooperates with the ARA system.

[6] BGBl. No 102/2002.

(14) The operation of the collection and recycling system enables ARA's licensees to be dispensed from their obligations for the packaging in question under Section 3(5) of the Packaging Ordinance. The rights of licensees in relation to the BRGs are represented by ARA acting as trustee.

(15) The BRGs do not perform the tasks of collection and recycling directly either, but conclude contracts for this purpose in every Austrian region, i.e. political subdivision, with private businesses (known as 'regional partners') who take charge of the actual disposal. The regional partners may in turn subcontract out their work. In a few instances, especially in larger cities, the regional partners are the municipal authorities. The BRGs are:

ARGEV Arbeitsgemeinschaft Verpackungsverwertungs-Gesellschaft mbH

ÖKK Österreichischer Kunststoff Kreislauf AG (ÖKK)

Aluminium-Recycling GmbH (ALUREC)

Arbeitsgemeinschaft Verbundmaterialien GmbH (AVM)

Verein für Holzpackmittel (VHP)

Ferropack Recycling GmbH (FERROPACK)

Altpapier-Recycling-Organisations-gesellschaft mbH

Austria Glas Recycling GmbH (AGR)

ARGEV Arbeitsgemeinschaft Verpackungsverwertungs-Gesellschaft mbH

(16) ARGEV is responsible for the collection, sorting and conditioning of packaging made of plastic, metal, wood, textile fibre, ceramics or bonded material. ARGEV shareholders are ARA (11 %) and the ARGEV Association. The ARGEV Association comprises around 110 members in four categories (manufacturers/importers, retailers, packaging industry/BRGs, disposal/recycling firms). The waste disposal sector has no voting rights in the association's statutory bodies (executive committee, general assembly).

(17) ARGEV collection systems comprise a household system for light packaging, a household system for metal packaging and a commercial system for light and metal packaging.

(18) In 2000 there were 57 regional partners — waste disposal firms, municipal enterprises and consortia — running the collection systems on behalf of ARGEV. At regional level there were 144 private and municipal disposal companies involved in providing services as collectors plus 47 sorting and shredder plants. In 2002 the number of regional partners was 64.

(19) ARGEV has concluded cooperation contracts with the following BRGs responsible for recycling.

ÖKK Österreichischer Kunststoff Kreislauf AG (ÖKK)

(20) ÖKK is in charge of the recycling of plastic and textile packaging. ARA holds 11 % of the shares in ÖKK. The remaining 89 % of shares are held by the Österreichischer Kunststoffkreislauf association. At 31 December 2000 the association had 51 members. The association's members are divided into constituencies of plastic manufacturers and distributors, plastic goods manufacturers and distributors, users of plastic packaging, system partners (in concrete terms ARGEV), organisations and undertakings in the plastics recycling industry and organisations and undertakings in the disposal industry. To avoid conflicts of interest, organisations and undertakings in the plastics recycling sector and the disposal industry (some of whom have business dealings with ÖKK) have no voting rights in the association's committee and are completely excluded from meetings to discuss legal business between association members and ÖKK.

(21) To carry out recycling, ÖKK has concluded contracts with recycling firms and transport companies. In 2001 there were 16 recycling companies for sorted plastics and eight recycling companies for mixed plastics in Austria.

Aluminium-Recycling GmbH (ALUREC)

(22) ALUREC is responsible for the recycling of aluminium packaging collected by ARGEV. The shareholders in ALUREC are the aluminium producer Austria Metall AG (AMAG) and Salzburger Aluminium AG (SAG). The other shareholders are packaging manufacturers.

(23) The recycling of aluminium packaging is done in the only two Austrian disposal plants, AMAG and SAG. The proceeds from the aluminium are renegotiated each year and linked by a percentage key to the secondary quotation for aluminium on the London Metal Exchange.

Arbeitsgemeinschaft Verbundmaterialien GmbH (AVM)

(24) AVM is responsible for the recycling of packaging made of bonded materials except for bonded drinks cartons. The shareholders are ARO and ÖKK, each with 50 %. AVM organises recycling of the materials in close cooperation with ÖKK.

Verein für Holzpackmittel (VHP)

(25) VHP is responsible for the recycling and some collection of wood packaging. The association currently has 16 members, who are the Austrian wood packaging manufacturers and dealers.

Ferropack Recycling GmbH (FERROPACK)

(26) FERROPACK is responsible for the recycling of ferrous metal packaging collected by ARGEV, in other words tinplate and steel. The sole shareholder of FERROPACK is the FerroPack Association for Metal Recycling (Verein für Metallrecycling FerroPack). The association currently has six members, who are the Austrian manufacturers of tinplate and steel packaging.

Altpapier-Recycling-Organisations-gesellschaft mbH

(27) ARO is responsible for collection and recycling of packaging made of paper, cardboard, board and corrugated board (the 'paper and board' category of materials). ARA holds 11 % of the shares in ARO. The remaining shares are owned by paper manufacturers (roughly 28 %), de-inking recycling firms (27 %) and the paper processing industry (about 34 %). None of the 17 ARO shareholders holds more than 17 %.

(28) ARO has concluded agreements with 538 local authorities throughout Austria for near-household collection and with 79 disposal companies for all services relating to collection from retailers, business and industry.

Austria Glas Recycling GmbH (AGR)

(29) AGR is responsible for the collection and recycling of glass packaging. ARA owns 11 % of AGR shares. The remaining 89 % are owned equally by the two Austrian glass producers Vetropack Austria GmbH and Stölzle Oberglas GmbH.

(30) AGR's countrywide collection system operates mainly as a bring-it-yourself system, with bulk containers set up at central locations. AGR operates in close cooperation with municipalities and over 30 private waste-disposal companies.

III. THE LEGAL CONTEXT

(31) On 1 December 1996 the Packaging Ordinance came into force in Austria. It is based on the AWG and implements Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste [7]. The Packaging Ordinance is an amended version of the first Packaging Ordinance that came into force in October 1993 [8].

(32) The aim of the Packaging Ordinance is to avoid or reduce the impact of waste and packaging on the environment. Section 1(1) of the Ordinance states that it applies to manufacturers, importers, packers, distributors and final consumers. Under Section 3, manufacturers, importers, packers and distributors of transport and sales packaging are obliged to take back any packaging they put into circulation, free of charge after use, and return it to an upstream obligated undertaking, or reuse it, or recycle it using the latest technology.

(33) Under the terms of Section 12 of the Packaging Ordinance, manufacturers, importers, packers and distributors of outer packaging are also required to take back any packaging they put into circulation, free of charge after use, if they are not the final consumer, and to return it to an upstream obligated returnee, or reuse it, or recycle it using the latest technology. Obligated undertakings may use the services of third parties in order to meet their obligations. Those obligations apply from the final distributor through every stage of distribution back to the domestic manufacturer or importer. When purchasing packaged goods, final consumers can leave outer packaging at or near the point of sale. If the final consumer does not leave outer packaging behind, the rules on sales packaging apply by analogy.

(34) Manufacturers, importers, packers and distributors are required under Section 3(3) of the Packaging Ordinance to take back sales packaging used by final consumers near the point of sale free of charge. This obligation is limited to packaging of the same type, shape and size as used for the goods put into circulation.

(35) Owners of businesses that accumulate certain minimum quantities of packaging can apply to be registered as major sources. This means that they must ensure the collection and reuse or recycling of the packaging within the business (Section 8 of the Packaging Ordinance).

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[7] OJ L 365, 31.12.1994, p. 10.
[8] BGBl. No 645/1992.

(36) Pursuant to Section 3(5) of the Packaging Ordinance, if manufacturers, importers and packers are part of a collection and recycling system, the obligation to take back and recycle transport and sales packaging, including upstream and downstream in the distribution chain, is transferred to the system operator. The same applies under Section 4 of the Packaging Ordinance to distributors who supply transport and sales packaging to final consumers (final distributors). In this case manufacturers, importers and packers are commonly said to be 'dispensed from their obligations' by the system operator.

(37) Pursuant to Section 11 of the Packaging Ordinance a collection and recycling system of this kind for transport and sales packaging must ensure the collection and recycling of the packaging materials for which contracts have been concluded with obligated undertakings.

(38) There is no general legal obligation to participate in any such system set up (but see paragraph 43 below). Undertakings not participating are still obliged to take back packaging individually. However, within their field of activity, collection and recycling systems are required to conclude contracts with any obligated undertaking that wishes to participate, provided this is objectively justified. The field of activity of collection and recycling systems comprises packaging accumulating both in private households and in commerce and industry. Packaging that comes under a collection and recycling system does not have to be specially labelled.

(39) Pursuant to Section 29(1) of the Waste Management Act the establishment of a collection and recycling system or any major alteration requires approval by the minister responsible. Once the minister has given his approval, the systems continue to be subject to his supervision (Section 31 of the Waste Management Act). The minister is supported in this task by an expert committee (Section 34 of the Waste Management Act) and an advisory board (Section 35 of the Waste Management Act). The legal requirements applying to household and commercial systems differ in some respects.

(40) Section 32 of the Waste Management Act lays down particular requirements for near-household collection and recycling systems. These must endeavour to have as high a participation rate as possible (Section 32(1) of the Waste Management Act), must conclude contracts with any undertaking obligated under the Packaging Ordinance that wishes to participate, provided this is objectively justified (Section 32(2) of the Waste Management Act) and are subject to special reporting requirements (Section 32(4) of the Waste Management Act). Under Section 35 of the Waste Management Act, the state authorities' scope for supervising and monitoring these systems is also substantially more far-reaching than in the case of systems that provide collection and recycling only in the commercial sector.

(41) Section 32(3) of the Waste Management Act deals with near-household collection and recycling systems whose activity covers not only near-household waste, but also waste accumulating in the commercial sector. In such cases, the system must not cross-subsidise the commercial sector and must, through appropriate organisational and accounting separation of the two areas of activity, ensure transparency in the flow of payments and goods and services between the two areas.

(42) Both undertakings with a take-back obligation but not participating in a system and collection and recycling systems themselves have to meet specified collection and recycling quotas. Under Section 11(7) of the Packaging Ordinance, authorisations for collection and recycling systems may lay down specific collection and recycling quotas if this serves the requirements of environmental protection and economic expedience and is appropriate. Under Section 3(6) of the Packaging Ordinance, manufacturers, importers and packers as defined in Section 3(4) of the Packaging Ordinance, final distributors as defined in Section 4, and all subsequent stages in the distribution chain for packaging that does not come under a collection and recycling system or has not been granted exemption under Section 7 are subject to certain record-keeping requirements regarding take-back and recycling and to packaging-specific take-back and recycling quotas.

(43) Pursuant to Section 3(9) of the Packaging Ordinance, whoever does not supply records relating to his take-back obligations under Section 3(6) has to participate in a collection and recycling system.

(44) In response to a Commission request for information, Austria stated in its comments of 15 January 2003 that, under the Waste Management Act, the Packaging Ordinance and the administrative decisions taken pursuant to them, it is possible to authorise other systems in addition to the already existing system for the collection and recycling of packaging waste arising in private households.

(45) Similarly, under the abovementioned provisions, it is permissible, in the collection of packaging waste from private households, for competitors of the ARA system to make use of the containers available. This is because it is not possible, for practical reasons, i.e. lack of space and protection of the urban and countryside environment, for competitors of the ARA system to set up additional containers at the premises of final consumers.

(46) However, Austria takes the view that each collection and recycling system must demonstrate that it has collected and recycled the packaging waste for which it is participating in the system. Consequently, following collection in the common container, the packaging must be sorted in accordance with the particular system to which it belongs.

IV. THE NOTIFIED AGREEMENTS

(47) ARA, ARGEV and ARO have notified the following agreements:

— the dispensation and licence agreements between ARA and obligated undertakings under the Packaging Ordinance (without list of charges),

— the waste disposal contract between ARA and ARGEV as a model for the waste disposal contracts concluded between ARA and the following BRGs listed in the Annex to the notification: ARGEV, AVM, ARO, AGR, ALUREC, Verein für Holzpackmittel, Ferropack, ÖKK,

— the waste disposal or cooperation contract between ARGEV and ÖKK, and between ARGEV and ALUREC, as models for the contracts concluded by ARGEV with ÖKK, ALUREC, FERROPACK and VHP, and

— the contracts concluded by ARGEV and ARO with their respective regional disposal partners.

1. Dispensation and licence agreements

(48) Participation in the ARA system arises through conclusion of the dispensation and licence agreement, as a result of which the contracting undertaking transfers its obligation under the Packaging Ordinance to the ARA system against payment of a fee and is thus 'dispensed' from its obligation. The following variants of the standard contract exist:

— a dispensation and licence agreement for transport packaging, sales packaging and outer packaging (ELV), and

— a dispensation and licence agreement for service packaging (ELVS).

(49) Licensees with a low annual licence fee can conclude a 'supplementary agreement for small quantities of packaging'. Firms with their registered offices in Member States can become licensees of ARA by concluding a 'supplementary agreement for foreign licensees from EU countries'.

1.1. *Dispensation and licence agreement for transport packaging, sales packaging and outer packaging (ELV)*

(50) Article I.1 of the ELV spells out ARA's role as trustee for the licensees, representing licensees' interests vis-à-vis the BRGs. The licensees charge and authorise ARA to conclude the lowest-cost waste disposal contracts possible with the BRGs in their interest. The waste disposal contracts are to require the BRGs to collect and/or recycle (depending on the BRG concerned) all packaging covered by collection and/or recycling guarantees in a proper professional manner in accordance with the Packaging Ordinance. Licensees' rights vis-à-vis the BRGs are exercised solely by ARA as the trustee, acting in its own name but on behalf and in the interest of licensees. ARA obtains services from the BRGs under contracts with BRGs in its own name, but on behalf and in the interest of licensees.

(51) Pursuant to Article I.2 licensees are obliged to participate in the collection and recycling systems in the ARA system in respect of all packaging covered by the Packaging Ordinance for which collection and recycling guarantees exist for the duration of the contract. The sole exception concerns packaging where it can be shown that there is already dispensation at another economic stage or where the licensee himself or authorised persons charged by him carry out collection and recycling demonstrably in accordance with the law without direct or indirect recourse to the ARA system.

(52) ARA has stated that a confirmation of dispensation issued pursuant to Section 3(5) of the Packaging Ordinance by the operator of approved collection and recycling systems to licensees suffices as evidence of recourse to a parallel dispensation system. With regard to self-disposed packaging, ARA contents itself with presentation of the take-back records drawn up by self-disposers themselves for submission to the environment ministry in accordance with Section 3(6)(2) of the Packaging Ordinance.

(53) Pursuant to Article I.4 ARA grants the licensee the right, for the duration of the contract, to use the 'Green Dot' — the protected mark of the Duales System Deutschland AG (DSD) — to indicate their participation in the collection and recycling systems of the ARA system. The right to use the mark can be withdrawn by ARA at any time; it is geographically confined to Austrian territory and is not transferable. Packaging must be marked so as not to mislead. The mark must always be used in such a way as to take account of the interests of the mark. The licensee must take note that use of the logo abroad may require the permission of an authorised user there. The payment of licence fees to ARA does not signify permission by DSD or a foreign authorised user to use the mark. There is no obligation to affix the Green Dot mark on packaging participating in the ARA system.

(54) Article II deals with calculation and payment of the licence fee. Pursuant to paragraph 1, the fee payable by the licensee is based on the volume of packaging that the licensee puts into circulation within the country (cf. Article I(2), see paragraph 51 above). The licensee undertakes to determine the volume for each specific type of packaging covered by the contract and to use those figures for calculating the licence fee payable. The licence fees are calculated using the rates published by ARA, which, under paragraph 5, may be changed by ARA no more than once a year subject to three months' advance notice. In the event of substantial change in the cost situation or the fundamental assumptions underlying calculation of the size of the licence fees, special adjustments in licence fees may be made. Pursuant to paragraph 10, the licensee will receive a closing annual statement from ARA by 1 March each year, indicating all packaging reported by the licensee during the previous calendar year, broken down by type of packaging. The licensee has the right to make retrospective corrections to his reports for the previous calendar year and to request a corresponding licence fee offset. ARA has claimed that the annual closing statement thus gives the licensee the opportunity to adjust his reports to his actual situation in terms of self-disposal. ARA in turn reserves the right to make licence fee offsets only on production of supporting documents for the corrections to the annual statement.

(55) According to ARA, the licensee's payment obligation pursuant to Article II was never intended as payment for the use of the logo (in other words as consideration for the right to use the Green Dot on packaging), but as a fee for the dispensation provided via the system. Article II.1 has to be understood accordingly, and is applied in such a way that the licence fee is payable only for packaging in respect of which licensees seek dispensation through the system. The way in which this principle is implemented is that the licensee makes monthly or quarterly reports to ARA in accordance with Article II.4 only in respect of packaging for which it does not operate a self-disposal solution or does not participate in a parallel dispensation system. This even means that ARA sometimes has 'blanks', in other words there are firms which maintain their ELV but do not wish to participate with any packaging in the ARA system over a certain period and enter 'zero' in their reports on the amount of licensed packaging put into circulation.

(56) ARA has also indicated that it has no objection if the Green Dot is affixed to packaging that is not licensed with ARA, provided it can be shown that the packaging is dealt with and recycled in accordance with the Ordinance, and ARA can verify this. On this question ARA has entered into undertaking 2 referred to in paragraph 5. Under Article III the contract is concluded for an indefinite period. The licensee has the ordinary right to terminate the contract at the end of each calendar year after giving six months' notice. ARA waives its ordinary right to terminate the contract. Both parties have the special right to terminate the contract on grounds of major importance.

(57) Article IV deals with ARA's rights and obligations regarding information and monitoring. ARA monitors the dispensation of licensees by the BRGs and their disposal partners. It can verify the accuracy of the licensee's reports, e.g. by checking the relevant business documents.

1.2. *Dispensation and licence agreement for service packaging*

(58) The dispensation and licence agreement for service packaging differs from the standard agreement for transport and sales packaging in that Article I.2 obliges the licensee to participate in the ARA system in respect of all packaging falling under the Packaging Ordinance for which the BRGs have given collection and/or recycling guarantees or in respect of which its customers wish to obtain dispensation through it. So, depending on its customers' wishes, the licensee can conclude a dispensation and licence agreement for only some of its service packaging, without having to present evidence in accordance with the second sentence of Article 1.2 ELV in respect of packaging for which dispensation has already been obtained at another economic stage or which is collected and recycled in conformity with the law without recourse to the ARA system. The dispensation and licence agreement for service packaging is thus more open in its formulation.

1.3. *Supplementary agreement for small quantities of packaging*

(59) Where ARA and the licensee expect the licensee's annual licence fee under Article II of the ELV to amount to less than EUR 1 817 (excl. VAT), a 'supplementary agreement for small quantities of packaging' may be concluded. This involves the agreement of simplified administrative procedures regarding reporting packaging quantities and payment of the licence fee.

1.4. *Supplementary agreement for foreign licensees from EU countries*

(60) Pursuant to Article 5 of the supplementary agreement for foreign licensees from EU countries, ARA also enjoys the ordinary right to terminate the ELV (Article III.1 ELV). The reason given by ARA is the increased difficulty of carrying out checks on licensees abroad. ARA also argues that enforcement abroad is more difficult. Ordinary termination, it says, is a precaution for cases where ARA has concrete grounds for suspecting that the party concerned has not properly fulfilled its contractual obligations, but cannot furnish proof for special termination of the contract under the ELV because of the difficulties of gathering evidence abroad.

2. **Waste disposal contracts**

2.1. *The relationship between ARA and BRGs*

(61) ARA concluded waste disposal contracts with all BRGs, covering the entire territory of Austria, between 25 August and 30 September 1993. It has notified the contract with ARGEV as a model.

(62) Pursuant to the terms of Article 1(1), the contract covers the disposal of the packaging listed for each BRG in the guarantee statements (Annex 2 to the waste disposal contract). Disposal comprises collection and transport as well as sorting and conditioning in accordance with the Packaging Ordinance and with reference to the Framework Agreement which ARA has concluded with the local authorities (Annex 3 to the contract); in particular the objectives and quotas indicated in the Packaging Ordinances must, at least, be attained proportionally. ARA receives the disposal services provided by BRGs pursuant to Article 1(3) in its own name, but in the interest and on behalf of the licensee; it thus acts as trustee for the licensee. Under Article 1(5) the BRGs are required to take back or take in, free of charge, all packaging for which a contract exists between ARA and licensees. As authentication of payment of the licence charge, ARA awards the protected Green Dot mark. Regarding this point, ARA has explained that Article 1(5) has no practical significance. In particular, the distinguishing methods used by undertakings in the ARA system in order to decide whether a given item of packaging may be brought into the ARA system or not are quite separate from the Green Dot. The provision, it says, does not entail any legal consequences.

(63) Where a BRG employs subcontractors to perform its disposal tasks, it must, under Article 4, require them to fulfil its relevant contractual obligations. When awarding new contracts to subcontractors, BRGs must observe the principles of free competition and apply reasonable economic criteria. However, it must take account of the provisions of the Framework Agreements concluded by ARA with local authorities concerning the selection of the collector/sorter. In addition, the BRG must put new contracts with subcontractors out to tender. ARA has the right to inspect the tender documents and bids.

(64) Pursuant to Article 5, the BRG enjoys exclusive rights for the duration of the contract in the territory covered, i.e. the whole of Austria. The BRG undertakes not to set up, operate or participate in any other collection or recycling system within the meaning of the Packaging Ordinance besides the ARA system or to carry out any active disposal that falls under the responsibility of other BRGs. The BRG recognises ARA's position as the sole intermediary between the BRGs and licensees, but is not precluded from holding direct talks or concluding contracts with licensees where necessary to fulfil their contractual obligations; the BRG may not conclude contracts with licensees entailing dispensation of the licensee.

(65) Pursuant to Article 6, the fee for the disposal carried out by BRGs is the share of the licence charges charged by ARA for their services minus a mark-up for ARA. In practical terms, the fee is based on the costs necessarily incurred in the disposal of used packaging material. Under Article 6(4) this must not result in cross-subsidies between BRGs and ARA in the packaging-material-specific calculation. Cross-subsidies are defined as fixing a fee that does not correspond to the true costs, resulting in one packaging material being treated more/less favourably than another (Article 6(4)). The fee is set in advance by ARA on a proposal by the BRG, as a general rule for one calendar year at a time. Article 6(13) contains a most-favoured clause, under which the BRG grants ARA most-favoured treatment, meaning that it undertakes not to offer or carry out services comparable to contractual disposal services or parts of such comparable services to a third party on terms more favourable than those it offers ARA or its licensees.

(66) Contracts between ARA and the BRG are concluded for an indefinite period. The BRG is required to provide disposal services under the contract from 1 December 1993. Under Article 7B the contract can be terminated by either party at the end of the calendar year, with 12 months' notice. The parties' ordinary right to terminate the contract does not apply until after 31 December 2000. If another ARA enterprise offered cheaper services, ARA enjoyed the right to terminate in certain circumstances even before 31 December 2000.

(67) Pursuant to an agreement of 23 January 2001 with ARGEV and ARO, ARA agreed that the waste disposal contracts concluded with the two BRGs between 24 August 1993 and 30 September 1993 could not be terminated ordinarily before 31 December 2003. Article 7C deals with the right to terminate the contract without notice on serious grounds. For instance, the contract can be terminated without notice if the contract or the ARA system does not obtain a required authorisation from the antitrust authorities.

(68) Pursuant to Article 11, ARA is granted the right to inspect the collection and disposal facilities or other facilities of BRGs covered by the contract during normal working hours after giving advance notice. This right to inspect also applies to subcontractors working for BRGs. ARA also has the right to inspect BRGs' business documents, subject to advance notice, if it deems this necessary to verify that the contract is being performed properly by the BRG. Under Article 12 the BRG also enjoys a right to information and a right of inspection.

(69) Article 13 lays down reciprocal reporting obligations for the contracting parties: the BRGs must give ARA quarterly and annual reports on the disposal they carry out; ARA is required to provide BRGs with regular information on the number and size of contracts concluded with licensees and on the quantity of packaging put into circulation by licensees.

(70) Article 14 provides that disputes between the parties are to be settled by an arbitrator or an arbitration tribunal.

(71) Pursuant to Article 15, the recycling of packaging is to be handled by the BRG responsible for the recycling of the category of waste material in question. For this purpose, ARA is required to conclude an essentially similar waste disposal contract with each of those BRGs, defining the BRGs' disposal tasks as the recycling of the packaging specified. There is also provision for conclusion of a contract between ARGEV and each BRG responsible for recycling governing relations between the two firms, specifically as regards the disposal services owed to ARA by ARGEV and by the BRG responsible. In particular, the contract should ensure that ARGEV and the BRGs together provide complete disposal — from collection, transport and sorting to recycling — and that no gaps in disposal occur between ARGEV and the BRGs.

2.2. *BRG-BRG relations*

(72) Since ARGEV is responsible only for organising collection and sorting, it has concluded cooperation contracts with other BRGs (ÖKK, ALUREC, FERROPACK, AVM and VHP) responsible for organising recycling. ARGEV's contracts with ÖKK and ALUREC were notified as model contracts.

(a) Cooperation contract between ARGEV and ÖKK

(73) This contract, concluded on 9 March 1994, governs relations between ARGEV and ÖKK as regards demarcation and the complete performance of the disposal services due from ARGEV and ÖKK to ARA.

(74) Pursuant to Article 1, point 1.2, ARGEV organises the establishment and continuous operation of a country-wide collection, sorting and conditioning system for packaging; it undertakes to make available to ÖKK all sorted packaging collected under the ARGEV collection system. ÖKK organises adequate and suitable recycling capacity or temporary storage facilities and transport between the ARGEV partner concerned and the recycling or storage facility.

(75) Under the terms of Article 2, ÖKK guarantees ARGEV that it will accept packaging provided by ARGEV or its contractors in accordance with the contract. The contract also lays down obligations regarding the provision and acceptance of used material and the quality of packaging, proof of licensing, the principles for calculating the ARA licence fees, the duty to supply information and to observe discretion, and an agreement on arbitration.

(76) Article 4 stipulates that ARGEV becomes the owner of the packaging collected through its system. From the moment packaging in accordance with the specifications is accepted by the storage or recycling facility, ownership passes to ÖKK.

(77) Pursuant to Article 15, the parties undertake not to set up, operate or participate in any other collection and recycling system within the meaning of the Packaging Ordinance outside the ARA system during the lifetime of the contract, except with the express consent of the other party. ARGEV further undertakes not to pass on the packaging to a third party without ÖKK's consent during the lifetime of the contract. Similarly ÖKK undertakes not to take packaging from a third party without ARGEV's consent. These exclusive provisions expressly exclude reciprocal agreements with self-disposers, provided this is compatible with the waste disposal contracts concluded with ARA. The parties also undertake not to perform any active disposal falling within the area of responsibility of the other party.

(78) Article 16 stipulates that the contract is to run for an indefinite period from 1 October 1993. The contract can be terminated by either party at the end of a calendar year, subject to 12 months' notice. Ordinary termination is not possible before 31 December 2000. Under Article 17 the contract may be terminated on serious grounds.

(b) Cooperation contract between ARGEV and ALUREC

(79) This contract, concluded on 20 January 1994, governs performance of the contractual obligations on ARGEV and ALUREC vis-à-vis ARA. In terms of subject matter and the terms and conditions it is broadly similar to the contract between ARGEV and ÖKK.

(80) Pursuant to Article II, ARGEV undertakes to make available all packaging collected by it or its subcontractors. In Article III, ALUREC undertakes to ensure the proper recycling of the packaging accepted by ARGEV or the sorting firms.

(81) Article V stipulates that ARGEV undertakes to pass on all the packaging in question collected by it or its subcontractors solely to ALUREC for the duration of the contract. ALUREC in turn undertakes to accept and send for recycling only packaging collected by ARGEV or its subcontractors.

(82) As regards ownership the same applies as in the cooperation agreement between ARGEV and ARO, even though this is not specifically regulated in the contract between ARGEV and ALUREC. Ownership of the goods collected rests first with ARGEV, and then passes to ALUREC when the goods are transferred to it.

(83) Pursuant to Article VI, the contract is to run from 1 October 1993 for an indefinite period. The contract can be terminated by either party at the end of a calendar year, subject to 12 months' notice. Ordinary termination is not possible before 31 December 2000. Under Article VII the contract can also be terminated on serious grounds.

2.3. *Relations between BRGs and regional partners*

(84) These are the contracts concluded by ARGEV and ARO with the regional disposal companies or local authorities. The contracts govern the actual disposal of used packaging.

ARGEV agreement

(85) In the original version of ARGEV's agreement with the regional partner ('partner agreement'), which dates from 1994, the regional partner undertakes, in Article 2.2, to set up a collection, sorting and conditioning system under the terms of the agreement. Only one regional partner is contracted per collection region.

(86) The collection of packaging waste from households and establishments accumulating similar packaging is organised by the regional partner in consultation with the local authority. Subcontractors may be brought in under Article 2.3 subject to ARGEV's approval. Under Article 2.7 waste is collected in containers provided either by the regional partner or by the local authority. Under Article 3 the costs for the containers and for setting up a collection infrastructure are reimbursed through a payment by ARGEV.

(87) Article 2.10 states that, since the regional partner collects used material for ARGEV, it acquires ownership of the used material through collection solely on behalf of ARGEV. Consequently, the regional partner may not treat the used material in any manner other than that provided for in the agreement; any contravention constitutes grounds sufficiently serious for ARGEV to terminate the agreement without notice.

(88) Pursuant to Article 2.16, ARGEV guarantees, by means of bilateral contracts with recycling guarantors, to take back the used material made available by the regional partner in accordance with the agreement. The regional partner must keep the used material in storage ready to be taken back and inform ARGEV and/or the recycler designated either by ARGEV or by the recycling guarantor responsible without delay that it is ready to be taken back.

(89) Pursuant to Article 2.18, agreement with the local authority responsible should always be sought. In the event of disputes, Article 2.21 provides for an arbitrator to be called in.

(90) The agreement started to run from 1994 for an indefinite period, and can be terminated by either party at the end of the calendar year, subject to 12 months' notice. Ordinary termination before 31 December 2000 was not possible. If another enterprise offered the same services to ARGEV more cheaply, ARGEV had the right to ordinary termination before 31 December 2000 subject to certain conditions. Article 4.2 governs the right to terminate without notice on serious grounds.

(91) All ARGEV's legal and contractual obligations listed under Article C of the preamble to this agreement also apply to the regional partner.

(92) ARGEV had agreed most-favoured clauses under supplementary agreements or addenda to the existing waste disposal contracts with practically all the disposal companies with which it has contractual ties. These clauses provide that the disposal company must not offer its services to a third party or carry out its services for a third party on more favourable terms than for ARGEV. Through undertaking 1 set out in paragraph 139, ARGEV waived the right to apply these most-favoured clauses from 29 November 2000.

(93) In the new version of the agreements governing relations with disposers, a distinction is now made between sorting and collection partners; there is a separate standard contract for each. The two agreements are broadly similar to the original agreement, but are set out in greater detail.

(94) Both standard contracts came into force on 1 January 2002, except in the case of three municipalities, Vienna, Linz and Salzburg, where the contracts had already come into force earlier; essentially they correspond in substance to the standard contracts. The contracts dating from 1993/94 are no longer in force.

ARGEV — collection partners

(95) The agreement with the collection partners governs concrete reciprocal services between ARGEV and collection partners in implementing the Packaging Ordinance as regards 'collection', 'transhipment' and 'individual enterprise disposal'. Only one regional partner is contracted per collection region.

(96) According to Article 1.2, the agreement covers the establishment and smooth operation of a collection system for used packaging in a specified collection region. Under Article 1.6 ARGEV reserves the right to collect non-packaging waste under the collection system; the provisions of the contract apply to such waste *mutatis mutandis*.

(97) Pursuant to Article 2.2, waste from the household sector is collected together with waste from establishments accumulating similar packaging. Such establishments may be commercial or institutional sources; they must register for collection each year and show that the packaging concerned will be 100 % ARA-licensed; if licensing is less than 100 % the waste must be disposed of as commercial waste.

(98) Pursuant to Article 2.2.3, ARGEV must arrange the provision of the necessary sites with the local authority in a separate agreement. The collection containers and sacks are provided by the collection partner or the local authority after consulting ARGEV. Under Article 2.2.4, the costs are borne by ARGEV only for containers for the household sector, but not for establishments accumulating similar packaging.

(99) Pursuant to Article 2.2.5, collection comprises the regular emptying of containers and collection of sacks, together with transport of the waste collected to the specified sorting facility or to a transhipment station in the catchment area covered by the contract. The volume of collected waste to be supplied by the collection partner is based on actual requirements, i.e. depending on the behaviour of the local population or source, subject to an average utilisation rate of 80 % for collection containers and sacks and a maximum error rate for the waste collected of 20 % in terms of mass. If commercial packaging is also collected together with the household collection, these are to be separated as specified by ARGEV (Annex 2 to the agreement).

(100) For the commercial sector individual enterprise disposal applies. Under Article 2.4.1 the collection partner operates a regional transfer point to take back, free of charge, ARGEV-packaging from commercial sources, from controlled material transferred from recycling yards and from collected problem waste. Besides the basic infrastructure of the regional transfer points, under Article 2.4.2 the collection partner must offer pick-up systems for licensed packaging from the point where the waste occurs, especially in regions with a large commercial sector.

(101) Pursuant to Article 2.5.1, ARGEV's prior consent is required in order to subcontract out specific tasks under the agreements.

(102) Article 2.5.2 stipulates that the collection partner merely takes charge of the packaging on behalf of ARGEV and so never acquires ownership of it. Consequently, the regional partner may not treat the used material in any manner other than that provided for in the agreement; any contravention constitutes grounds sufficiently serious for ARGEV to terminate the agreement without notice.

(103) In reply to a Commission request for information, ARGEV stated that, in household collection, the disposer is not prevented from keeping volumes in the same container for another system, provided that this does not affect the fulfilment of the disposer's obligations to ARGEV. In particular, the contractually agreed minimum collection volume, in accordance with the specifications set by ARGEV, must be made available for the collection of ARA-licensed packaging without restriction to any specific quota. If the disposer were, through the granting of shared use, to jeopardise the dispensation of the ARA licensees, this would be in breach of contract.

(104) In the commercial system, ARGEV does not set any specifications as to the collection containers. The disposers and/or sources are at liberty to collect externally-licensed packaging as well in the collection containers. However, it must be ensured through precise records for each source that ARGEV's transfer point receives only packaging which, in terms of quantity and quality, corresponds to the ARA-licensed packaging actually accumulating there.

(105) Pursuant to Article 3.1, the collection partner receives a quarterly fee for the collection containers and sacks provided and documented, based on container/sack size. In return for emptying collection containers and collecting sacks from households and similar establishments, transporting and emptying collected waste at a sorting facility or transhipment station and producing the required reports, the collection partner receives a fee based on the quantity in question. For the transhipment of collected waste from households and similar establishments in the area covered by the agreement and for producing reports, the collection partner receives a fee based on the quantity involved. There is a ceiling on the collection and transhipment services chargeable annually to ARGEV per collection region and type of waste collected. The framework quantity for 2002 to 2004 inclusive was calculated on the basis of the 2001 forecasts for the gross quantity to be collected from households and similar establishments. In return for taking over and collecting packaging waste accumulating in businesses, including input control, re-sorting, conditioning, temporary storage, making available, loading, etc. of types of wastes taken by the recycler from commercial, industrial and institutional sources and from controlled take-overs and collections of problem materials, the collection partner receives output fees based on quantity.

(106) Pursuant to Article 3.5, ARGEV guarantees, by means of bilateral contracts with recycling guarantors, to take back all used material made available by the regional partner in accordance with the agreement.

(107) Pursuant to Article 5.1, the agreement began to run from 1 January 2002. It was concluded for an indefinite period and can be terminated by either party giving six months' notice, but not before 31 December 2004. Both parties also have the special right to terminate on serious grounds; such grounds include, for instance, gross disregard of the obligation to keep commercial waste separate in household collection.

(108) Regarding the term of the contract, ARGEV has entered into undertaking 4 set out in paragraph 139.

(109) ARGEV has also stated that the collection partner agreements do not contain any exclusive obligations on disposers, either in the near-household or commercial sectors. Disposal companies are free to provide similar services for other dispensation systems or as part of self-disposal solutions. As regards shared use of collection containers, ARGEV has entered into undertaking 3 set out in paragraph 139.

ARGEV — sorting partners

(110) The standard agreement for sorting partners very closely resembles the agreement for collection partners.

(111) Pursuant to Article 1.5, ARGEV entrusts the task of operating collection systems for light and metal packaging from households and similar establishments in defined collection regions (as a rule political subdivisions or major cities) throughout the country to the collection partner responsible. The quantities collected by collection partners are transferred direct or via a transport company to the sorting partner. Only one sorting partner is contracted per collection region.

(112) In order to optimise the collection, sorting and transport system, the quantities collected by certain collection partners or from certain collection regions are allocated to certain sorting partners or sorting facilities under Article 1.6. Through corresponding provisions in the separate collection partner agreements, ARGEV will ensure that the packaging collected by collection partners from households and similar establishments in certain collection regions (as specified in Annex 5 to the agreement) are sorted only in the sorting partner's sorting facility.

(113) Pursuant to Article 2.1.1, the sorting partner is required to take and sort all quantities of packaging made available or collected from households (Module 1) and similar establishments (Module 2) by the collection partner(s) in the collection regions. The sorting partner must take unsorted waste collected under Modules 1/2 ARGEV collection only from collection partners or from collection regions specified in Annex 5 to the agreement. Under Article 2.2, the sorting partner must, at the site of the sorting facility, operate a regional transfer point where packaging from commercial sources (Module 3), from recycling yards (Module 4) and problem material collections (Module 5) is accepted free of charge.

(114) Pursuant to Article 2.4.2, the sorting partner merely takes charge of the packaging for ARGEV and does not, therefore, acquire ownership of the packaging. Consequently, the sorting partner may not treat the used material in any manner other than that provided for in the agreement; any contravention constitutes grounds sufficiently serious for ARGEV to terminate the agreement without notice under Article 5.5.2(a).

(115) In reply to a Commission request for information, ARGEV stated that the ownership clause did not entail any prohibition on the use of the sorting facilities for third parties. If, in any event, the disposer were, through the granting of shared use, to jeopardise the dispensation of the ARA licensees, this would be in breach of contract.

(116) The provisions concerning the engagement of subcontractors (Article 2.4.1) and the duration/termination of the contract (Article 5) are similar to those in the collection partner agreement.

(117) Pursuant to Article 3.1, the sorting partner receives the input fees indicated in Annex 6 to the contract within the specified quantity ranges. The input fees constitute the consideration for taking charge of the collected waste from the ARGEV household system and near-household system, input control, a share of the facility's fixed costs by reference to the agreed annual input quantities, removal and proper disposal of intrusive material from collected waste, and the conditioning, temporary storage, making available and loading of all output waste types, free of intrusive material or positively sorted. A ceiling applies to the sorting input quantity chargeable annually to ARGEV, being the sum of the quantities collected from households in certain collection regions. For positive sorting of output waste types from households and similar establishments, the sorting partner receives specific fees for each type of material. These output fees also apply to the acceptance of deliveries, input control, re-sorting, conditioning, temporary storage, making available, loading etc. of specified waste types from business sources, recycling yards and problem material collections.

(118) ARGEV has also stated that the sorting partner agreements do not contain any exclusive obligations on sorting partners. Disposal companies are free to provide similar services for other dispensation systems or as part of self-disposal solutions. ARGEV has also entered into undertaking 3 set out in paragraph 139 and has entered into undertaking 4 regarding the term of the agreements.

ARO agreement

ARO — collecting partners

(119) The agreement concerns the operation of a collection system for paper packaging to satisfy the obligations flowing from the Waste Management Act, the Packaging Ordinance, the ARA/ARO waste disposal contract and the official authorisations. Only one regional partner is contracted per collection region.

(120) Pursuant to Article 1.1, the agreement does not cover the collection of waste paper and paper packaging from households and establishments accumulating similar waste. Rather it covers commercial street disposal (Article 2.4), transport of packaging from recycling yards (Article 2.5) and individual enterprise disposal (Article 2.6).

(121) Pursuant to Article 1.5, ARO's take-back obligation is confined to the quantity of paper, cardboard, board and corrugated-board packaging licensed with ARA. However, ARO is prepared to take the entire quantity of packaging delivered to the collection and recycling system. If this means that it exceeds its obligations under the official authorisation, namely making available sufficient take-back capacity for paper packaging, with a collection quota of 90 % in the commercial sector and 80 % in the household sector, and a recycling quota of 85 % in the commercial sector and 75 % in the household sector, and this conflicts with the licensee's economic and legal interests, ARO reserves the right to adapt its take-back guarantee and the corresponding fee payments to the requirements of the official authorisations; it must inform the collection partner accordingly in good time.

(122) Commercial street disposal concerns the disposal of pure-paper packaging from small business sources. What are known as supervised take-back sites (recycling yards, scrap collection centres, etc.) are run by the local authority and take packaging from private individuals and small business sources. The ARO collection partner takes packaging from recycling yards and handles its removal. For individual enterprise disposal the ARO disposal partner operates what are known as ARO transfer points, where business sources can bring their packaging into the collection and recycling system free of charge.

(123) Pursuant to Article 2.7, the collection partner is required to take all paper packaging covered by the agreement at the ARO transfer points. Article 2.7.4 stipulates that the business source must confirm by appropriate means that the packaging handed in is licensed with ARA. Additional transfer points must be authorised by ARO.

(124) Pursuant to Article 2.8, ARO decides on the disposal companies and the transport arrangements for packaging. The partner must therefore secure written agreement with ARO in this respect. The collection partner guarantees ARO a certain minimum quality of paper packaging on delivery to the recycler (Article 2.9).

(125) Article 2.10 states that the partner collects the paper packaging for ARO and that the collected waste is therefore the sole property of ARO. Consequently, the material collected may not be treated in any manner other than that provided for in the agreement; any contravention constitutes grounds sufficiently serious for ARO to terminate the agreement without notice.

(126) Pursuant to Article 2.15, ARO guarantees, by means of its bilateral contracts with recyclers, to take from collection partners the paper packaging they present and ensure its proper recycling according to the type of packaging. Should the recycling guarantees given to ARO be withdrawn, it must ensure an adequate substitute for disposal companies.

(127) Pursuant to Article 4, the agreement started to run from 1 January 2002 for an indefinite period. Subject to six months' notice, it can be terminated with effect from 31 December 2004. It can also be terminated without notice on serious grounds.

(128) Regarding the term of the contract, ARO has entered into undertaking 4 set out in paragraph 139.

(129) ARO has also stated that the collection partner agreements do not contain any exclusive obligations on collection partners. Collection partners are free to provide similar services for other dispensation systems or as part of self-disposal solutions.

ARO — local authorities

(130) The agreement concerns cooperation between ARO and the local authority in the operation of the municipal waste paper systems for paper packaging from households and establishments accumulating similar packaging waste in the area covered by the agreement. Account is taken of the obligations stemming from the Waste Management Act, the Packaging Ordinance, the ARA-ARO waste disposal contract and the official authorisations.

(131) Pursuant to Article 2.1, ARO's take-back obligation is confined to the quantity of paper, cardboard, board and corrugated-board packaging licensed with ARA. However, ARO is prepared to take the entire quantity of packaging delivered to the collection and recycling system, subject to retrospective readjustment in line with the obligations under the official authorisation, of which the local authority must be informed in good time.

(132) In the municipal waste paper collection run by the local authority, packaging together with non-packaging from the same material (newspapers, magazines, catalogues, etc.) is collected regularly pursuant to Article 2.2. The share of the costs for collection of paper, cardboard, board and corrugated-board packaging is borne by ARO; the other costs of municipal waste paper collection are borne by the local authority.

(133) Pursuant to Article 2.4, fundamental changes to the collection system described in the collection scheme (e.g. switch from a bring-it-yourself to a collection system) must be agreed between the local authority and ARO if it entails substantially higher costs for ARO. The local authority takes charge of putting the collection services out to tender or renegotiating them after consulting ARO. Selection of the disposal company (collector) rests with the local authority.

(134) The local authority must provide the following services: collecting paper packaging as part of the municipal waste paper collection (Article 3.1); providing sites for collection containers together with the necessary permits (Article 3.2); providing and maintaining the collection containers (Article 3.3); taking packaging via supervised recycling yards, used-material centres, etc. (Article 3.4); and guaranteed quality of packaging plus bearing the cost in the event of the need for re-sorting the packaging taken over in the recycling yards (Article 3.5). For its

part, ARO guarantees recycling in accordance with the Packaging Ordinance through bilateral contracts with recyclers (Article 3.6).

(135) Article 3.7 governs the transfer of ownership of the packaging: as regards packaging waste collected from households and establishments accumulating similar waste, ownership passes from the local authority to ARO on delivery of the packaging to the ARO transfer point. Ownership of material collected under supervision in recycling yards, used-material centres, etc., passes to ARO when it is picked up by the ARO disposal partner; if the local authority provides transport, ownership does not pass from the local authority until acceptance by the ARO transfer point.

(136) The local authority may not treat paper packaging in any manner other than that stipulated by ARO; any contravention constitutes grounds sufficiently serious for ARO to terminate the agreement without notice. Paper packaging may be recycled separately from non-packaging material of the same type or mixed with such material.

(137) Pursuant to Article 5.1, the contract begins to run from 1 January 2002 for an indefinite period and can be terminated no earlier than 31 December 2003, subject to six months' notice. It can also be terminated without notice on serious grounds.

(138) The contract contains no provision ruling out the possibility of another collection and recycling system sharing use of the municipal waste paper collection containers. ARO has stated that for the most part in the sector of near-household paper collection it purchases only quantities from municipal collection. There is no obvious reason, it says, why the local authorities should not conclude similar agreements with other dispensation systems.

V. **UNDERTAKINGS GIVEN**

(139) The Commission indicated that it had reservations regarding the implications for competition of some aspects of the contracts notified. In the course of the procedure the parties have given the Commission the following undertakings:

— (undertaking 1) with effect from 29 November 2000 ARGEV and ARO will refrain from invoking the most-favoured clauses which were agreed in supplementary agreements or addenda to the waste disposal contracts concluded with the disposal companies with which the company concerned had contractual relations,

— (undertaking 2) ARA undertakes not to invoke its licence rights to the Green Dot mark vis-à-vis firms inside or outside Austria (a) that participate with marked or similar packaging in collection and recycling systems within the meaning of Directive 94/62/EC on packaging and packaging waste which require the use of the Green Dot; or (b) that are required by regulations to affix the Green Dot to packaging. This obligation applies provided that the firm concerned can show that it collects and recycles the packaging marked with the Green Dot in Austria in accordance with the Packaging Ordinance (BGBl 648/1996, as amended) — whether by means of a self-disposal solution within the meaning of the Packaging Ordinance or by participating in an authorised collection and recycling system — and grants ARA the corresponding monitoring rights by contract. The monitoring rights may not extend beyond the rights granted under the standard ARA contract. In exercising these monitoring rights, ARA will not impose requirements stricter in terms of providing evidence that collection and recycling comply with the Ordinance than the obligations of the firms concerned vis-à-vis the authorities responsible for implementation of the Packaging Ordinance,

— (undertaking 3) ARGEV will not prevent local authorities and/or disposal companies from working for competitors of the ARA system. Further, ARGEV will not prevent local authorities and/or disposal companies from concluding and fulfilling contracts with competitors of the ARA system concerning the shared use of containers or other facilities for the collection and/or sorting of used packaging from households and similar establishments. This undertaking does not restrict ARGEV's right to enforce contractual arrangements for the shared collection and recycling system and to take all necessary measures to fulfil its obligations as a collection and recycling system, whether imposed by the law or by the official authorisations, in spite of shared use. Furthermore, this undertaking applies only if:

(a) the local authorities and/or disposal companies declare their willingness to reduce the charges to be paid by ARGEV for the provision and operation of collection/sorting facilities, and/or for collection/sorting, in proportion to the use of containers and other facilities, and to reimburse ARGEV an appropriate share of the other costs directly attributable to collection/sorting (that is, costs for ongoing engineering and management of the shared collection system, costs for waste consultants, costs for R & D, etc.); ARGEV will produce an attestation from an independent chartered accountant regarding the amount and chargeability of the costs charged;

(b) the local authorities and/or disposal companies declare their willingness to reimburse ARGEV for the additional costs incurred by the companies in the ARA system and/or their contractors as a result of shared use (for instance, additional analysis costs or sorting costs in order to maintain the quality of the packaging collected and sent for recycling on behalf of ARGEV). ARGEV will produce an attestation from an independent chartered accountant regarding the amount and chargeability of the costs charged. Additional costs incurred by the companies in the ARA system and/or their contractors simply by virtue of reductions in the licenced quantity will not be taken into account. This undertaking will be implemented on a case-by-case basis through supplementary agreements to individual service contracts,

— (undertaking 4) ARGEV and ARO will terminate their contracts with disposal partners when the contracts have run for three years, unless the contracting parties agree on extension of the contract for no more than a further two years. No later than at the end of a five-year contract period ARGEV and ARO will again put the service contracts out to tender through a competitive, transparent and objective procedure (invitation to tender of whatever kind, invitation to submit quotations, etc.).

VI. THE RELEVANT MARKET

(140) For the purposes of assessing the agreements covered by this proceeding, the relevant product and geographic markets are defined as follows.

Product market

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

(142) The business purpose of the ARA system is the organisation and operation of a countrywide take-back system in Austria for used packaging. The agreements underlying the ARA system have economic effects at various stages in the value-added process. Furthermore, a distinction is made in the contracts within the ARA system between both individual types of packaging and different sources of the packaging to be disposed of. The assessment pursuant to Article 81(1) of the EC Treaty of the individual contracts and of the relevant source of the packaging must be carried out on the basis of different, autonomous relevant markets.

1. *Markets for systems or self-disposal solutions for the collection and recycling of used packaging*

(143) Through the operation of the collection and recycling system, ARA makes it possible for its licensees to be 'dispensed' from the obligations laid down in the Packaging Ordinance for the contracted packaging (dispensation system) and accordingly acts as a trustee for its licensees vis-à-vis the BRGs obliged to take back and recycle packaging. The demand-side customers are the companies obligated under the Packaging Ordinance.

(144) Since ARA acts as a trustee for the obligated undertakings, it is at the same time a customer for the organisational management of a dispensation system. The operation of a dispensation system is offered by the BRGs, which hold the official notices of approval. Both the trustee activity of ARA and the operation of the dispensation system by the BRGs must be ranked on the supply side at the same level of the value-added chain. If ARA were not intervening as a trustee, the BRGs could not offer the dispensation service direct to the obligated undertakings. Since ARA and the BRGs thus operate on a single market, discussion below will refer to the supply of the dispensation service by the ARA system.

(145) Undertakings which do not wish to join a countrywide collection and recycling system are still required under their own responsibility to perform the obligations laid down by the Packaging Ordinance. The same applies to registered major sources as regards the packaging they accumulate. However, the companies not participating in systems can charge third parties with the task of performing the disposal of used packaging incumbent on them. As a result, such third parties offer to organise the individual performance of the collection and recovery obligations relating to used packaging under the Packaging Ordinance (self-disposal solution).

(146) The question of whether dispensation systems and self-disposal solutions operate on the same market or on different, but neighbouring markets can be left open. This is because, as explained below, with regard to the agreements to be assessed here, neither of these two definitions of the relevant product market involves any restriction of competition within the meaning of Article 81(1) of the EC Treaty. The precise market definition as regards the organisation of the taking-back and recycling of used packaging can accordingly be left open.

(147) The market on which dispensation systems and self-disposal solutions operate can be referred to as a 'system market'. The system market is confined to packaging waste, since this can be distinguished from other waste on the basis of the specific obligations imposed on customers in the Packaging Ordinance.

(148) Within this 'system market', the following relevant markets should be distinguished as regards the source of the packaging.

(149) The ARA system offers on the one hand participation in a system for the disposal of used packaging that accumulates in private final consumers' households and in near-household establishments. On the other, the ARA system offers participation in a system for the disposal of packaging that accumulates in trade and industry. The ARA system has been given separate authorisations for its household and commercial systems.

(150) A company wishing to be dispensed from the obligations imposed by the Packaging Ordinance brings packaging into circulation that accumulates either in the household sector, or in the large-business industrial sector or, in definable quantities, in both sectors. It can therefore participate only in a collection and recycling system that is set up for the relevant sources. From the point of view of the demand-side company, therefore, there is no substitutability between participation with packaging in a system for household packaging and in a system for packaging in the trade and industry area for the purpose of achieving dispensation from the obligations imposed by the Packaging Ordinance.

(151) On the supply side, the organisation of a dispensation system for the 'dispensation' of licensees must basically be geared to the legal specifications, which distinguish between household and commercial systems and impose differing requirements. The fields of business must be separated in organisational or at least accounting terms (paragraph 41) and only household systems must endeavour to have as high a participation rate as possible, are obliged to enter into contracts, must meet greater reporting requirements and are subject to more far-reaching monitoring (paragraph 40).

(152) Against this background, the Commission concludes that, from the point of view of the system operator, the dispensation service offered to an undertaking within the framework of a system for household packaging is not functionally interchangeable with that offered to the undertaking within the framework of a system for packaging stemming from the trade and industry sector.

(153) It is not necessary to take the above differentiation any further by breaking down the two relevant markets on the basis of individual types of material (e.g. paper, glass, etc.), since this would not produce any other competition assessment pursuant to Article 81(1) of the EC Treaty.

(154) The Commission therefore finds that, with regard to the organisation of systems for the disposal of used packaging (system market), the market for systems for household packaging must be distinguished from the market for systems for packaging stemming from the trade and industry sector.

2. *Markets for the collecting and sorting of used packaging*

(155) Within the ARA system, a number of BRGs are responsible for organising the collection and sorting of used packaging. Since they do not themselves carry out disposal, they are customers for this service. The suppliers of the disposal service are disposal companies and municipal authorities (referred to below as disposers).

(156) In the collection and sorting of used packaging, a distinction must be made in terms of categories of material on the one hand and between household and commercial sectors on the other.

(157) Paper and board packaging accumulating in households is collected jointly with similar non-packaging material (newspapers, magazines, etc.). Collection is performed by the local authorities. These therefore also enter into contracts with the disposal companies. ARO purchases only certain quantities of the local authorities' used-paper collection. The local authorities' used-paper collection already existed before the setting-up of the ARA system. For the most part, used paper fetches a favourable market price. As a rule, paper and board waste is collected in the bring-it-yourself system in collection containers set up on local authority land. Where re-sorting has to be carried out, it is relatively simple. On the basis of these features, the Commission assumes that a separate market for the collection and sorting of used-paper accumulating in households exists which comprises paper and board packaging together with newspapers, magazines and other used paper. Paper and board packaging arising in the commercial sector is taken either in recycling yards or used material centres, collected at the transfer points set up by the systems or collected direct from major sources. The disposer enters into a contract with ARO, with competing systems or with the major source. Overlaps with household collection arise to only a limited extent.

(158) Glass involves particular features which make it appropriate to identify this type of material as a subcategory as well. Used-glass collection already existed before the setting-up of the ARA system. As a rule, used glass is collected in the bring-it-yourself system in collection containers set up on local authority land. Where re-sorting has to be carried out, this is relatively simple. Used-glass collection is largely confined to used-glass accumulating in households.

(159) The collection of light packaging (in particular plastic, bonded material, aluminium, tin plate and steel), by contrast, is carried out on a separate basis from household-waste collection only after the ARA system has been set up. The collection is carried out mainly using a pick-up system in containers or bags set up near households. Light packaging made from plastic and bonded material has predominantly a negative market price. Consequently, the conditions for the collection and sorting of household packaging waste made from these types of material must, in terms of disposal logistics, be clearly distinguished from those applicable both to the household collection of used paper and used glass and those applicable to the collecting and sorting of packaging in the trade and industry sector.

(160) Since in the collection of light packaging in the household sector all households must normally be serviced direct, there are substantial network effects, i.e. substantial economies of scale and scope. As a result of these specific supply-side conditions, sources in the household sector can as a rule be serviced on an optimum cost basis only by a limited number of disposers. Furthermore, as far as the latter are concerned, normally only one collection container can be provided per category of material. By contrast, the number of sources in trade and industry is smaller and, because of the large volume of waste to be disposed of, can also be serviced by different disposers.

(161) Furthermore, the sales packaging arising in households differs significantly in terms of its used-material value from the packaging arising in trade and industry. Various types of material accumulate in small quantities in the case of private final consumers and are collected by them with the result that the material must subsequently be sorted in comparatively capital-intensive sorting facilities. In the case of packaging in trade and industry, which usually accumulates in large quantities and is already sorted into individual types of materials, sorting facilities are not necessary in this type of technical configuration.

(162) Against this background, there is no functional interchangeability between collection and sorting services for packaging collected from private final consumers and those in trade and industry.

(163) The market for the collection and sorting of used household packaging must be differentiated from household waste and rubbish collection, which, following the adoption of the Packaging Ordinance, has remained within the sphere of responsibilities of the local authorities that have to provide disposal services. The market for the collection and sorting of used packaging differs from the latter through a much broader service profile, since the sorting of the collected packaging by type of material provided on this market in accordance with specific rules and the provision of the collected used materials for further recycling involve an autonomous value-added chain which as a rule requires extensive and demand-specific investment in an appropriate sorting infrastructure. Furthermore, a separate collection infrastructure exists for each sector, since household waste and rubbish in private households is collected in different containers than used packaging.

(164) In the household sector, therefore, the following markets can be distinguished: the market for the collection of used paper, the market for the collection of used glass and the market for the collection and sorting of light packaging.

(165) In the commercial sector, the customers for disposal services are the BRGs involved in collection (ARGEV and ARO) and competing systems. Systems demand only disposal services for packaging and, because of requirements, cannot substitute other disposal services for this demand. Other customers are self-disposers and large sources. These accumulate both packaging waste and other commercial waste. Because of the specifics of the legal requirements applicable to packaging disposal, however, this is, from the customers' point of view not interchangeable with the disposal of other commercial waste.

(166) From the point of view of disposal service suppliers, there are considerable differences between the collection and sorting of commercial packaging and the disposal of other commercial waste. Although in terms of disposal logistics the parameters are to some extent comparable (source location, collection frequency, waste characteristics), the differing legal requirements have an effect at collection and sorting level. Packaging waste is subject to reporting rules, which collectors and sorters are responsible for fulfilling. They must therefore prove and document to their clients that minimum amounts have been collected and prepared for recycling. This requires planning, not just in terms of the waste that accumulates, but also to ensure a steady provision of sufficient quantities of waste. Furthermore, because of the reporting requirements, the collection of packaging and non-packaging of similar types of material in the

same container is difficult. This is either ruled out by the contractor or a proportionate allocation must be undertaken that meets the legal requirements as to quota record-keeping.

(167) It must therefore be assumed that the market for the collection and sorting of packaging accumulating in the commercial sector must be distinguished from the market for the disposal of other commercial waste. The question of whether, on the market for the collection and sorting of commercial packaging, a further distinction must be made in terms of types of materials can be left open, since this is not relevant to the competition assessment pursuant to Article 81(1) of the EC Treaty.

(168) For all that, in addition to the household markets, a market must be distinguished for the collection and sorting of used packaging from large business and industry. There is no need to carry out any further differentiation in terms of elementary value-added chains (e.g. collecting, transporting, sorting) since the competition assessment pursuant to Article 81(1) of the EC Treaty would not be any different.

3. *Markets for recycling services and secondary raw materials*

(169) The ARA system intervenes in the markets for recycling services and/or secondary raw materials insofar as, with regard to the reusable materials collected under the system, the BRGs except for ARGEV organise, on a long-term basis and regardless of the relevant market situation, provision of the sorted used materials for recycling, in line with the specifications of the Packaging Ordinance. The recycling companies, as contract partners of the BRGs, provide the reusable materials for recycling in accordance with the Packaging Ordinance.

(170) It must be assumed that the markets here are separate markets in line with the types of reusable material involved. Furthermore, no differentiation is made at recycling level between household and industrial packaging of one and the same type of material, since the technical and economic requirements involved in recycling are largely identical. For the same reason, other products of the same type of material intended for recycling can be included in the recycling market. In the case of paper and board waste, for example, this would include newspapers and magazines.

(171) Furthermore, the organisation itself of the recycling of a given type of material by the BRGs and the actual carrying-out of the recycling of the used material or the supply of secondary raw materials are each different levels of a given product market.

Geographic market

(172) The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of or demand for products and 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.

(173) It has to be assumed that the objective supply and demand conditions on the relevant markets here differ distinctly from those in other areas of the common market. Consequently, in the application of the Community competition rules to the product markets covered by the ARA system, the territory of Austria must be taken as the relevant geographic market insofar as system markets and the markets for collection and sorting are involved.

(174) With regard to the markets for recycling services and secondary raw materials, the Commission starts from the assumption that these markets are, to some extent, already clearly marked by internationalisation tendencies and cross-border elements and that therefore the territory of the European Economic Area must be taken as the relevant geographic market. However, the exact definition of the relevant geographic market can ultimately be left open here.

VII. **MARKET STRUCTURE**

(175) The number of licensees in the ARA system was 10 994 in 1997, 11 479 in 1998, 12 027 in 1999, 12 295 in 2000 and 12 652 in 2001. ARA's licensing revenue amounted to ATS 2 608,1 million/ EUR 189,6 million in 1997, ATS 2 673,0 million/ EUR 194,2 million in 1998, ATS 2 694,2 million/ EUR 195,8 million in 1999, ATS 2 543,3 million/ EUR 184,8 million in 2000 and EUR 162,7 million in 2001.

(176) In the household sector, the ARA system is the only countrywide collection and recycling system in Austria that covers all types of materials (except for bonded drinks cartons).

(177) In the household sector, in addition to ARA, Öko-Box Sammel GmbH is the only other countrywide operator of a collection and recycling system for used light drinks-packaging, cooperating with ARGEV in order to ensure countrywide collection. In addition, Bonus Holsystem für Verpackungen GmbH & Co. KG operates a disposal system in the building sector for packaging left at building sites with private final consumers and in the farming sector for packaging left with farmers.

(178) In the household sector, there are no self-disposal solutions in operation pursuant to Section 3(6) of the Packaging Ordinance on any significant scale.

(179) In the field of commercial and industrial packaging, the ARA system has several competitors, though they bear no comparison with the ARA system in terms of their economic importance. They are:

— EVA Erfassen und Verwerten von Altstoffen GmbH (EVA), a subsidiary of the INTERSEROH group in Germany, which disposes of metal, plastic, paper, wood and bonded materials,

— Bonus Holsystem für Verpackungen GmbH & Co KG (Bonus — formerly FRS Folien-Rücknahme-Service GmbH & Co KG), Kufstein, which disposes of metal, plastic, paper, wood and textile packaging; this is, however, confined to packaging left with a commercial end-user (in the building sector also with private final consumers at bare-shell buildings and in the farming sector with farmers),

— RUG Raiffeisen Umweltgesellschaft mbH, Kornneuburg, which disposes of reusable wine bottles and agricultural film,

— GUT Dr Klaus Galle Umwelttechnik & Ökoconsulting (GUT), Klosterneuburg, which disposes of metal, plastic, paper, wood, bonded materials and bio-packaging,

— Pape Entsorgung GmbH & Co KG, Hannover, Germany, which disposes of packaging for automobile OEM spare parts.

(180) Only EVA, Bonus and GUT have their own system authorisation for the entire commercial sector.

(181) There are also some self-disposal solutions, including for what are known as major sources.

(182) Tables on licensed and collected quantities

Packaging wastes, licensed volumes and system volumes, 2001 ([9])

	Market volume (total volume of packaging brought onto the market in Austria) (tonnes)	Licensed volume, other systems (tonnes)	Licensed volume, ARA (tonnes)	ARA-licensed packaging as a proportion of packaging brought onto the market in Austria (%)
Paper and board	535 000	13 300	[...]* (*)	[... 50-60 % ...]*
Glass	230 000	0	[...]*	[... 80-90 % ...]*
Wood	70 000	1 600	[...]*	[... 65-75 % ...]*
Ceramics	28	0	[...]*	[... 90-100 % ...]*
Metals	85 000	900	[...]*	[... 50-60 % ...]*
Textiles	—	34	[...]*	[... 15-25 % ...]*
Plastic	210 000	7 100	[...]*	[... 50-60 % ...]*
BM ([10])	40 000	23 600	[...]*	[... 15-25 % ...]*
Other	—	54	0	[... 0-10 % ...]*
Total	1 170 028	46 700	[...]*	[... 55-65 % ...]*

— = no figures available.

(*) The square brackets marked with an asterisk denote confidential information which has been deleted from the text.

([9]) Figures in this table are according to information from the Austrian Federal Ministry for Agriculture and Forestry, the Environment and Water Resources, situation as at 2001.

([10]) Bonded materials.

Volumes of packaging wastes collected, 2001 [11]

	Total volume collected by ARA (tonnes)	Volume collected by other systems	Volume collected Annex 3 (= commercial)	Landfill and incineration	Total	ARA's share of total packaging wastes collected (%)
Paper and board	297 400	11 500	102 200	92 000	503 100	59 %
Glass	174 400	0	900	39 000	214 300	81 %
Wood	15 600	600	12 100	40 000	68 300	23 %
Ceramics	9	0	0	0	9	100 %
Metals	29 500	700	4 600	27 000	61 800	48 %
Textiles	7	27	300	0	334	2 %
Plastic	102 800	6 000	6 900	78 000	193 700	53 %
BM [12]	5 000	17 200	100	5 000	27 300	18 %
Other	0	45	200	0	245	0 %
Total	624 716	36 072	127 300	281 000	1 069 088	58 %

VIII. COMMENTS FROM THIRD PARTIES

(183) Following publication of a notice pursuant to Article 19(3) of Regulation No 17 and Article 3 of Protocol 21 to the EEA Agreement, a total of eight interested third parties submitted their comments to the Commission. The comments focused on the following points.

(184) Third parties suggested that the undertakings given by ARA should be backed up by the imposition of obligations. This concerned in particular the shared use of the collection infrastructure in the household sector. They also regarded the scope of the undertakings as being insufficient.

(185) It was also argued that the ARA system used the household sector to cross-subsidise the commercial sector so as to drive competitors from the market. There was no clear separation between the two sectors either as regards charges or as regards calculation. ARA should therefore be prohibited from operating in the commercial sector.

(186) Lastly, it was alleged that ARA gave preferential treatment to certain groups of licensees by selectively refunding these contributions, while other licensees were allowed only the general reductions in charges.

(187) The list of charges was not notified by ARA. Consequently, the charge system and any cross-subsidising are not covered by the Decision.

(188) The Commission has carefully examined the comments submitted by third parties and, where necessary, taken account of them in this Decision.

[11] Figures in this table are according to information provided by the Austrian Federal Ministry for Agriculture and Forestry, the Environment and Water Resources, situation as at 2001. According to oral information provided by the official responsible in the Austrian Federal Ministry for Agriculture and Forestry, the Environment and Water Resources in June 2003, about one third of the volume of paper and board collected by ARA is accounted for by the household sector and about two thirds by the commercial sector; about 7/10 of the volume of plastics collected by ARA are accounted for by the household sector and 3/10 by the commercial sector.

[12] Bonded materials. Bonded materials include bonded drinks cartons. Öko-Box collected 16 600 tonnes of bonded drinks cartons, the ARA system did not collect any bonded drinks cartons.

IX. ARTICLE 81(1) OF THE EC TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT

(189) Agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited as being incompatible with the common market.

Agreements between undertakings

(190) ARA and obligated undertakings under the Packaging Ordinance are engaged in economic activity. The dispensation and licence agreements concluded between ARA and obligated firms are therefore agreements between undertakings.

(191) The BRGs are engaged in economic activity. Since ARA's shareholding in some BRGs is only 11 %, it cannot exercise control over them under company law. And since the firms participating in the ARA system are not linked through any group or parent-subsidiary relationship (except for AVM, which is owned by ÖKK and ARO, each with a 50 % stake), both the waste disposal agreements between ARA and the BRGs and the cooperation agreements between ARGEV and ÖKK, ALUREC, FERROPACK and VHP constitute agreements within the meaning of Article 81(1) of the EC Treaty.

(192) In order to provide the actual collection, sorting and disposal services the BRGs in turn conclude contracts with disposal undertakings. Some of these undertakings are local authorities. They, too, are therefore engaged in economic activity. All the contracts between the BRGs and the collection/sorting and disposal undertakings are therefore agreements between undertakings within the meaning of Article 81(1) of the EC Treaty.

Restriction of competition

1. *System market for household packaging*

1.1. Restriction of competition through dispensation and licence agreements

(193) ARA operates on the household packaging market by concluding dispensation and licence agreements with firms that release them from their obligations under the Packaging Ordinance to take back and recycle the packaging material in question that is accumulated by final consumers in private households.

(194) ARA uses several variants of the dispensation and licence agreements. In what follows, the dispensation and licence agreement for transport, sales, and outer packaging (ELV) will serve as a model for closer examination.

Evidence of use of a parallel dispensation system or self-disposal solution

(195) Pursuant to Article I.2 of the ELV the only permitted exception to the licensees' obligation to participate in the ARA collection and disposal systems is if they can produce evidence that they are using a parallel dispensation or self-disposal system. Regarding the evidence required, ARA has indicated that a certificate issued by the system operator pursuant to Section 3(5) of the Packaging Ordinance suffices as evidence of use of a parallel dispensation system, while the evidence of return that has to be submitted to the Ministry of the Environment pursuant to Section 3(6)(2) of the Packaging Ordinance suffices as evidence of use of a self-disposal solution (see paragraph 52).

(196) Pursuant to Article II.1 of the ELV the fee payable by the licensee is based on the volume of packaging that the licensee puts into circulation within the country. ARA has indicated, however, that Article II.1 of the ELV is applied in such a way that the fee is paid only for packaging in respect of which the licensee is seeking dispensation through the ARA system, in other words for the volume notified to ARA pursuant to Article II.4 as the basis for calculating the licence fee (see paragraph 55). Moreover licensees can correct the amounts declared for the year just ended retroactively and apply for a corresponding adjustment of their licence fee if they have disposed of certain quantities by other means. The danger with this flexible system for determining the licence fee is that firms participating in the ARA system could subtract a certain quantity of packaging material from the licence fee calculation retroactively without ensuring that it is disposed of by some other means. As ARA accepts corrections to packaging material declarations, and especially retroactive corrections, the Commission considers it reasonable for ARA to require licensees to produce evidence in order to prevent them from undermining the flexible declaration system.

(197) In view of these facts, the requirement of Article I.2 of the ELV for licensees to produce evidence is not contrary to Article 81(1) of the EC Treaty.

Use of the Green Dot mark

(198) There could be restriction of competition within the meaning of Article 81(1) of the EC Treaty if licensees had to pay a licence fee for all packaging carrying the Green Dot mark. In that case problems would arise for licensees who used ARA's dispensation services only in respect of part of their packaging, or who did not use any dispensation service at all in Austria, but who distributed uniform packaging bearing the Green Dot in other EEA Member States. They would then either be forced to pay ARA a licence fee even for those quantities in respect of which they were not participating in the ARA system in addition to the fee paid to the competing system; or they would have to introduce separate lines of packaging and distribution channels, which would not be practical or economic.

(199) The ELV does not contain any provision requiring packaging that comes under the ARA system and is brought into circulation in Austria to carry the Green Dot mark. The Packaging Ordinance, too, makes no provision for any such compulsory labelling of packaging covered by a collection and disposal system.

(200) Furthermore, according to the information given by ARA, Article II of the ELV is taken to mean that licensees' payment obligation is not a consideration for the right to use the Green Dot mark but rather for the dispensation service provided by the ARA system. It is thus a service fee and not a fee for the use of a mark.

(201) This means that firms can turn to a competing dispensation system or a self-disposal solution for part or all of their packaging bearing the Green Dot without having to pay a licence fee to ARA provided that they can prove to ARA that they have disposed of the packaging in accordance with the Ordinance.

(202) To ensure that ARA does not take any other measures against firms which are not ARA licensees but which are obliged to mark the packaging they put into circulation with the Green Dot either under a contract with a collection and disposal system in another Member State or under the national law of another Member State, ARA has confirmed that it has no objection if packaging not licensed with ARA carries the Green Dot provided it can be shown to have been disposed of in accordance with the Ordinance and that ARA is supplied with the proof. This applies irrespective of whether non-participation in the ARA system is partial or total. Even in the case of total non-participation in the ARA system, that fact does not have to be indicated on the packaging.

(203) In the light of the foregoing, it has to be assumed that the provisions of the ELV regarding the use of the Green Dot on packaging brought into circulation do not hamper current or potential competing collection and disposal systems or self-disposal solutions for household packaging and therefore do not constitute a restriction of competition within the meaning of Article 81(1) of the EC Treaty.

Ordinary right to terminate contracts for foreign licensees from other Member States

(204) Pursuant to Article 7 of the Directive 94/62/EC, return systems must also be open to imported products, which may not be discriminated against. The detailed arrangements and any tariffs imposed for access must avoid discrimination. Section 32(2) AWG accordingly makes contracting compulsory for the household sector. Consequently ARA cannot, in principle, exercise the right to terminate agreements. Where this does occur in the exceptional cases described by ARA (see point 60), ARA is subject to control against abuse. Seen in this light, the ordinary right of termination granted to foreign licensees under the agreements cannot be deemed an appreciable restriction of competition within the meaning of Article 81(1) of the EC Treaty.

1.2. Restriction of competition through disposal agreements between ARA and BRGs

(205) Article 5 of the disposal agreement between ARA and ARGEV, which was notified as a model for all the agreements concluded between ARA and BRGs, includes exclusive provisions for the benefit of both ARA and the BRGs. Article 6(13) of the agreement also includes a most-favoured clause for the benefit of ARA.

Exclusivity for the benefit of ARA

(206) The exclusive provisions for the benefit of ARA during the lifetime of the agreement contained in Article 5(2) of the disposal agreements between ARA and the BRGs mean that potential competitors of ARA cannot contract with BRGs, which hold the system operator licences. However, this ability to contract is not an essential requirement for access to the system market in terms of competition law. The key factor is that competitors can conclude contracts with the firms that do the actual collection and sorting. This market, downstream of the system market, will be examined in more detail below.

(207) Scrutiny of the exclusive arrangement in Article 5(2) of the disposal agreements leads to the conclusion that it does not pose an appreciable restriction of competition within the meaning of Article 81(1) of the EC Treaty.

Exclusivity for the benefit of the BRGs

(208) The exclusive provisions in Article 5(1) for the benefit of the BRGs for the lifetime of the agreement mean that no other firm can become a BRG under the ARA system and can avail itself of ARA's trustee services. Since what competitors want is precisely to conclude contracts with obligated undertakings rather than with ARA, it is impossible to see what interest they might have in making use of ARA's services. The Commission therefore concludes that, here too, there is no appreciable restriction of competition within the meaning of Article 81(1) of the EC Treaty.

(209) Furthermore, each BRG is assigned certain categories of material and stages of disposal. Pursuant to Article 5(3) of the disposal agreement, each BRG undertakes not to provide any disposal services that fall within another BRG's area of responsibility. This means that BRGs may not compete with one another, which primarily affects the organisation within the ARA system. Outside the ARA system the arrangement has no impact beyond the exclusivity discussed above. And although the BRGs' freedom of action is further restricted within the ARA system, this can be justified on the grounds of the need for a clear allocation of responsibilities and reasonable specialisation within the system. At system level, it would be effectively impossible to perform tasks such as tendering with collecting, sorting and recycling firms or ensuring that quotas are observed if the lines of responsibility were not clearly drawn. Another important point is that the commitment by BRGs to keep to their own area of responsibility ceases to apply after the agreement expires. The arrangement under Article 5(3) of the disposal agreement is therefore not in contradiction with Article 81(1) of the EC Treaty.

Most-favoured clause

(210) A further point that has to be considered is whether the most-favoured clause in Article 6(13) of the disposal agreement between ARA and the BRGs, under which BRGs are forbidden to offer or provide their services to a third party on more favourable terms than for ARA or its licensees, constitutes an appreciable restriction of competition on the system market for the purposes of Article 81(1) of the EC Treaty. The most-favoured clause, like the exclusive clause, is incapable of any impact by itself, as the BRGs are forbidden by the exclusive clause from working with any collection system other than ARA. Consequently the question of more favourable terms does not arise at all. By itself, therefore, the most-favoured clause cannot pose an appreciable restriction of competition within the meaning of Article 81(1) of the EC Treaty.

1.3. Restriction of competition through the cooperation agreement between ARGEV and BRGs

(211) The exclusive clause agreed between ARGEV and ÖKK/ALUREC could amount to a restriction of competition if it prevented potential competitors from entering the market. Pursuant to Article 15 of ARGEV's disposal agreement with ÖKK, which is responsible for organising the recycling of plastic packaging, the parties undertake for the lifetime of the agreement not to set up, operate or participate in any collection and recycling system within the meaning of the Packaging Ordinance other than the ARA system, except with the other party's permission. Article V of the agreement between ARGEV and ALUREC contains a similar exclusive provision.

(212) Potential competitors are therefore excluded from the organisational arrangements for recycling or marketing secondary raw materials, but not from access to the market. Competitors could build up their own organisational structures themselves. In particular, there is nothing to suggest that there might be any impediment to potential competitors of the ARA system concluding contracts with recycling firms. The exclusive clause for the benefit of ARGEV does not constitute a restriction of competition within the meaning of Article 81(1) of the EC Treaty.

2. *System market for packaging from the large-business and industrial sector*

2.1. Restriction of competition through dispensation and licence agreements (ELVs)

(213) The ELV is used for licensing of household packaging and large-business and industrial packaging.

(214) The analysis, in paragraph 193 et seq., of the ELV's provisions concerning existence of use of a parallel dispensation system or self-disposal solution also applies therefore to large-business for commercial and industrial packaging. Consent to use of the Green Dot can be given if an item of packaging occurs in the household sector and therefore has to carry the Green Dot in at least one other Member State.

(215) The Commission therefore concludes that the relevant provisions of the ELV do not result in a restriction of competition on the system market for large-business and industrial packaging and as such are not caught by Article 81(1) of the EC Treaty.

2.2. Restriction of competition through disposal agreements between ARA and BRGs

(216) The disposal agreements between ARA and the BRGs, for which the agreement between ARA and ARGEV was notified as a model, concern the disposal of packaging not only from households but from the commercial sector as well. The legal assessment of the problem of exclusivity in respect of household packaging given in paragraphs 206 et seq. applies equally to this sector. As in the household sector, the clauses examined do not constitute a restriction of competition within the meaning of Article 81(1) of the EC Treaty in the commercial sector.

2.3. Restriction of competition through the cooperation agreements between ARGEV and BRGs

(217) The cooperation agreements between ARGEV and the BRGs, for which the agreements between ARGEV and ÖKK, and ARGEV and ALUREC were notified as models, make no distinction between the household and commercial sectors. The legal assessment is no different from that arrived at as regards the market for the collection and sorting of household packaging (paragraph 211 et seq.). For the reasons stated there the reciprocal exclusive arrangements contained in the agreements do not constitute a restriction of competition within the meaning of Article 81(1) of the EC Treaty.

3. *Market for the collection and sorting of used household packaging*

(218) The ARA system operates on the market for collecting and sorting used light packaging accumulating in households primarily through regional partner agreements between ARGEV and collectors and sorters.

(219) Pursuant to the agreements valid from 1 January 2002 ARGEV concluded separate contracts with disposal firms for the collection and sorting of packaging.

3.1. Restriction of competition through the regional partners agreement between ARGEV and the collection partners

Exclusivity for the benefit of collection partners

(220) The sorting partner agreement is concluded between ARGEV and individual partners covering a particular region for which the partner in question has sole responsibility.

(221) Because of the obligation entered into by ARGEV to seek all collection services during the lifetime of the contract from one single disposal firm for the area covered by the contract, and in view of ARGEV's dominant market position in terms of demand (see paragraph 182), other suppliers of collection services for light household packaging are denied substantial supply opportunities.

(222) Contracting only a single collection partner per disposal region amounts to a self-imposed restriction by ARGEV in terms of demand for collection services for light household packaging. The result of this restriction is to exclude competing suppliers of collection services for light household packaging from supplying the major source of demand for such services and so restricting competition on the supply side between collection partners in the contract areas concerned. Even though collection has been separated from sorting in the contracts valid since 2002, bundling of demand does occur through the ARA system. At the same time, moreover, collectors are operating for the ARA system in the commercial sector as well, on the basis of a standard collection partners agreement.

(223) ARGEV's contracts with the collection partners are not limited in time at all and merely provide for an ordinary right to terminate after three years. In undertaking 4 described in paragraph 139, ARGEV has committed itself to terminating its contracts with the disposal partners after a period of three years unless the parties jointly agree to extend them by a maximum of two years in any event. ARGEV will put the service contracts up for tender again through an objective procedure after a period of five years. Although this undertaking prevents parties from binding themselves for an indefinite period, contracts can run for up to five years. This means that excluded disposal firms are denied access to the main source of demand for three to five years, noticeably restricting competition in the contract region.

Appreciable effect

(224) However, the exclusivity for the benefit of collection partners is contrary to Article 81(1) of the EC Treaty only if it affects competition to an appreciable extent. How appreciable the restriction of competition is depends primarily on the position of the contracting parties on the relevant market and the duration of the exclusive connection.

(225) Altogether ARGEV has concluded collection partner agreements for 64 areas, creating a network of agreements covering the whole of Austria. This means that only the ARA system currently has a countrywide collection and disposal system covering all categories of material in the near-household packaging sector in Austria and is therefore the main customer for such disposal services both in each collection area and throughout Austria as a whole. In the light household packaging sector, only Öko-Box has set up a competing system. But it is confined to bonded drinks cartons, which account for around 20 % of all light packaging accumulating in households (see paragraph 182).

(226) As ARGEV has covered the entire relevant geographical market with a network of similar contracts, the bundling of exclusive arrangements that they contain prevents third parties from entering the market for the lifetime of the contracts. The cumulative impact of all the contracts taken together has the effect of closing off the market to excluded disposal firms.

(227) On the supply side, moreover, spatial and logistic reasons militate against the establishment of another collection structure for final consumers alongside the one set up by ARGEV's collection partners (see paragraphs 160 and 281 et seq.). Even Öko-Box makes partial use of the ARGEV disposal firms' collection infrastructure. Alternative supply opportunities for excluded collection service providers must therefore be regarded as rather unlikely for the moment. Realistically any dispensation system wishing to compete with ARA is more likely to work together with the collection partners who already perform the collection of packaging for the ARA system under the sorting partner agreement. Against this background, it has to be considered unlikely that new supply opportunities will arise on the relevant market for excluded collection service providers to any appreciable, i.e. substantial, extent during the lifetime of the sorting partner agreement in each area.

(228) An important factor in assessing the effects of the exclusivity on competition is its duration. Under undertaking 4 given by ARGEV (see paragraph 139), future collection partner agreements will have to be put out to tender again after a maximum of five years. This means that other suppliers of collection services who are not successful when contracts are awarded are excluded from central supply opportunities for the same period of time.

(229) The Commission therefore concludes that the exclusivity in the collection partner agreements for the benefit of the respective disposal partners does appreciably restrict competition.

Access to collection partners' collection facilities

(230) Because of the bottleneck in the near-household collection infrastructure, as described in paragraph 227, free and unhindered access to these facilities by competitors of the ARA system is especially important for competition. In particular, there would be a restriction of competition within the meaning of Article 81(1) of the EC Treaty if the collection partner agreement were so worded as to exclude competitors of the ARA system from access to the disposal infrastructure.

(231) The service contracts contain no exclusive provision for the benefit of ARGEV, which means that disposal firms may offer their services to other dispensation systems or as part of self-disposal systems. In the undertaking reproduced at paragraph 139, ARGEV confirmed that it was not requiring an exclusive obligation for its own benefit.

(232) The remaining question that has to be considered is whether the sorting partner agreement frustrates shared use of the collection partners' containers by competitors of the ARA system.

(233) A possible problematic point is the ownership clause in Article 2.5.2 of the sorting partner agreement, under which collection partners take charge of packaging on behalf of ARGEV and may therefore deal with material collected for ARGEV only in the way provided for in the agreement. Furthermore ARGEV pays a fee in consideration of container costs and reserves the right to require their positioning to be decided in agreement with it. Under these provisions ARGEV could claim to have a certain degree of control over the containers, yet they do not expressly rule out shared use. Also, ARGEV has stated that disposal firms are not prevented from making space in the same container available for another

system provided this does not affect fulfilment of their obligations towards ARGEV (see paragraph 103). Regarding the ownership clause, ARGEV has made it clear that this applies only to the quantities of packaging licensed for ARA and so does not prevent competitors of the ARA system from making unrestricted use of packaging collected through shared use of disposal facilities. The ownership clause should therefore be interpreted as meaning that it does not frustrate the dividing up of the quantities of packaging collected in one container for several systems.

(234) Consequently, it cannot be argued that provisions in the sorting partner agreement prevent disposers from concluding and fulfilling contracts with competitors of the ARA system for shared use of the collection containers. However, the restrictions in undertaking 3 on shared use justify the fear that ARGEV could try to make it difficult for collection partners to open up access to containers for competitors without a specific link to a provision of the sorting partner agreement. This risk will have to be taken into account when deciding whether the tests of exemption are satisfied in respect of the exclusive arrangements for the benefit of collection partners (see below, paragraph 278 et seq.).

3.2. Restriction of competition through the regional partner agreements between ARGEV and sorting partners

(235) Because of the distinction made in the collection and sorting partner agreement since 1 January 2002, collection and sorting partners may in both cases be different firms. In terms of their content, ARGEV's contracts with its sorting partners are similar to those with its collection partners.

(236) Article 5 of the sorting partner agreement provides for the same duration as the collection partner agreement. In addition, only a single sorting partner per collection region is contracted by ARGEV to sort used sales packaging. Undertaking 4, which is reproduced at paragraph 139 and concerns the duration of the contract and re-tendering after no more than five years, also applies to the sorting partner agreement. As regards the legal assessment of the exclusive arrangement for the benefit of sorting partners, reference should be made to the explanation given concerning the collection partner agreement. The end result is that the exclusive arrangement contained in the sorting partner agreement amounts to an appreciable restriction of competition on the relevant market within the meaning of Article 81(1) of the EC Treaty.

3.3. Restriction of competition through agreements between ARO and local authorities

(237) ARO has concluded an agreement with local authorities on the operation of municipal wastepaper systems for paper packaging from households and establishments with similar volumes of waste packaging. Under the agreement, however, the local authorities do not provide their collection services for ARO but operate their own municipal wastepaper collection and disposal system, which also covers non-packaging (e.g. newspapers and magazines). As regards near-household collection of paper and board packaging, ARO confines itself to buying up quantities from the municipal collection. The agreement with the local authorities contains no provisions excluding any other collection and disposal system from sharing the municipal wastepaper collection containers. The local authorities are therefore not prevented from making contracts with competitors of ARO for the collection and disposal of paper packaging.

(238) Given these facts, the Commission has concluded that the agreements concluded by ARO with local authorities do not contain any clauses restricting competition and are therefore not contrary to Article 81(1) of the EC Treaty.

4. *Market for the collection and sorting of commercial packaging*

(239) The ARA system operates on the market for the collection and sorting of commercial packaging especially through the regional partner agreements concluded between the BRGs and collection/sorting partners.

(240) The contracts concluded by ARGEV and ARO with collection/sorting partners for the actual implementation of the requirements for collection and recycling systems laid down in the Packaging Ordinance cover commercial packaging.

4.1. Restriction of competition through regional partner agreements between ARGEV and collection partners

(241) The exclusive provision for the benefit of collection partners also has to be examined in respect of commercial packaging to determine whether it is compatible with Article 81(1) of the EC Treaty.

(242) In view of the undertaking given by ARGEV to seek to obtain all collection services including in the commercial sector from a single disposal firm, other competing suppliers of collection services for commercial packaging are denied supply opportunities and thus competition between collection partners/disposers in the commercial sector is restricted.

(243) Unlike in the household packaging disposal sector, on the market for commercial packaging and other commercial waste ARGEV is not the completely dominant customer for disposal services. For commercial packaging there are other systems that are also in the market for disposal services. Disposal firms can also offer their collection services to major sources of waste.

(244) Although ARGEV is not the completely dominant customer for disposal services in the commercial sector, the competing collection and recycling systems and major sources of waste in the field of commercial packaging bear no comparison with the ARA system in terms of their economic importance (see paragraph 182). It must therefore be assumed that the exclusive arrangements deny disposal firms not insignificant supply opportunities and therefore have an appreciable impact on the common market for disposal services for commercial packaging.

(245) Since the collection partner agreements provide for a standard contract for the collection of both household and commercial packaging, disposal firms will be able to become ARGEV collection partners for commercial packaging only if they are also able to provide the infrastructure for household collection. Smaller, less powerful disposal firms are thus at a disadvantage in terms of the services they can offer to ARGEV. This kind of arrangement in effect reinforces the restriction of competition just described.

(246) Another important factor in assessing the effects of the exclusivity on competition is the duration of the collection partner agreements. Under the undertaking given by ARGEV, the agreements will have to be put out to tender again after, at most, five years. This means that other suppliers of disposal services are denied significant supply opportunities during that period.

(247) This leads to the conclusion that the exclusive arrangements for the lifetime of the contract do amount to an appreciable restriction of competition under the terms of Article 81(1) of the EC Treaty on the market for the collection and sorting of commercial packaging.

4.2. Restriction of competition through the regional partner agreement between ARGEV and the sorting partners

(248) The sorting partner agreement also covers both the household and commercial sectors.

(249) As regards the exclusive arrangements for the benefit of sorting partners, reference should be made to the observations made above in paragraphs 241 et seq. The outcome is that they do constitute an infringement of Article 81(1) of the EC Treaty.

4.3. Restriction of competition through the agreement between ARO and the collection partners

(250) The agreement between ARO and collection partners for paper and board packaging from the commercial sector contains an exclusive provision for the benefit of the collection partners, subject to the limitation of the five-year maximum contract period under the commitment given. This provision denies excluded suppliers of collection services in the commercial sector access to ARO, a major source of demand. For the collection of paper and board packaging there are, admittedly, other systems on the market which use disposal services. But it is also true for this sector that the competing collection and recycling systems are not comparable with the ARA system in terms of their economic importance (see paragraph 182). It must therefore be assumed that the exclusive arrangements deny disposal firms not insignificant supply opportunities. This amounts to an appreciable restriction of competition on the relevant product market within the meaning of Article 81(1) of the EC Treaty.

5. *Markets for recycling and marketing secondary raw materials*

(251) ARA is active on the market for recycling and marketing secondary raw materials in so far as the BRGs organise the recycling of the material in the packaging collected under the system. ARGEV is responsible for light and metal packaging from households and similar establishments and for plastic, bonded metal, wood, textile and ceramic packaging from commercial sources, while ARO is responsible for packaging made of paper, cardboard, board, and corrugated board from the household and commercial sectors.

(252) The question to be considered is how far the control of the packaging flow embodied in the contracts between ARGEV/ARO and the collection partner has an impact on the recycling and marketing market and whether it is compatible with Article 81(1) of the EC Treaty.

5.1. Agreements between ARGEV/ARO and collection partners

(253) Pursuant to ARGEV's and ARO's agreements with the collection partners, the latter may only dispose of packaging in the manner laid down in the agreement, thus restricting their freedom of choice as regards sorting facilities, transhipment stations and recycling firms (Article 2.5.2 read in conjunction with Article 2.2.5 in ARGEV's agreements and Article 2.8 in ARO's).

(254) Pursuant to the agreement concluded by ARO with local authorities, which mainly relates to the collection of packaging from the household sector, the local authorities are not allowed to dispose of paper packaging in any other manner than that specified by ARO (Article 3.7).

(255) The fact that the flow of packaging is controlled under the contracts between ARGEV or ARO and the collection partners does not restrict the latter's scope for disposal or recycling, since they never acquire ownership of the packaging. ARGEV and ARO have the right to dispose freely of the packaging which they own.

(256) Given the position of the BRGs on the relevant markets for recycling and marketing secondary raw materials, and bearing in mind the structure of those markets, the agreements cannot be said to foreclose the market.

(257) The market share of Ferropack Recycling GmbH for ferrous metal packaging (tinplate and steel) is under 10 %, while ALUREC's market share for aluminium packaging is only 1,7 %. The amount of paper, cardboard, board and corrugated board packaging recycled by ARO each year amounts to 22 % of the total volume for Austria. In view of these low market shares, the arrangements cannot be said to foreclose the market in these categories of material.

(258) Only in the plastics category does the competent BRG, ÖKK, have a 40 % share of the annual recycling market. However, it has to be borne in mind that until the Packaging Ordinance was enacted and the ARA system set up, this type of waste, unlike others such as glass or paper, used to come under the ordinary domestic waste collection and was not collected and recycled separately. The Packaging Ordinance created a new field of enterprise for the collection and recycling of plastic packaging, motivated by environmental concerns. However, most of the plastic packaging collected under the ARA system does not fetch much on the market, and so ÖKK has to pay extra in order to recycle this material in accordance with the Ordinance. In view of the structure of the recycling market in respect of plastic waste, ÖKK's market share cannot be said to constitute a restriction of competition.

(259) Account also has to be taken of the fact that the disposal industry, in so far as it is part of the ARGEV association committee, has no voting rights and is excluded from meetings when legal business is discussed between the recycling BRGs and association members. Consequently the industry cannot exert any influence for its own benefit.

(260) In view of the above, the Commission has concluded that the relevant provisions of the agreement between ARGEV or ARO and the collection partners do not constitute an appreciable restriction of competition within the meaning of Article 81(1) of the EC Treaty on the relevant product market for recycling and marketing secondary raw materials.

5.2. Agreements between ARGEV and BRGs

(261) The contracts between ARGEV and ÖKK/ALUREC also contain an exclusive clause for the latter's benefit, under which ARGEV undertakes not to pass on collected packaging to any third undertaking for the lifetime of the contract. As a result, no other firm can operate in the field of organising recycling for ARGEV. However, this does not rule out performing actual recycling services for the ARA system. The contracts between recycling BRGs and recycling undertakings which actually perform the recycling itself are awarded annually by competitive tender. Furthermore, the small market shares of the recycling BRGs in the overall market for recycling and marketing secondary raw materials tend to suggest that the exclusive clauses do not have the effect of foreclosing the market.

(262) The exclusive clause in the ARGEV's contracts with ÖKK and ALUREC for the benefit of the recycling BRGs does not, therefore, pose an appreciable restriction of competition on the market for the recycling and marketing of secondary raw materials within the meaning of Article 81(1) of the EC Treaty.

Effects on trade between Member States

(263) Since the exclusive obligations in ARGEV's and ARO's collection and sorting partner agreements have a restrictive effect on competition, the question arises whether it is also liable to have an appreciable effect on trade between the Member States.

(264) ARGEV and ARO have concluded exclusive collection partner agreements for 64 contractual areas, thereby establishing a disposal network for the collection of used packaging that covers the whole of Austria. Throughout the lifetime of the contract this makes market access much more difficult for other collection service providers, especially those from other Member States of the European Economic Area. The exclusive arrangement has a very negative impact on the scope for foreign disposal firms to establish themselves in the relevant markets for the collection and sorting of household packaging and commercial waste. Consequently the exclusive arrangement in the collection partner agreement is liable to have an appreciable effect on trade between the Member States.

(265) For the same reasons, the exclusive arrangement contained in the sorting partner agreement is liable to have an appreciable effect on trade between Member States.

Conclusion

(266) Examination of the exclusive arrangement in the collection and sorting partner agreement for the benefit of the undertakings providing collection and sorting services shows that it makes it considerably more difficult for domestic and foreign disposal firms to enter the relevant market and therefore contributes significantly to foreclosure of a substantial part of the common market. The exclusive arrangement contained in the collection and sorting partner agreement is therefore caught by Article 81(1) of the EC Treaty.

X. APPLICATION OF ARTICLE 81(3) OF THE EC TREATY AND ARTICLE 53(3) OF THE EEA AGREEMENT

(267) Since the exclusive arrangement under the collection and sorting partner agreement for the benefit of collection and sorting partners is caught by Article 81(1) of the EC Treaty, it has to be examined whether the provision satisfies the conditions for the application of Article 81(3). In what follows, the potential positive effects arising from the exclusive arrangement of the collection partner agreement, which is prohibited under Article 81(1), will be balanced against the arrangement's restrictive effect on competition.

1. Market for the collection and sorting of used household packaging

1.1. *Regional partner agreement between ARGEV and the collection partners*

Improving production or distribution and promoting technical or economic progress

(268) ARA currently operates the only countrywide collection and recycling system for household packaging in Austria and its business aim is to implement national and Community environmental policy in terms of preventing, reusing and recycling packaging waste. The collection partner agreement is therefore designed to fulfil the requirements of the Austrian Packaging Ordinance and to apply Community Directive 94/62/EC. The purpose of these pieces of legislation is to prevent and mitigate the impact of packaging waste on the environment and thereby to secure a high level of environmental protection.

(269) The collection partner agreements concluded between ARGEV and the collection partners is intended to implement these environmental requirements regarding the collection of used light packaging in operational terms. It is essential in order for ARA and ARGEV to be able to fulfil the obligations they have entered into in connection with their system activities. To this end the collection partner agreement requires the establishment of collection infrastructure that entails a considerable investment (see paragraph 160 et seq.). The regular collection of used sales packaging from final users, broken down by type of reusable material, is therefore a direct means of implementing environmental requirements.

(270) The exclusive arrangement examined allows the contracting parties to undertake the long-term planning and organisation of their services. Since the positive network effects in the area of collecting used light household packaging, as described in paragraph 160, allow considerable economies of scale and scope to be achieved, contracting a single disposal firm for each area for the term of the contract leads to efficiency gains. At the same time ARA/ARGEV, as the service customer, obtains the assurance that its needs will be met regularly and reliably in what is a sensitive sector formerly run by the public authorities.

(271) In view of the above, the Commission has concluded that the exclusive arrangement in favour of collection partners in the service agreements contributes to improving production and promoting technical and economic progress.

Benefits for consumers

(272) The purpose of the collection partner agreement is the practical implementation of a countrywide system for collecting the various types of sales packaging materials from final consumers that come under the ARA system. This is in line with final consumers' past disposal habits and can therefore be described as very consumer-friendly. Secondly, because of the economies of scale and scope described in paragraph 160, the participation of manufacturers and distributors who are subject to the take-back and recycling obligation in a countrywide system dispensing them of that obligation is likely, when viewed realistically, to result in cost savings compared to the option of fulfilling their obligation individually. It can therefore be assumed that, where there is competition on the markets for packaged products, the cost savings attained over the term of the contract will be properly passed on to the consumer.

(273) The Commission has therefore concluded that the collection partner agreement benefits consumers and that they enjoy a fair share of the gains.

Indispensability of the restriction

(274) As its basis for examining the exclusive arrangement contained in the collection partner agreement the Commission took the revised duration of the contracts, as given in undertaking 4 cited at paragraph (139), including re-tendering after five years at most, and concludes that this duration is indispensable.

(275) Assessing whether the exclusive arrangement is indispensable or not depends on the economic and legal circumstances in which the agreement under consideration was made. From ARA's point of view there are management and efficiency considerations, but the prime argument in favour of contracting with only a single partner per disposal region for the entire contract period is to ensure lasting and reliable collection services, which are indispensable for the success of the system as a whole.

(276) Crucial to deciding whether the agreed exclusivity is indispensable is the need for planning and investment certainty for the investment required in order to fulfil the collection partner agreement. To maintain the system, ARA's collection partners have to make substantial investment in setting up and maintaining the collection infrastructure for used packaging. In particular, mention should be made of suitable collection vehicles and containers.

(277) Taking account of the special circumstances involved in implementing the requirements of the Packaging Ordinance and, in that connection, establishing a countrywide take-back and dispensation system, the Commission has reached the conclusion that an exclusive arrangement of at least three years is indispensable on economic grounds. On the other hand, this is no longer the case after a five-year contract period, and for this reason putting the contracts out to tender again after that period, as agreed in the undertaking given, is justified and constitutes a necessary condition of exemption under Article 81(3) of the EC Treaty.

Non-elimination of competition

(278) Even if the market position of the ARA system on the markets concerned is taken into account, the exclusive arrangement in the collection partner agreement is not such as to eliminate competition on the market for the collection and sorting of household packaging.

(279) In assessing whether competition is likely to be eliminated, the specific supply situation on the market in question has to be considered. As described in paragraph 160, the market for the collection and sorting of light packaging accumulated by final consumers is characterised by substantial economic network effects, i.e. economies of scale and scope. From an economic point of view, it is therefore reasonable, within one and the same dispensation system at any rate, for a contract to be concluded with only one disposal firm per area.

(280) While competition between collection service providers within a given disposal area may be unlikely for the reasons described above, there is every chance that the new arrangements under the undertaking given, whereby ARGEV will put its service contracts out to tender again through an open, transparent and objective procedure at the latest once contracts have run for five years, will at least lead to 'competition for disposal areas' in the course of such a tendering procedure. This makes allowance for the special supply situation prevailing in the market for the collection and sorting of household waste.

(281) With regard to demand-side competition on the market for the collection and sorting of household packaging, it has to be borne in mind that it would be almost impossible in practice and in economic terms to duplicate the collection infrastructure in the household sector across the whole of Austria.

(282) First, setting up a further collection system would be uneconomic. The cost of establishing one or even several parallel collection systems would be unacceptably disproportionate in economic terms to the relatively small quantities of reusable waste material obtained from final consumers when entering the market, so that the necessary incentives for competitors to enter the market would be lacking. From a national economic perspective, duplicating systems would simply mean higher costs, while the volume of recyclable waste would not increase significantly if competitors to the ARA system were to enter the market. Firstly, that volume is dependent on consumption by final consumers and, secondly, it is probable that competitors would capture at least some of the ARA system's current customers.

(283) Moreover, setting up another parallel collection system would be truly impossible because of local conditions and final consumers' traditional disposal patterns. In private households there is often no room for additional collection containers for light packaging. Similarly, introducing collection sacks would not bring about any fundamental change, as full sacks take up almost as much space as solid receptacles. The same would apply if an alternative bring-it-yourself system were introduced at the public sites for glass and paper collection containers. This spatial constraint would become especially marked if a third or fourth competitor were to enter the market: whether on private or public sites, there is not enough space for containers belonging to three or four dispensation systems for collecting identical types of material.

(284) Duplication of disposal systems would also give rise to serious problems in terms of acceptance. It would be difficult for final consumers to understand — and contrary to their current habits — if they were expected to collect packaging of the same types of material in different containers. It would also be unclear what criteria final consumers should apply in order to decide what system they should use to dispose of their various types of packaging.

(285) In its comments of 15 January 2003 ([13]), Austria points out that setting up additional containers in the proximity of final consumers had to be ruled out in practice because of lack of space, to protect localities and the countryside, and because of the greater volume of traffic involved (separate trips to empty the containers) and the greater environmental burden. In addition, with collection more complicated and the increased demands placed on consumers to separate their waste, proper separation would be jeopardised. The increased burden on the environment and the heavier demands in terms of separation are considerations that also apply to separate sack collections.

(286) There are, then, substantial practical, legal and economic reservations that militate against setting up either another parallel collection system or an alternative bring-it-yourself system. Because of the special supply situation on the relevant market the containers put in place close to households for used sales packaging often create a competitive bottleneck. Viewed realistically, the likelihood is that dispensation systems entering the market would often collaborate with disposal firms already providing collection services for ARGEV. Free and unhindered access to the collection infrastructure set up is therefore a crucial precondition both for greater competition in terms of demand for collection services and for greater competition on the vertical upstream market for organising the take-back and recycling of used sales packaging from private final consumers.

(287) Competition in terms of demand for collection services for used sales packaging can develop only if ARGEV does not forbid its collection partners from concluding contracts with competitors of the ARA system for shared use of containers. Consequently ARGEV may not prevent its partners from allowing shared use, whether on the basis of specific provisions in the collection partner agreement (see paragraph 230 above) or on any other grounds.

Obligations

(288) Although ARGEV has stated that disposers are not prevented from making space available in the same containers for competing systems, it wishes to impose considerable restrictions in respect of shared use (see undertaking 3, paragraph 139). In view of the key importance of unhindered access to the disposal infrastructure for the development of competition on this market characterised by a special supply situation, it is therefore necessary to impose certain obligations in connection with the present decision. The aim is to ensure that the competitive effects do indeed come about and that competition in terms of demand on this market is made possible, so satisfying the tests of exemption in Article 81(3) of the EC Treaty.

([13]) See Annex, pp. 4 and 5.

(289) ARGEV is instructed not to prevent disposal firms from concluding and fulfilling contracts with competitors of ARA and ARGEV for the shared use of containers or other facilities for the collection and sorting of used sales packaging (obligation (a)).

(290) In addition, ARGEV may only require disposal firms to provide evidence of packaging quantities corresponding to the ARA system's share of the total quantities of packaging licensed by systems in the household sector for given types of material (obligation (b)). ARGEV may not require disposal firms to provide evidence of quantities of packaging that are not collected for the ARA system. This obligation is necessary to ensure that ARGEV does not bind the entire volume of collected packaging to itself and so make it impossible for competitors to meet their quotas, and to ensure that competitors of the ARA system have unrestricted access to the sales packaging collected for them.

(291) In this case ARGEV may reduce the fee provided for in Article 3.1.1 of the collection partner agreement by the proportion indicated in obligation (b). The fees pursuant to Articles 3.1.2 and 3.1.3 of the same agreement are determined by the quantities in respect of which evidence is supplied to ARGEV. This is intended to prevent collection partners from charging ARGEV for services that can be shown to have been performed for third parties. For that reason ARGEV can make a suitable reduction in the fee in respect of its collection partners.

(292) Obligation (b) relates not only to disposal firms that allow shared use but to all disposal firms with which ARGEV has concluded a collection partner agreement. This applies to the extent that a competing system in the particular collection area wishes to obtain shared use under obligation (a) at all and once the system licence has been granted. As a result, disposers are given an incentive to conclude a contract with a competing system, and there is a guarantee that the competing system can then access the packaging quantities, if this is necessary for fulfilling its quota.

(293) These obligations are essential in order to prevent the elimination of competition on the relevant markets; they constitute a clarification of the contractual relationship between ARGEV and its collection and sorting partners that serves to ensure legal certainty. The obligations do not restrict ARGEV's other contracting possibilities vis-à-vis its collection and sorting partners. In particular, they do not obstruct ARGEV's right to determine the categories of materials that are to be collected for it.

(294) ARGEV takes the view that there is no legal basis for these obligations, that they cannot be implemented and are disproportionate, and that they affect the legal position of third parties.

No legal basis

(295) ARGEV again emphasises that there is no exclusive right to the packaging collected in the containers available. Since ARGEV's collection and sorting partner agreements do not therefore restrict competition, the obligation is not valid.

(296) The restriction of competition derives from the exclusive arrangements for the benefit of the collection and sorting partners (paragraphs (229) and (236)). For it to be possible to exempt this restriction, competition must not be eliminated from the market for the collection and sorting of household packaging. Demand-side competition on this atypical market is possible only if ARGEV does not prevent the collection and sorting partners from concluding contracts with competitors of the ARA system for the shared use of containers (paragraphs (281) and (287)). ARGEV, however, does place considerable restrictions on shared use and could obstruct it by so doing (paragraphs (288) and (304) et seq.). The obligation is therefore necessary, if the conditions for exemption are to be restored; the legal basis for the obligation is to be found in Article 8(3)(b) of Regulation No 17.

Impracticability and unreasonableness

(297) ARGEV contends that the obligations are impracticable, since neither it nor the disposers know what the ARA system's share is of the total volume of systems-licensed packaging in the household sector for particular categories of material.

(298) Competing systems will communicate to disposers the licensed quantities for which they are trying to obtain shared use. The disposer will pass that figure in anonymous forms) on to ARGEV. On the basis of this information, ARGEV will be able to calculate its licensing share.

(299) ARGEV also considers the obligations to be unreasonable, since they would inevitably mean it could no longer comply with its authorisation to operate a collection and recycling system. If a competing system licensed additional quantities of waste, ARGEV would not achieve its collection quotas, since the available infrastructure could not automatically absorb more packaging waste. If a new system installed its own collection facilities either wholly or in part, ARGEV would have to accept that the quantities it collected would diminish, although the competing system would have no need at all of the packaging arising in the facilities make available by ARGEV.

(300) Even if the containers were shared, ARGEV would still be able to fulfil its obligations towards the public authorities. The Packaging Ordinance contains no indication that containers should be made available to one system only. Austria has also stated, in its comments of 15 January this year, that the shared use of containers for household collection was basically permissible under the conditions of the licensing system set out in AWG 2002. It will also be noted that the significance attached in the interpretation of the Packaging Ordinance to shared use as a means of stimulating competition on the basis of the Community competition rules should also be taken into account ([14]).

(301) If a competing system licenses additional quantities, this would be reflected in the instructions to such systems regarding the volumes collected. Where appropriate, container capacity would be adjusted in order to receive a larger collection volume. If a competing system does not seek shared use but builds its own collection facilities, the obligations do not apply.

(302) ARGEV also submits that the obligations are grossly prejudicial, since it would receive no compensation for its current optimisation of the collection system, although these services would also proportionately benefit the competitor. Further, it is assumed that the packaging material behaviour of competing systems in the household sector would match that of the ARA system; there is no empirical basis for this, and it is not borne out by previous experience.

([14]) See Commission Decision 2001/463/EC of 20 April 2001 in Case COMP/34493 — DSD, OJ L 319, 4.12.2001, p. 1, paragraph 171.

(303) ARGEV's legitimate interest in ensuring that it is not charged for any services demonstrably supplied by the collection partners to third parties is recognised, because obligation (b) allows ARA to reduce the fee paid to its collection partners by an appropriate amount.

(304) It is not necessary that disposers reimburse ARGEV for any other costs directly attributable to collection, as provided for in undertaking 3(a) (paragraph (139)). The said other costs are system costs, which ARGEV incurs by maintaining its system. As contractual partners of ARGEV, collectors perform certain services and receive remuneration for them. ARGEV's other system costs are not relevant to them and are not covered by the partner agreement. Moreover, where shared use is permitted for disposers, partial passing on would result in a non-calculable financial risk. Competitors do not derive an unjustifiable advantage from this, since they will also incur costs from setting up their own system. Furthermore, it should be possible for competitors to conclude agreements with local authorities direct and in an independent manner on, say, the payment of waste advisers.

(305) Nor is it appropriate for disposers to reimburse ARGEV for costs which the companies in the ARA system or their contractual partners incur as a result of shared use (see undertaking 3(b), paragraph (139)). Such costs are not the reponsibility of the disposers. If disposers were to assume them, they would incur a non-calculable financial risk.

(306) Furthermore, the Commission assumes that shared use does not give rise to any additional analysing and sorting costs. Austria stated, in its comments of 15 January this year, that the quotas should be substantiated by reporting the collection and recycling of those packaging wastes that were covered by the system. In particular, the extent to which the packaging can be technically recycled will be determined by the contents, the size of the labels used and the volumetric proportion of plastic packaging materials. It was therefore necessary to analyse the quantities collected in the individual containers as accurately as possible and subsequently to separate them. This leads to considerably higher costs, estimated at up to 25 % of total costs.

(307) The Packaging Ordinance contains no provision, however, that links quota recording to the collection and recycling exclusively of the packaging belonging to a particular system. Pursuant to Section 11 of the Packaging Ordinance, a collection and recycling system for transport or sales packaging must ensure the collection and recycling of those packaging materials for which contracts have been signed with the packaging manufacturers. Packaging materials are defined in Section 2(6) of the Packaging Ordinance as certain categories of materials from which the packaging is made, e.g. paper and board, glass or plastics.

(308) Further, compulsory shared use would not be practicable where quotas are recorded on the basis only of packaging actually belonging to the system. The principle cannot be made the subject of an obligation therefore. Instead, it should be assumed that the quantities collected per category of materials are divided between the systems in proportion to the quantities licensed per category of materials ([15]). Additional analysing and sorting stages are then not needed. This impact of the obligation should also be taken into account by Austria, since shared use is crucial for stimulating competition as far as interpreting the Packaging Ordinance and issuing licences are concerned.

(309) The mechanism of the obligation, which is dictated by competition law, does not place ARGEV at an unjustifiable disadvantage. There is nothing to indicate that, in the event of shared use, there could be a qualitative change generally in the categories collected. It should be expected, rather, that systems which want to establish themselves in the household sector as major competitors and hence seek to achieve shared use will try to offer contracts across the entire packaging range. The bonus system mentioned by ARGEV as an example focuses on commercial packaging and, in the household sector, operates only on the periphery of the market at quite specific sources (see paragraph (179)). Moreover, when granting licences in accordance with the current tariffs, the ARA system too distinguishes only by category of material and size of packaging, not by content or industry.

Encroachment on the rights of third parties

(310) Lastly, ARGEV claims that the obligations restrict disposal partners' rights, since their volume-dependent remuneration might be reduced if they find no other interested partners, and since they would then have to accept a proportionate reduction in the remuneration for providing containers. While this would basically be legitimate, disposers should at least have an opportunity to give their opinion.

(311) Obligation (b) relates to all disposers, so that — assuming shared use is indeed the objective — disposers have an incentive to contract with competing systems. Where a disposer decides to allow shared use, the obligations will not affect it more than the conditions provided for in undertaking 3 (see undertaking 3(a) and (b), paragraph (139)).

(312) Disposal partners were given an opportunity to express their opinion before the decision was adopted. The Association of Austrian Disposal Companies (Verband Österreichischer Entsorgungsbetriebe — VÖEB) commented on behalf of the majority of collection and sorting partners that it was in favour of shared use. It considers, however, that obligation (b) imposes administrative costs on disposers and could lead to a reduction in the remuneration of those disposers which have not concluded contracts with alternative system operators.

(313) As explained in paragraph (298), the competing system will communicate to the disposer the licensed quantity, which the disposer then passes on to ARGEV. This does not involve excessive expense for the disposer. It would also be conceivable, however, for both ARGEV and disposers to notify licensed quantities to an independent agency, which determines the licensed shares. Remuneration will be reduced only if the competing system seeks to obtain shared use in the particular collection region and only once it has been granted a licence (see paragraph (301)).

(314) The VÖEB also points out that the collection and sorting infrastructure is provided in part by the municipalities. It considers that the competing system should share the use of all the infrastructure facilities necessary for collection and sorting, irrespective of who provides them. Dividing into quantities can take place only after sorting.

([15]) Further subdivision by specific types of packaging within each category of materials would be conceivable if they were treated separately at the licensing, collection and/or sorting stages.

(315) The obligations concern the relation between ARGEV and collection and sorting partners. A competing system has to create the conditions for shared use within its area of responsibility. Dividing into quantities after sorting seems particularly appropriate, if a category of material is further subdivided by types of packaging and these are separated only after sorting (see paragraph (308)).

1.2. *Agreement between ARGEV and the sorting partners*

Conditions of exemption

(316) The exclusive arrangements in the sorting partner agreement likewise satisfy, for the reasons given, the tests of exemption, taking into account the obligation attached to exemption. Sorting partners must make a considerable investment in order to build/expand sorting infrastructure for light packaging. The separation of light packaging by reusable materials is technically demanding. The necessary investment for construction and expansion can be used for other sorting processes to a limited extent only.

Obligation

(317) Although ARGEV has stated that disposers are not prevented from making sorting facilities available to competing systems, it would like to make shared use conditional on substantial restrictions (see undertaking 3, paragraph (139)). The Commission therefore considers it necessary, since unimpeded access to sorting facilities is important for stimulating competition, to attach the following obligation to this Decision: ARGEV should not prevent disposers from concluding and fulfilling contracts with competitors of the ARA system for the shared use of facilities for the sorting of used sales packaging. Reference is made to the explanations concerning ARGEV's collection partner agreements. Here too, the obligation is meant to ensure that the effects on competition actually occur, demand-side competition actually becomes possible on this market and, hence, the tests of exemption in Article 81(3) of the EC Treaty are satisfied.

(318) The ARA system's competitors rely on shared use of sorting facilities for fulfilling their sorting and recycling obligations, in particular when they take up their activity. The construction of new sorting facilities would require large investment, which would constitute a not inconsiderable entry barrier for them. The introduction of competition on the market for disposal services would at least be considerably delayed. Further, because they can offer their services to competitors of the ARA system, ARA sorting partners are able to benefit from the scale and scope effects on the market for sorting sales packaging arising at private final consumers.

2. **Market for the collection and sorting of commercial packaging**

2.1. *Collection partner agreement between ARGEV and the collection partners*

(319) Since, in the commercial packaging field as well, the exclusive provision for the benefit of collection partners in the collection partner agreement is also caught by Article 81(1) of the EC Treaty, it has to be examined whether the provision satisfies the tests for the application of Article 81(3).

Improving the production or distribution of goods or promoting technical or economic progress

(320) In the commercial sector too, ARA provides a country-wide collection and recycling system for packaging in Austria, which is governed by the Packaging Ordinance and the Austrian Waste Management Act; these transpose Directive 94/62/EC. The Directive applies to household packaging and commercial packaging. The regular collection of used packaging in the commercial sector broken down by specific categories of reusable material therefore promotes the direct application of environmental provisions.

(321) As in the household sector, the exclusive arrangements examined enable the contract partners to plan and organise for the long term the services they supply. Expanding the logistics for the collection of commercial packaging and waste requires a not inconsiderable investment. A certain period for amortisation is necessary in order to stimulate such investment. Even if in the commercial packaging sector the network effects are less than in household packaging, economies of scale and scope that lead to efficiency gains can be achieved by commissioning a single disposer for the duration of the contract. With regard to the obligations assumed by the packaging manufacturers pursuant to the Packaging Ordinance, it is important for the ARA system as a services customer to ensure some planning certainty so that demand can be satisfied on a regular, reliable basis. Planning certainty thus ensures that all parties involved will reliably meet their obligations under the Packaging Ordinance.

(322) The Commission therefore concludes that the exclusive arrangements for the benefit of the collection partners in the service contracts help to improve the production of goods and promote technical or economic progress.

Advantages for the consumer

(323) The collection partner agreement seeks to give practical effect to the countrywide collection, differentiated by reusable material, of ARA-system sales packaging, including that from the large-business and industrial sector.

(324) For the purposes of Article 81(3) of the EC Treaty, consumers are not just final consumers of the services provided but all direct or indirect customers for the products or services in question, including firms in the large-business and industrial sector. The collection partner agreement benefits these, since it ensures regular disposal in compliance with the Ordinance of the packaging accumulating at them.

(325) The Commission therefore concludes that the collection partner agreement allows consumers a fair share of the resulting benefit within the meaning of Article 81(3) of the EC Treaty.

Indispensability of the restriction

(326) As its basis for examining the exclusive arrangements contained in the collection partner agreement the Commission took, for the commercial sector as well, the revised duration of the contract, as given in undertaking 4 cited at paragraph (139), including re-tendering after five years at most, and concludes that this duration is indispensable.

(327) The assessment of whether the exclusive obligation is indispensable depends on the economic and legal circumstances in which the agreement was concluded. Crucial to the assessment is planning and investment certainty for the investment needed to fulfil the collection partner agreement. In the commercial sector, regional take-back centres and a collection system have to be set up, and the logistics of collection-rounds have to be agreed. The collection partner is therefore dependent on being able to plan its investment and operations for a definite period. Likewise, from ARA's point of view, in order to provide a sustainable, reliable collection service for commercial packaging, it is indispensable for the success of the system as a whole to commission only one collection partner per disposal area for the ARA system during the lifetime of the contract. In the commercial sector, while the necessary investment for building and expanding the infrastructure is not so large as in the household sector, the restraint of competition resulting from the exclusive obligation is less, because ARGEV's buyer power is limited. Where a contract's term is a minimum of three years and a maximum of five, an exclusive obligation is indispensable in the commercial sector as well. After five years, however, this is no longer the case, which is why a new invitation to tender within the meaning of the undertaking is justified and is also essential for an exemption under Article 81(3) of the EC Treaty.

Non-elimination of competition

(328) Even in the context of ARGEV's position on the markets in question, the exclusive obligation in the collection partner agreement is not likely to eliminate competition on the market for the collection and sorting of household packaging.

(329) The suppliers of collection services excluded by ARGEV can offer their disposal activities both to other collection and recycling systems in the commercial sector and to self-disposal systems and large sources.

(330) In the commercial sector too, care should be taken to see that disposers are allowed to collect licensed packaging in their containers from competitors of the ARA system and that, in contrast to the household sector, joint collection is already taking place.

(331) It remains to examine what the effects on competition are of linking the collection service for commercial packaging to the collection of packaging in the household sector. In such circumstances a firm may become a collection partner of ARGEV's in the commercial sector, only if it is able to make the necessary investment in setting up a collection infrastructure for the household sector. However, even the requirement to provide an infrastructure for the household sector in order to become an ARGEV collection partner in the commercial sector does not lead to elimination of competition on the market for commercial packaging and other commercial waste. Disposal companies that are not able to set up a suitable infrastructure for household collection can, as already explained, offer their collection services to other collection and recycling systems, for whom it is not necessary to set up a collection infrastructure for the household sector, and to self-disposers and large sources.

(332) It should also be noted that the ARA system has put out separate tenders for the disposal of different categories of material, so that bidders can offer their services for specific categories in a limited fashion. In the commercial sector this applies in particular to light packaging and paper and board packaging.

(333) The residual competition will thus not be eliminated by the exclusive obligation from the common market for the collection of commercial packaging and other commercial waste.

(334) The tests of exemption pursuant to Article 81(3) of the EC Treaty are consequently satisfied where the term of the contract is between three and five years.

2.2. *Sorting partner agreement between ARGEV and the sorting partners*

(335) For the reasons described, in view of the competitive conditions on the market for sorting commercial waste, the exclusive obligation in the sorting partner agreement also satisfies the tests of exemption.

2.3. *Agreement between ARO and the collection partners*

(336) The exclusive obligation in the agreement between ARO and the collection partners ensures a degree of planning and investment certainty for the disposal companies involved and, hence, that all parties involved regularly and reliably fulfil their obligations under the Packaging Ordinance. A contractual term of three to five years is to be regarded as necessary, given the significance of the restriction of competition resulting from the exclusive obligation. For the reasons given (paragraphs (329) to (332)), competition is not excluded on the market concerned. Thus the tests of exemption under Article 81(3) are satisfied where the term of the contract is, at most, five years.

XI. **RETROACTIVE EFFECT, DURATION OF THE EXEMPTION, OBLIGATIONS**

(337) The collection and sorting partner agreements of ARGEV and ARO were notified to the EFTA Surveillance Authority on 30 June 1994 and transferred to the Commission in accordance with Article 172(3) of the Act of Accession. The amended versions of the collection and sorting partner agreements were notified to the Commission on 28 August 2001. The Commission finds that since the date of their notification the collection and sorting partner agreements satisfy the tests for the application of Article 81(3) of the EC Treaty.

(338) Under Article 8(1) of Regulation No 17, exemptions must be issued for a specified period and conditions and obligations may be attached thereto. Pursuant to Article 6 of the Regulation, the date from which such a decision takes effect may not be earlier than the date of notification in accordance with Article 81(1) and (3) of the EC Treaty. The exemption should apply from the entry into force of ARGEV's and ARO's current collection partner agreements until 31 December 2006, in order to give ARA, ARGEV, ARO and the disposers sufficient legal certainty under the Community's competition rules to protect their investment.

(339) To ensure access by third parties to the disposal facilities of ARGEV's and ARO's collection and sorting partners and to prevent the elimination of competition on the relevant markets, the obligations mentioned should be communicated to ARGEV. The obligations are essential for preventing the elimination of competition on the relevant markets. They will remain in force for the duration of the exemption. Pursuant to Article 8(3)(b) of Regulation No 17, the Commission may revoke this Decision if the parties do not fulfil the obligations.

(340) This Decision is without prejudice to the application of Article 82 of the EC Treaty.

(341) This Decision is issued, furthermore, irrespective of any pending or future Commission proceedings against the Packaging Ordinance or other State provisions,

HAS ADOPTED THIS DECISION:

Article 1

In the light of its current knowledge, and taking account of the undertakings given by Altstoffrecycling Austria AG (ARA), ARGEV Verpackungsverwertungs-Gesellschaft mbH (ARGEV) and Altpapier-Recycling Organisationsgesellschaft mbH (ARO), the Commission finds that it has no reason pursuant to Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement to proceed against the dispensation and licence agreements between ARA and the firms covered by the Austrian Packaging Ordinance, the waste disposal contract between ARA and the BRGs, the disposal or cooperation contract between ARGEV and the BRGs, or against the contract between ARO and the local authorities.

Article 2

The provisions of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement are declared to be inapplicable, pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, to individual collection and sorting contracts of ARGEV and ARO with their respective regional disposal partners which contain an exclusive obligation and expire at the latest on 31 December 2006.

The exemption shall run from 30 June 1994 to 31 December 2006.

Article 3

The exemption in Article 2 is conditional on the following obligations:

(a) ARGEV does not prevent disposers from concluding and fulfilling contracts with competitors of the ARA system for the shared use of containers or other facilities for the collection and sorting of used sales packaging arising at households;

(b) ARGEV may ask disposers for evidence only of those packaging quantities that correspond to the ARA system's share of the total packaging quantities licensed by systems in the household sector for specific categories of material. In that case it may reduce the remuneration in accordance with point 3.1.1 of the collection partner agreement in the proportion mentioned in the first sentence of this point. As regards the remuneration referred to in points 3.1.2 and 3.1.3 of the collection partner agreement, the quantities reported to ARGEV shall be authoritative. This obligation relates to all disposers with whom ARGEV has concluded a collection partner agreement.

Article 4

This Decision is addressed to the following firms:

Altstoffrecycling Austria AG
Mariahilfer Straße 123
A-1062 Vienna

ARGEV Verpackungsverwertungs-GmbH
Lindengasse 43/12
A-1071 Vienna

Altpapier-Recycling Organisationsgesellschaft mbH
Gumpendorfer Straße 6
A-1061 Vienna

Done at Brussels, 16 October 2003.

For the Commission

Mario MONTI

Member of the Commission