

JUDGMENT OF THE COURT (Grand Chamber)

16 July 2009\*

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\* Language of the case: German.

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In Case C-385/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 8 August 2007,

**Der Grüne Punkt — Duales System Deutschland GmbH**, established in Cologne (Germany), represented by W. Deselaers, E. Wagner and B. Meyring, Rechtsanwälte,

applicant,

the other parties to the proceedings being:

**Commission of the European Communities**, represented by W. Mölls and R. Sauer, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

I - 6221

supported by:

**Interseroh Dienstleistungs GmbH**, established in Cologne, represented by W. Pauly, A. Oexle and J. Kempkes, Rechtsanwälte,

intervener on appeal,

**Vfw GmbH**, established in Cologne, represented by H. Wissel, Rechtsanwalt,

**Landbell AG für Rückhol-Systeme**, established in Mainz (Germany), represented by A. Rinne and M. Westrup, Rechtsanwälte,

**BellandVision GmbH**, established in Pegnitz (Germany), represented by A. Rinne and M. Westrup, Rechtsanwälte,

interveners at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, M. Ilešič (Rapporteur), J.-C. Bonichot and T. von Danwitz, Presidents of

Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, A. Arabadjiev, C. Toader and J.-J. Kasel, Judges,

Advocate General: Y. Bot,  
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 9 December 2008,

after hearing the Opinion of the Advocate General at the sitting on 31 March 2009,

gives the following

### **Judgment**

- 1 By its appeal, Der Grüne Punkt — Duales System Deutschland GmbH ('DSD') seeks to have set aside the judgment of the Court of First Instance of the European Communities of 24 May 2007 in Case T-151/01 *Duales System Deutschland v Commission* [2007] ECR II-1607 ('the judgment under appeal'), by which that court rejected its application for the annulment of Commission Decision 2001/463/EC of 20 April 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP D3/34493 — DSD) (OJ 2001 L 166, p. 1) ('the decision at issue').

## Legal context

### *German legislation*

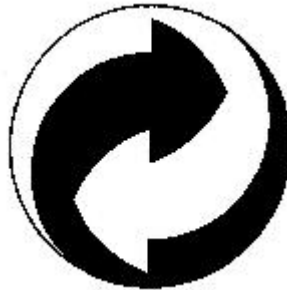
- 2 On 12 June 1991, the German Government adopted the Ordinance on the avoidance of packaging waste (Verordnung über die Vermeidung von Verpackungsabfällen, BGBl. 1991 I, p. 1234); the revised version, which is applicable in the present proceedings, entered into force on 28 August 1998 ('the Packaging Ordinance'). The ordinance is intended to reduce the environmental impact of packaging waste and to that end requires manufacturers and distributors of packaging to take back and recover used sales packaging outside the public waste disposal system.
  
- 3 In particular, manufacturers and distributors are obliged to take back free of charge used sales packaging covered by the Packaging Ordinance at or in the immediate vicinity of the actual point of sale and to recover it ('the self-management solution'). The consumer's attention must be drawn to that possibility by means of clearly visible signs.
  
- 4 However, the Packaging Ordinance exempts manufacturers and distributors from the obligation to collect and recover individual waste where they participate in a system which guarantees the regular collection, throughout the distributor's sales territory, of used sales packaging from the final consumer or in the vicinity of the final consumer's home in order for it to be recovered ('the exemption system'). Manufacturers and distributors participating in an exemption system are exempted from their collection and recovery obligations in respect of all packaging covered by that system and must make it known that they are participating in such a system by marking packaging or by other suitable means. They can thus make such participation known on the packaging or use other measures, such as informing customers at the point of sale or by means of a package leaflet, for example.

- 5 Exemption systems must be approved by the competent authorities in the *Länder* concerned. In order to be approved, those systems must, inter alia, cover the territory of at least one *Land*, provide regular collections in the vicinity of consumers' homes and be based on a written agreement entered into with the local bodies responsible for waste management. Any undertaking which satisfies those conditions in a *Land* may organise an exemption system in that *Land*.
- 6 Since 1 January 2000, both exemption systems and manufacturers and distributors who have opted for a self-management solution have been subject to the same recovery rates. Those rates, which are laid down in Annex I to the Packaging Ordinance, vary depending on the packaging material. Compliance with the collection and recovery obligations is ensured, in the case of self-management solutions, by certificates issued by independent experts and, in the case of exemption systems, by the provision of data on the quantities of packaging collected and recovered.

*DSD's exemption system, the Trade Mark Agreement and the Service Agreement*

- 7 DSD is a company which has operated an exemption system throughout Germany since 1991 ('the DSD system'). For that purpose, DSD was approved by the competent authorities of all the *Länder* in 1993.
- 8 The relationship between DSD and the manufacturers and distributors which participate in its system is governed by an agreement which covers the use of the 'Der Grüne Punkt' logo ('the Trade Mark Agreement'). By entering into that agreement, the participating undertaking is authorised, in return for a fee, to affix the 'Der Grüne Punkt' logo ('the DGP logo') to packaging included in the DSD system.

- 9 DSD registered the DGP logo, which appears below, as a trade mark in 1991 with the German Patents and Trade Marks Office:



- 10 As regards the use of the DGP logo outside Germany, in particular in the other Member States of the European Community, DSD has assigned its rights to use the logo in the form of a general licence in favour of Packaging Recovery Organisation Europe SPRL (ProEurope), whose seat is in Brussels (Belgium).
- 11 Within Germany, clause 2 of the Trade Mark Agreement provides that DSD is to be responsible on behalf of the undertakings which participate in its system for the collection, sorting and recovery of the packaging which those undertakings decide to have processed by the DSD system, thereby relieving them of their obligation to collect and recover that packaging. To that end, clause 3(1) of the agreement provides that the participating undertakings are required to notify the types of packaging which they wish to process through the DSD system and to affix the DGP logo on each item of packaging belonging to those types and intended for domestic consumption in Germany.



- 12 Under the provisions of the Trade Mark Agreement in force at the date of the facts which gave rise to the present case, users of the DGP logo paid DSD a fee for all packaging carrying that logo which they distributed in Germany pursuant to that agreement. Clause 4(1) of the agreement provided that exceptions to that arrangement were to be the subject of a separate written agreement. Clause 5(1) of the agreement also stated that a fee was payable in respect of all packaging bearing the DGP logo and distributed by the user of that logo in Germany.
- 13 The amount of that fee was determined on the basis of two factors, namely (i) the weight of the packaging and the type of material used and (ii) the volume or surface area of the packaging. By virtue of clause 4(2) and (3) of the Trade Mark Agreement, the fees did not include any profit element and were intended solely to cover the costs of collection, sorting and recovery and the associated administrative costs.
- 14 Under the DSD system, packaging bearing the DGP logo may be collected either in special bins and divided into metal, plastic and composite materials, or in containers placed close to private households (in particular for paper and glass), while residual waste must be put into the bins provided by the public waste disposal system.
- 15 However, DSD neither collects nor recovers used packaging itself, but sub-contracts that service to local collection undertakings. The relationship between DSD and those undertakings is governed by a standard-form agreement, amended on a number of occasions, which aims to create and operate a system to collect and sort packaging ('the Service Agreement'). Under that agreement, which has been entered into between DSD and 537 local undertakings, each of those undertakings has the exclusive power to carry out, in a particular area, the collection of packaging on DSD's behalf. Once sorted, that packaging is transported to a recycling centre for it to be recovered.
- 16 The Service Agreement was the subject of Commission Decision 2001/837/EC of 17 September 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Cases COMP/34493 — DSD, COMP/37366 — Hofman + DSD, COMP/37299 — Edelhoff + DSD, COMP/37291 — Rethmann + DSD,

COMP/37288 — ARGE and five other undertakings + DSD, COMP/37287 — AWG and five other undertakings + DSD, COMP/37526 — Feldhaus + DSD, COMP/37254 — Nehlsen + DSD, COMP/37252 — Schönmakers + DSD, COMP/37250 — Altvater + DSD, COMP/37246 — DASS + DSD, COMP/37245 — Scheele + DSD, COMP/37244 — SAK + DSD, COMP/37243 — Fischer + DSD, COMP/37242 — Trienekens + DSD, COMP/37267 — Interseroh + DSD) (OJ 2001 L 319, p. 1). By judgment of the Court of First Instance of 24 May 2007 in Case T-289/01 *Duales System Deutschland v Commission* [2007] ECR II-1691, which was not the subject of an appeal before the Court of Justice, DSD's action for annulment of Decision 2001/837 was dismissed.

*Directive 89/104/EEC*

- 17 Article 5(1) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1) provides:

‘The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

- (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;
- (b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark.’

18 Article 8 of that directive states:

‘1. A trade mark may be licensed for some or all of the goods or services for which it is registered and for the whole or part of the Member State concerned. A license may be exclusive or non-exclusive.

2. The proprietor of a trade mark may invoke the rights conferred by that trade mark against a licensee who contravenes any provision in his licensing contract with regard to its duration, the form covered by the registration in which the trade mark may be used, the scope of the goods or services for which the licence is granted, the territory in which the trade mark may be affixed, or the quality of the goods manufactured or of the services provided by the licensee.’

19 Directive 89/104 was repealed by Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25), which came into force on 28 November 2008. Having regard to the date of the facts, however, the present case continues to be governed by Directive 89/104.

## **Background**

20 On 2 September 1992, DSD notified the Trade Mark Agreement and the Service Agreement to the Commission of the European Communities with a view to obtaining negative clearance or, failing that, a decision granting exemption.

- 21 Following publication in the *Official Journal of the European Communities* of 27 March 1997 (OJ 1997 C 100, p. 4) of the notice in which it announced its intention to take a favourable view of the agreements notified, the Commission received observations from third parties concerning, in particular, various aspects of the application of the Trade Mark Agreement. In particular, those third parties complained of the distortion of competition which might arise if an undertaking were charged twice as a consequence of participating in the DSD system and the system of another service provider.
- 22 On 15 October 1998, DSD submitted to the Commission a series of commitments aimed at preventing manufacturers and distributors of packaging which participated in the DSD system from having to pay twice where they participated in a different exemption system operating at regional level. In particular, DSD envisaged the situation in which exemption systems, restricted to one or more *Länder*, were set up alongside the DSD system. In that case, packaging of the same type and of the same distributor or manufacturer could be taken back, in those *Länder*, by one of the new exemption systems and, in the other *Länder*, by the DSD system. DSD gave the following commitment in that regard:

‘On condition that regional alternative systems to [the DSD system] are created and are formally approved by the highest authorities of the *Land* [in accordance with the] Packaging Ordinance, [DSD] is prepared to apply the Trade Mark Agreement in such a way that licensees are able to participate in such a system as regards some of their packaging. [DSD] will not charge a licence fee under the Trade Mark Agreement for packaging that can be shown to be covered by such an alternative system. A further condition for release from the licence fee obligation in respect of packaging bearing the [DGP logo] is that protection of the [DGP trade mark] should not be impaired.’

- 23 On 3 November 1999, the Commission expressed the view that the series of commitments given by DSD on 15 October 1998 should also include self-management solutions used for the processing of some of the packaging and not be restricted only to exemption systems.

- 24 On 15 November 1999, certain manufacturers of packaging addressed a complaint to the Commission. They claimed that the Trade Mark Agreement prevented the setting up of a self-management solution for taking back packaging. They considered that the use of the logo, where the waste processing service has not actually been provided by DSD, constituted an abuse of a dominant position on the part of DSD.
- 25 By letter of 13 March 2000, DSD submitted two further commitments to the Commission. The first concerned the case where manufacturers and distributors of packaging opted for a self-management solution for some of their packaging and participated in the DSD system for the remainder. In that case, DSD undertook not to charge a fee under the Trade Mark Agreement for the part of the packaging taken back by the self-management solution, on condition that it was provided with evidence in respect of the latter type of collection.
- 26 On 3 August 2000, the Commission sent a statement of objections to DSD, to which DSD responded by letter of 9 October 2000.
- 27 On 20 April 2001, the Commission adopted the decision at issue.

### **The decision at issue**

- 28 Recital 20 to the decision at issue states that it was apparent from the observations of the German authorities that a combination of a self-management solution and an exemption system is possible with participation in an exemption system applying only to a certain quantity of a packaging product ('mixed systems'). The decision also notes, at recital 23, that it was clear from a reply of the German authorities that the Packaging Ordinance does not mean that the establishment of only one system is possible. It was not the legislature's intention that only one system should be created in Germany or in each *Land*.

- 29 At recital 95, the decision at issue also takes as its starting point the fact, not disputed by DSD, that that undertaking holds a dominant position which, at the time of the adoption of the decision, consisted in the fact that it was the only undertaking to offer an exemption system throughout Germany and that the DSD system collected some 70% of sales packaging in Germany and some 82% of sales packaging collected from final consumers in Germany.
- 30 According to recitals 100 to 102 to the decision at issue, the abuse of a dominant position is based on the fact that the fee charged by DSD to manufacturers and distributors who participate in the DSD system is tied not to the actual use of that system but is calculated on the basis of the number of packages bearing the DGP logo which those manufacturers and distributors put into circulation in Germany. Manufacturers and distributors participating in the DSD system are required to affix the DGP logo to all packaging notified to DSD and intended for consumption in Germany. The investigation carried out by the Commission led to the conclusion that the method of calculation of the fee paid to DSD constitutes an obstacle to the desire of certain packaging manufacturers who are customers of the DSD system to be able to make use of their own self-management solution or of another exemption system in respect of some of the packaging put into circulation by them.
- 31 According to recitals 103 to 107 to the decision at issue, the solution proposed by DSD, namely not to affix the DGP logo to packaging that is not covered by the DSD system, is economically unrealistic. Such a solution would require selective labelling of packages (with, or without, the DGP logo), which would lead to considerable additional costs. In addition, such a solution would require packaging manufacturers and distributors using mixed systems to ensure that packaging carrying the DGP logo was disposed of at outlets where it would be collected by the DSD system and that packaging without that logo was disposed of at outlets where it would be collected by other systems, something which would be impossible in practice. Lastly, having regard to the fact that often it is only after having bought the packaged product, or sometimes after using it, that the final consumer will decide whether to dispose of the packaging in an exemption system close to his home or to bring it back to the place where he bought it in order to deposit it in a self-management solution, it would be impossible to determine correctly whether sub-quantities should be marked with the DGP logo or not.

32 At recitals 111 to 115 to the decision at issue, the Commission states that the effects of the abuse of a dominant position are twofold. First, by making the licence fee dependent solely on the use of the DGP logo, DSD imposes unreasonable prices and unfair commercial terms on undertakings which do not use its service or which use it in respect of only some of their packaging. The excessive difference between the cost of supplying the service and the price charged gives rise to the exploitative abuse of a dominant position within the meaning of point (a) of the second paragraph of Article 82 EC. Secondly, given the fee system laid down by the Trade Mark Agreement, it is of no interest to undertakings subject to the collection and recovery obligation to participate in a competing self-management solution or a competing exemption system, because those undertakings would either have to pay a licence fee to DSD in addition to the remuneration paid to the competitor, or to establish separate packaging and distribution channels. The fee system thus makes it more difficult for competitors of the DSD system to enter the market.

33 At recitals 143 to 153 to the decision at issue, the Commission states that the finding that a dominant position has been abused is not invalidated by the need to preserve the distinctive character of the DGP logo. In that regard, the decision at issue states that the essential function of the logo is fulfilled when it signals to the consumer that he has the option of having the packaging processed by DSD.

34 At recitals 155 to 160 to the decision, the Commission states that trade between Member States is likely to be appreciably affected by the abuse of a dominant position as a result of the licence fee terms at issue, having regard to the particular circumstances in which packaging is collected and recovered in Germany and in the common market.

35 The result of the Commission's appraisal of the case under Article 82 EC is set out in Article 1 of the decision at issue, which is worded as follows:

“The conduct of [DSD], in requiring, under the first sentence of Article 4(1) and the first sentence of Article 5(1) of the Trade Mark Agreement, payment of a licence fee for the total quantity of sales packaging carrying the [DGP logo] and put into circulation in

Germany is incompatible with the common market even where undertakings subject to the obligations arising out of the Packaging Ordinance:

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

<sup>36</sup> Having established that an abuse of a dominant position existed, in recitals 161 to 167 to the decision at issue and in Articles 2 to 7 of that decision, the Commission specified, pursuant to Article 3(1) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87), the way in which DSD was to put an end to the infringement that had been established.

<sup>37</sup> The principal measure imposed on DSD was the requirement not to charge any licence fee for quantities of packaging put into circulation in Germany carrying the DGP logo for which the exemption service is not used and for which the obligations imposed by



Packaging Ordinance have demonstrably been fulfilled in another way. The measure in question is laid down in Article 3 of the decision at issue, which provides:

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

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

<sup>38</sup> In Article 5 of the decision at issue, the Commission specifies the evidential requirements to be satisfied in the following cases:

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

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

...

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

...'

39 Article 4 of the decision at issue states:

'1. In the case of packaging which is collected and recovered in another Member State under a system using the [DGP logo] and which is put into circulation using the [logo] in the territory covered by the Packaging Ordinance, DSD shall not charge a licence fee if the requirements of the Packaging Ordinance have demonstrably been met otherwise than through participation in the system set up by DSD ...

...'

**The proceedings before the Court of First Instance and the judgment under appeal**

40 By application lodged at the Registry of the Court of First Instance on 5 July 2001, DSD brought proceedings for the annulment of the decision at issue.

41 By a separate document, lodged on the same day, the applicant also submitted an application under Article 242 EC to suspend the operation of Article 3 of that decision, and Articles 4 to 7 thereof in so far as they refer to Article 3, until the Court of First Instance gave a ruling on the substance.

42 By order of 15 November 2001 in Case T-151/01 R *Duales System Deutschland v Commission* [2001] ECR II-3295, the President of the Court of First Instance rejected the application to suspend the operation of the decision at issue.

43 By order of 5 November 2001, the Court of First Instance granted the applications of Vfw AG (since renamed Vfw GmbH) ('Vfw'), Landbell AG für Rückhol-Systeme ('Landbell') and BellandVision GmbH ('BellandVision') for leave to intervene in support of the form of order sought by the Commission. Those undertakings, which are competitors of DSD, submitted their observations on 7 February 2002.

44 The final written submissions were lodged on 27 May 2002. The parties were notified of the end of the written procedure on 9 September 2002.

45 In June 2006, the Court of First Instance decided to open the oral procedure. By way of measures of organisation of procedure, it sent the parties a number of questions, to be replied to orally at the hearing. Those questions related to the different stages of the process for collecting and recovering packaging and to the conditions in which

competition between self-management solutions and exemption systems might exist. The Court also invited the Commission to produce a document provided by the German authorities during the administrative procedure. On 26 June 2006, the Commission lodged that document.

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

47 By the judgment under appeal, the Court of First Instance dismissed the action before it and ordered DSD to bear its own costs and those incurred by the Commission, Landbell and BellandVision, including those relating to the interlocutory proceedings. It ordered Vfw, which had not applied for DSD to bear the costs, to bear its own costs, including those relating to the interlocutory proceedings.

48 DSD had put forward three pleas in law alleging, first, infringement of Article 82 EC, secondly, infringement of Article 3(1) of Regulation No 17 and of the principle of proportionality and, thirdly, infringement of Article 86(2) EC.

49 By its first plea, DSD maintained that the disputed provisions of the Trade Mark Agreement had been necessary in order to ensure the attainment of the objectives of the Packaging Ordinance, that is to say, preserving the different functions of the Der Grüne Punkt trade mark ('the DGP mark') and to enable the DSD system to function properly.

50 In reply to the various arguments put forward by DSD under this plea, the Court of First Instance held in particular at paragraphs 139 and 154 of the judgment under appeal that

it was possible for a manufacturer or a distributor of packaging to use a number of systems at the same time in order to comply with the recovery rates:

‘139 ... the manufacturer or distributor of packaging does not transfer to DSD a set number of items of packaging intended to bear the [DGP logo], but rather a quantity of material which that manufacturer or distributor is going to market in Germany and whose taking back and recovery he intends to entrust to the DSD system. It is therefore possible for a manufacturer or distributor of packaging to use mixed systems in order to comply with the recovery rates laid down in the [Packaging Ordinance].

...

154 In that regard, it should be pointed out that it is not stated in the [Packaging Ordinance] that the [DGP logo] may not be affixed to packaging collected in the context of a competitor exemption system or a self-management solution if they comply, in addition, with the conditions laid down in the [Packaging Ordinance] to identify the system used in conjunction with the DSD system. Such indications may be cumulative and the same piece of packaging may thus be covered by several systems at the same time. It is with that in mind that the Commission rightly interprets the transparency requirement defined by the German authorities in their observations, namely that it is necessary to clearly define, in the interests of the consumer and of the authorities, which packaging is subject to the take-back obligation at or in the immediate vicinity of the points of sale and which is not. ...’

51 The Court of First Instance also held at paragraph 156 of the judgment under appeal that ‘the fact that, in the case of shared use of two exemption systems, the [DGP logo] and the indication by a “suitable means” of another exemption system ... feature on the same packaging, and the fact that, in the case of shared use of the DSD system and a self-management solution, the [DGP logo] and an indication that it is possible to return the

packaging to the shop appear on the same packaging, does not adversely affect the essential function of [the DGP mark]’.

52 At paragraph 163 of its judgment, the Court of First Instance added that ‘as regards the arguments concerning the need to respect the proper functioning of the DSD system ..., ... the proper functioning of that system is not called into question in the case of mixed systems. In any event, the specific needs of the functioning of the DSD system cannot justify the applicant’s conduct, described in the *BäKo* judgment of the Bundesgerichtshof and the *Hertzel* judgment of the Oberlandesgericht Düsseldorf, cited by the Commission ..., the various complaints put forward by the Commission ... and DSD’s initial submission in its application ..., whereby it requires payment of a fee for all packaging carrying the [DGP logo] and put into circulation in Germany, even where it is proved that some of that packaging has been taken back and recovered by another exemption system or a self-management solution’.

53 The Court of First Instance held at paragraph 164 of the judgment under appeal that ‘neither the Packaging Ordinance, nor trade mark law or the specific needs of the functioning of the DSD system authorise [DSD] to require undertakings which use its system to pay a fee for all packaging carrying the [DGP logo] and put into circulation in Germany, where those undertakings show that they do not use the DSD system for some [or all] of that packaging’.

54 By its second plea, DSD submitted that selective marking of packaging depending on the system used would have been more appropriate than the obligation imposed by the decision at issue. Articles 3 and 4 of that decision are disproportionate, because they oblige DSD to grant third parties a licence.

55 The Court of First Instance rejected that plea. At paragraph 173 of the judgment under appeal, it held that ‘the fact that it may theoretically be possible to affix the [DGP logo] to packaging selectively cannot entail the annulment of [the measures imposed by the decision at issue], since that solution is more expensive and difficult to implement for

manufacturers and distributors of packaging than the measures laid down in Articles 3 to 5 of [that] decision ...’.

56 The Court of First Instance also stated at paragraph 181 of the judgment under appeal that the object of the obligations laid down in the decision at issue was not ‘to force DSD to grant a licence to use the [DGP logo] without any restriction in time, but merely to require it to not charge a fee on the total amount of packaging bearing the [DGP logo] where it is shown that all or only some of that packaging has been taken back or recovered through another system’.

57 At paragraph 196 of the judgment under appeal, the Court of First Instance stated that the decision at issue must be interpreted as not precluding the possibility for DSD to levy an adequate fee for merely using the DGP mark where it is shown that the packaging bearing the DGP logo has been taken back and recovered by another system.

58 In support of that finding, the Court of First Instance stated at paragraphs 193 and 194 of the judgment under appeal:

‘193 The Court observes that the obligation imposed on DSD, in Article 3 of [the decision at issue], enables manufacturers and distributors which use its system for only some of their packaging not to pay the fee to DSD where it is proved that the packaging bearing the [DGP logo] has not been collected and recovered by the DSD system but by a competitor system.

194 However, even in that case, it cannot be excluded that the [DGP mark] affixed to the packaging at issue may have economic value as such, since it can inform the consumer that the packaging at issue may be brought to the DSD system, as is also stated in the contested decision... Such a possibility offered to the consumer for all

the packaging put into circulation with the [DGP logo], whether part of the DSD system or not, after checking the quantities collected, is likely to have a price which, even if it cannot represent the actual price of the collection and recovery service, as could be the case under the provisions in dispute of the Trade Mark Agreement, should be able to be paid to DSD in consideration for the service offered in the present case, namely the making available of its system.’

59 By its third plea, DSD claimed that an infringement of Article 82 EC was ruled out because it was entrusted with the operation of services of general economic interest within the meaning of Article 86(2) EC, namely waste management for environmental purposes.

60 The Court of First Instance stated at paragraph 208 of the judgment under appeal that, even supposing that DSD was entrusted with such a service, the fact remained that the risk of that task being called into question as a result of the decision at issue had not been shown.

### **Procedure before the Court**

61 DSD brought the present appeal on 8 August 2007.

62 By application lodged at the Court Registry on 16 November 2007, Interseroh Dienstleistungs GmbH (‘Interseroh’), which has operated an exemption system throughout Germany since 2006, sought leave to intervene in support of the form of order sought by the Commission. By order of 21 February 2008, the President of the Court granted leave to intervene.



63 DSD claims that the Court should:

- set aside the judgment under appeal;
  
- annul the decision at issue;
  
- in the alternative, refer the case back to the Court of First Instance, and
  
- in any event, order the Commission to bear the costs.

64 The Commission, Vfw, Landbell, BellandVision and Interseroh contend that the Court should:

- dismiss the appeal, and
  
- order DSD to bear the costs.

## The appeal

*The first plea in law, alleging infringement of the duty to state reasons arising from the contradictory grounds set out in the judgment under appeal*

### Arguments of the parties

- 65 DSD claims that the Court of First Instance infringed its obligation to state reasons in the judgment under appeal by making contradictory findings in relation to the alleged abuse of a dominant position.
- 66 In support of that plea, DSD draws a comparison between the manner in which that abuse was presented by the Commission in recitals 101, 102, 111 and 115 to the decision at issue, as set out by the Court of First Instance at paragraphs 48, 50, 58, 60, 119, 163 and 164 of the judgment under appeal, and the grounds set out at paragraph 194 of that judgment.
- 67 First, the Court of First Instance took as a basis the fact that DSD requires undertakings which prove that they do not use its system or that they use the system for only some of the sales packaging bearing the DGP logo to pay the full fee under the Trade Mark Agreement.
- 68 Secondly, the Court of First Instance stated at paragraph 194 of the judgment under appeal that, for packaging which is not subject to the DSD system, DSD does not necessarily require payment of the price of the collection and recovery service. The findings of the Court of First Instance are thus manifestly contradictory.

69 The Commission states that the fee is intended to cover the expenses arising from the collection, sorting and recovery of the packaging, together with the administration costs and accordingly does not represent consideration for the use of the mark. Consequently, the decision at issue and the judgment under appeal do not concern a fee for the use of the DGP mark.

70 Like the Commission, Vfw, Landbell and BellandVision do not accept that the contradiction alleged by DSD exists. There is nothing in paragraph 194 of the judgment under appeal which relates to the findings of the Court of First Instance concerning the abuse of a dominant position. It concerns only the question whether the mere affixing of the DGP logo to packaging may have a price, even where DSD does not provide any service for the processing of that packaging.

#### Findings of the Court

71 According to settled case-law, the question whether the grounds of a judgment of the Court of First Instance are contradictory or inadequate is a question of law which is amenable, as such, to judicial review on appeal (see, inter alia, Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 25; Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel v Commission* [2007] ECR I-729, paragraph 77; and Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* [2008] ECR I-0000, paragraph 90).

72 In the present case, DSD considers that there is a contradiction between the finding set out at paragraph 194 of the judgment under appeal and the findings by which the Court of First Instance confirmed the existence of the abuse of a dominant position described by the Commission.

73 It is apparent from paragraphs 193 and 194 of the judgment under appeal that they concern the fact that, as a result of the obligations laid down by the Commission in the decision at issue, DSD may no longer charge the licence fee provided for in the Trade

Mark Agreement for packaging notified to it which bears the DGP logo and in respect of which it is proved that it was not taken back and recovered by the DSD system.

- 74 At paragraph 194 of the judgment, the Court of First Instance held that, notwithstanding that fact, the possibility cannot be ruled out that manufacturers and distributors of such packaging must pay a sum to DSD in consideration only for the affixing of the DGP logo to the packaging, since affixing the logo in that way implies that the DSD system is available to consumers and therefore represents a use of the DGP mark which is capable of having a price.
- 75 As the Court of First Instance itself stated in that paragraph, the sum which DSD might receive in consideration for the affixing of the DGP mark is separate from the fee which is due in respect of the packaging that is actually taken back and recovered by DSD under the Trade Mark Agreement.
- 76 It follows, first, that the Court of First Instance made no finding at paragraph 194 of the judgment under appeal that DSD might receive, in consideration merely for making its system available, a sum corresponding to the price of the collection and recovery service.
- 77 It follows, secondly, that paragraph 194 of the judgment under appeal concerns the consequences of the measures laid down in the decision at issue and not the finding that an abuse of a dominant position existed. Its purpose is merely to record, contrary to what DSD had argued before the Court of First Instance, that the decision at issue does not make it impossible for DSD to charge a fee that relates only to the affixing of the DGP mark to packaging.

78 Accordingly, DSD's claim that the judgment under appeal contains contradictory grounds cannot be considered well founded and the first plea in law must therefore be rejected.

*The second plea in law, alleging distortion of the meaning of the Trade Mark Agreement and other evidence in the file*

#### Arguments of the parties

79 DSD claims that the essence of the dispute involves the finding set out at recital 111 to the decision at issue that 'DSD can be deemed to impose unreasonable prices whenever the quantity of packaging bearing the [DGP logo] is greater than the quantity of packaging making use of the exemption service'. In that respect, the Court of First Instance found that under the Trade Mark Agreement DSD granted a separate licence for the use of the DGP logo, that is to say, a licence to place the mark on packaging for which the DSD system was not used.

80 That finding represents a distortion of the meaning of the Trade Mark Agreement, since that agreement merely grants a right to use the DGP logo in connection with the performance of the obligations arising under the Packaging Ordinance.

81 That finding also amounts to a distortion of other evidence in the file. In that regard, DSD states that the correspondence exchanged between the Commission and DSD during the administrative procedure shows that it did not grant a licence having the scope described by the Court of First Instance, but that it merely refused to implement the Commission's proposal to accept that packaging intended for competitor processing systems could carry the DGP logo.

82 In addition, the finding of the Court of First Instance relating to the existence of a 'separate licence' distorts the evidence in the file on which that Court expressly relied, in particular at paragraph 163 of the judgment under appeal, such as certain judgments of the German courts and the complaints made to the Commission.

83 The Commission, Vfw, Landbell, BellandVision and Interseroh contend that the Court of First Instance simply did not make the finding as to the existence of a 'separate licence' which DSD imputes to it.

84 Vfw, Landbell et BellandVision also argue that that plea is inadmissible in so far as DSD's appeal must be based not on what the appellant alleges is an incorrect appraisal of the facts, but only on the infringement of legal provisions by the Court of First Instance.

#### Findings of the Court

85 Contrary to what Vfw, Landbell and BellandVision contend, this plea, alleging distortion of the meaning of the Trade Mark Agreement and other evidence in the file, is admissible.

86 The error for which DSD criticises the Court of First Instance concerns the distortion of the scope of the licence granted under the Trade Mark Agreement.

87 As was stated at paragraph 11 of this judgment, the object of the Trade Mark Agreement is to allow DSD's contractual partners to be relieved of their obligation to

collect and recover packaging which they notify to DSD. The agreement provides that undertakings participating in the DSD system must affix the DGP logo to all packaging notified to DSD and intended for domestic consumption in Germany.

88 It follows that the Trade Mark Agreement which DSD's customers entered into concerns the affixing of the DGP logo to all packaging notified to DSD and intended for domestic consumption in Germany.

89 As is apparent, in particular, from Article 1 of the decision at issue, the abuse of a dominant position established by the Commission arises from the fact that the Trade Mark Agreement requires DSD's customers to pay a fee in respect of all packaging notified to DSD, even where it is proved that some of it has been taken back and recovered through competing exemption systems or self-management solutions.

90 It is clear that the Court of First Instance did not distort that part of the evidence on the file.

91 Thus, at paragraph 141 of the judgment under appeal, the Court of First Instance correctly stated that 'only the provisions of the Trade Mark Agreement concerning the fee are regarded as abusive in [the decision at issue] [and], thus, [the decision at issue] does not criticise the fact that ... the [Trade Mark Agreement] requires the manufacturer or distributor wishing to use the DSD system to affix the [DGP logo] to each piece of notified packaging which is intended for domestic consumption'.

92 As regards, specifically, the extent of the licence granted under the Trade Mark Agreement, DSD has been unable to identify the passages of the judgment under appeal in which the Court of First Instance incorrectly referred to the scope of that licence. With respect to the passages setting out the legal and factual assessment undertaken by the Court of First Instance, DSD merely refers under this plea to paragraphs 119, 163 and 164 of the judgment under appeal, at which the Court of First Instance noted the terms of the decision at issue and held that, notwithstanding DSD's arguments relating to the need to maintain the proper functioning of its system, the Commission had been

right to find that it was abusive to require payment of a licence fee for all packaging notified to DSD and bearing the DGP logo, even where it was proved that some of that packaging had been taken back and recovered by another exemption system or a self-management solution.

93 It follows that the second plea in law must also be rejected.

*The third plea in law, alleging an insufficient statement of reasons, distortion of the facts and errors of law concerning the exclusive rights relating to the DGP logo*

#### Arguments of the parties

94 According to DSD, the finding set out at paragraph 161 of the judgment under appeal that the DGP logo does not benefit from the exclusivity claimed by DSD, with the result that it could not restrict the grant of its licence to packaging processed by its system, is insufficiently reasoned. That finding is essentially based on the conclusions drawn by the Court of First Instance, at paragraph 130 et seq. of the judgment under appeal, from the pleadings and the replies given by the parties at the hearing, without it being possible to determine what was the true purpose of that oral argument.

95 Next, the finding set out at paragraph 139 of the judgment under appeal that ‘the manufacturer or distributor of packaging does not transfer to DSD a set number of items of packaging intended to bear the [DGP logo], but rather a quantity of material which that manufacturer or distributor is going to market in Germany and whose taking back and recovery he intends to entrust to the DSD system’ is manifestly contrary to the provisions of the Trade Mark Agreement concerning the notification of packaging and the grant of the licence, the provisions of the Packaging Ordinance relating to compliance with the obligation to process waste, the requirement of



transparency arising from that ordinance and the requirement arising under trade mark law that packaging covered by the DSD system must be identifiable.

- 96 In the same way, paragraphs 129 and 154 of the judgment under appeal, according to which packaging entrusted to the DSD system may be covered by another processing system at the same time, distort the evidence in the file, in particular the Packaging Ordinance.
- 97 Paragraph 137 of the judgment, according to which a distributor which has participated in an exemption system may subsequently assume responsibility for the taking back and recovery of packaging in person, and vice versa, also distorts the meaning of the Packaging Ordinance. Under that ordinance, participation in an exemption system entails exemption from processing obligations. Consequently, for packaging covered by an exemption system, it is not possible subsequently to use a self-management solution.
- 98 The findings of the Court of First Instance are, moreover, incompatible with trade mark law. The situation described by that Court, in which packaging that was not processed under the DSD system could bear the DGP logo, would deprive the logo of its distinctive character. DSD states that that logo, as a registered trade mark, refers exclusively to its system and thus to its services.
- 99 The Commission contends that in the grounds of the judgment under appeal criticised by DSD the Court of First Instance set out its analysis of the distinctive character of the DGP logo and of the functioning of mixed systems, that is to say, a combination of the DSD system and another exemption system or a self-management solution.
- 100 As regards paragraph 154 of the judgment under appeal, the Commission maintains that in that paragraph the Court of First Instance correctly set out the observation of the German Government that the same item of packaging may be subject to several systems at the same time. DSD wrongly attributes to the Packaging Ordinance an approach

focused on individual items of packaging, which does not correspond with the economic conditions applicable to mixed solutions.

101 As regards paragraph 137 of the judgment under appeal, the Commission argues that this paragraph involves an *obiter dictum* concerning the implementation of possible correction mechanisms should the recovery rates not be achieved. Furthermore, and in any event, DSD's criticism of that paragraph of the judgment is unfounded.

102 With respect to paragraph 161 of the judgment under appeal, the Commission states that the DGP logo merely indicates the possibility that packaging may be taken back and recovered by DSD. It observes that that logo is designed to inform traders and final consumers that the packaging on which it is affixed may be processed by the DSD system.

103 According to Vfw, DSD is wrong to argue that an item of packaging cannot be covered by two different systems.

104 Landbell and BellandVision submit that, to the extent that it seeks to justify the abuse of a dominant position by making reference to the Packaging Ordinance and trade mark law, this plea is manifestly unfounded. Contrary to what DSD claims, mixed systems are permissible, as, moreover, the German Government has stated.

105 According to Interseroh, DSD's argument that the exemption service applies to specific items of packaging misconstrues the Packaging Ordinance.

## Findings of the Court

- 106 As a preliminary point, it must be stated that DSD's arguments that the affixing of the DGP logo to packaging that is not processed under its system constitutes an infringement of trade mark law are essentially the same as those put forward under the fourth plea in law. They will therefore be examined under that plea.
- 107 As to the remainder, by this plea DSD essentially argues that the findings of the Court of First Instance at paragraphs 139, 154 and 161 of the judgment under appeal are insufficiently reasoned and distort some of the evidence on the file.
- 108 At paragraph 139 of the judgment under appeal, the Court of First Instance deduced from the information and the considerations referred to at paragraphs 129 to 138 of the judgment that it is possible for manufacturers and distributors of packaging to use mixed systems in order to comply with their obligations as to collection and recovery laid down in the Packaging Ordinance.
- 109 As is apparent, in particular, from paragraphs 129 and 154 of the judgment under appeal, that finding of the Court of First Instance relating to mixed systems concerns the fact, which is disputed by the appellant, that packaging entrusted to DSD and bearing the DGP logo may be covered at the same time by a collection and recovery system other than the DSD system.
- 110 It is clear beyond doubt from the grounds set out at paragraphs 131 to 138 of the judgment under appeal that the Court of First Instance founded its reasoning on the consideration that the question whether an item of packaging does, or does not, bear the DGP logo is not determinative. According to that Court, the only point at issue is whether the quantities of material for recovery put into circulation by the manufacturer or distributor are actually taken back and recovered and whether the rates laid down in the Packaging Ordinance are thereby achieved.

- 111 In that context, at paragraph 137 of the judgment under appeal, the Court of First Instance gave as an example the collection and recovery of plastic waste by a fast-food chain.
- 112 As the Commission has rightly pointed out, paragraph 137 constitutes an *obiter dictum*. For the purposes of the analysis to be undertaken on appeal, it is the finding made by the Court of First Instance at paragraphs 139, 154 and 161 of the judgment under appeal, that there is no exclusive tie between the DGP logo and DSD's take-back and recovery services, that is determinative.
- 113 In the first place, the Court of First Instance has set out in sufficient detail the reasons which led it to that conclusion.
- 114 It should be noted in that regard that the duty to state reasons does not require the Court of First Instance to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case and that the reasoning may therefore be implicit on condition that it enables the persons concerned to know why the Court of First Instance has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (see, inter alia, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 372; judgment of 25 October 2007 in Case C-167/06 P *Komninou and Others v Commission*, paragraph 22; and *FIAMM and Others v Council and Commission*, paragraph 96).
- 115 The judgment under appeal replies in detail to the line of argument put forward by DSD as regards the alleged exclusivity attached to the DGP logo and allows the Court of Justice to exercise its power of review. At paragraphs 131 to 138 and paragraphs 150 to 154 of the judgment under appeal, the Court of First Instance set out in full the reasons for which it considered that the Packaging Ordinance and other evidence in the file led to the conclusion that packaging bearing the DGP logo is not necessarily covered by the DSD system alone.

116 In the second place, and contrary to what DSD claims, the findings made by the Court of First Instance do not distort the meaning of either the Packaging Ordinance or the Trade Mark Agreement.

117 Suffice it to hold in that regard that DSD has not identified provisions or passages of the Packaging Ordinance which show that an item of packaging may be processed under one system alone and, accordingly, that an item of packaging bearing the DGP logo must necessarily be processed under the DSD system. Nor has it established that the Trade Mark Agreement contains any indication to that effect.

118 As regards, lastly, the requirement of transparency, DSD has provided no concrete evidence that the interpretation adopted by the Commission and the Court of First Instance, set out at paragraph 154 of the judgment under appeal, according to which it is necessary to define clearly, in the interests of the consumer and of the authorities, which packaging is subject to the take-back obligation at or in the immediate vicinity of the points of sale and which is not, distorts the evidence in the file. Furthermore, DSD has not established that the affixing of the DGP logo to packaging which is processed under a system other than the DSD system runs counter to that objective of transparency. The affixing of that logo to packaging notified to DSD indicates clearly to consumers and to the relevant authorities, irrespective of the question whether that packaging will actually be processed under that system or under another system, that the packaging in question is no longer covered by the obligation that it be taken back at points of sale or in the immediate vicinity of them but has been notified to DSD.

119 It follows from all of the above that the third plea in law must be rejected.

*The fourth plea in law, alleging infringement of Community trade mark law*

## Arguments of the parties

- 120 DSD claims that the finding set out at paragraph 161 of the judgment under appeal that the DGP logo cannot be accorded the exclusivity claimed by its proprietor, since such exclusivity 'would have no other effect than to prevent manufacturers and distributors of packaging from using a mixed system and to legitimise the possibility, for the applicant, of being paid for a service which the interested parties have nevertheless shown that it did not actually provide' is incompatible with Article 5 of Directive 89/104, which confers on the proprietor of a trade mark exclusive rights therein. That finding accordingly constitutes an infringement of Community trade mark law.
- 121 According to the Commission, the exclusivity described in Article 5 of Directive 89/104 is not the same as the type of exclusivity described at paragraph 161 of the judgment under appeal. In that passage of the judgment under appeal, the Court of First Instance merely drew the consequences from the reasoning set out at paragraphs 156 and 157 of that judgment, according to which the DGP logo merely indicates a possible processing option and its function as an indicator of origin is not affected where packaging bearing that logo is also subject to other processing options.
- 122 The Commission adds that the decision at issue does not entail improper use of the mark, that is to say, use by persons with whom DSD has not entered into an agreement.
- 123 VfW submits that the logo is not a trade mark in the classic sense. It argues that a trade mark characterises goods and services which are identical with or similar to those in respect of which the mark was registered. The DGP logo serves only to indicate participation in a collection system and not to identify identical or similar goods or services.

## Findings of the Court

- 124 It must be held, first of all, that Vfw's argument that the DGP logo is not truly a trade mark cannot be accepted. It is not disputed that the logo has been registered as a trade mark by the German Patents and Trade Marks Office in relation to waste collection, sorting and recovery services.
- 125 As regards, next, the alleged failure by the Court of First Instance to have regard to Article 5 of Directive 89/104, it must be noted that, by virtue of Article 5(1)(a), a registered trade mark confers on the proprietor exclusive rights therein, entitling the proprietor to prevent all third parties not having his consent from using in the course of trade any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered.
- 126 It follows that, by claiming that at paragraph 161 of the judgment under appeal the Court of First Instance failed to have regard to the exclusive right to the use of the logo of which it is the proprietor and by invoking Article 5 of Directive 89/104 in that context, DSD is arguing that the Court of First Instance should have held that the decision at issue had unlawfully stopped it preventing third parties from using a sign which was identical with its logo. DSD placed considerable emphasis on this argument at the hearing and claimed that the result of the obligations laid down by the decision at issue and of their approval by the Court of First Instance is that the DGP logo has, in practice, become available to be used by all.
- 127 In order to respond to that line of argument, it is necessary to draw a distinction between the use of the DGP logo by DSD's contractual partners and the possible use of that logo by other third parties.
- 128 As regards the use of the DGP logo by DSD's contractual partners, it is apparent from the wording itself of Article 5 of Directive 89/104 that that provision does not cover circumstances in which a third party uses a trade mark with the consent of its

proprietor. That is the case, in particular, where the proprietor has authorised its contractual partners to use its mark under the terms of a licence agreement.

129 It follows that DSD cannot validly rely on the exclusive right conferred on it by the DGP logo as regards the use of that logo by manufacturers and distributors who have entered into the Trade Mark Agreement with it. It is true that Article 8(2) of Directive 89/104 provides that a proprietor of a trade mark may invoke the rights conferred by that mark against a licensee who contravenes any of the terms in his licensing contract referred to in that provision. However, as the Advocate General stated at point 192 of his Opinion, in the present case, DSD itself set up a system which requires that the DGP logo be affixed to all packaging, even where some of the packaging is not taken back by the system. It is accordingly a matter of agreement between the parties that the use of the DGP logo on all packaging notified to DSD is required by the Trade Mark Agreement and is therefore compatible with it.

130 In so far as DSD argues that the measures imposed by the Commission have the effect that the use of the DGP logo by its licensees is, in part, to be free of charge, suffice it to note that the sole object and sole effect of the decision at issue is to prevent DSD from receiving payment for collection and recovery services where it is proved that they have not been provided by that company. Such measures are not incompatible with the rules laid down by Directive 89/104.

131 Furthermore, as the Court of First Instance correctly held at paragraph 194 of the judgment under appeal, the possibility cannot be ruled out that the affixing of the DGP logo to packaging, whether part of the DSD system or not, may have a price which, even if it cannot represent the actual price of the collection and recovery service, should be able to be paid to DSD in consideration for the use of the mark alone.

132 As regards the possible use of the DGP logo by third parties other than DSD's contractual partners, neither the decision at issue nor the judgment under appeal state that such use would be permitted under trade mark law. In that regard, the Court of



First Instance correctly found at paragraph 180 of the judgment under appeal that the obligations laid down by the decision at issue concerned only relations between DSD and 'manufacturers and distributors of packaging which are either contractual partners of DSD in the context of the Trade Mark Agreement ..., or holders of a licence to use the [DGP] mark in another Member State in the context of a take-back and recovery system using the logo corresponding to that mark ...'.

- 133 Therefore, any use of the DGP logo by third parties other than DSD's contractual partners is not a matter for which either the Commission or the Court of First Instance bear any responsibility. Moreover, there is nothing to prevent DSD from bringing proceedings against such third parties before the national courts having jurisdiction in that regard.
- 134 It follows from all of the above considerations that the fourth plea in law must also be rejected.

*The fifth plea in law, alleging infringement of Article 82 EC*

#### Arguments of the parties

- 135 The appellant submits that, by holding without stating sufficient reasons for its analysis and by distorting the evidence in the file, that DSD acted abusively in issuing licences to use the DGP logo independently of the use of the DSD system and in requiring payment of a fee for the licence even where the licensee proved that it did not use that system, the Court of First Instance infringed Article 82 EC.

- 136 According to DSD, had the Court of First Instance analysed the legal situation correctly, it would have been bound to find that DSD does not grant a licence for the use of its logo independently of the use of the DSD system, with the result that the decision at issue must be interpreted as meaning that the refusal to grant such a licence constitutes an abuse. The effect of the decision is therefore to oblige DSD to grant a licence. The Court of First Instance thus failed to have regard to the fact that the conditions necessary in order for such an obligation to be justified were not satisfied. That failure constitutes an error of law.
- 137 DSD adds that the judgment under appeal has the result that partial participation in the DSD system would be possible (even, for example, to the extent of only 0.1% of packaging bearing the DGP logo), without DSD being able to verify the plausibility or legitimacy of such a low level of participation. In particular, DSD would be unable to verify whether the reasons which, according to the decision at issue, make it necessary to affix the DGP logo to all packaging when only part of the packaging is covered by the DSD system were satisfied. The example of participation in the DSD system which may be weak and arbitrary in nature, while the DGP logo is affixed to all the packaging concerned, makes it all the more clear that the decision at issue imposes an obligation to grant a licence for the use of that logo.
- 138 The Commission, Landbell and BellandVision maintain that the decision at issue and the judgment under appeal are not based on the hypothesis of a licence to use the DGP logo independently of the use of the DSD system, but are concerned with the amount of the fee attaching to the services provided. Similarly, the decision at issue and the judgment under appeal do not mean that DSD is obliged to grant a licence for the use of the DGP logo to manufacturers and distributors to which it does not wish to do so.
- 139 In Vfw's submission, this plea is based on a misunderstanding of the subject-matter of the dispute, as it is not the Commission's intention to impose on DSD an obligation to grant such a licence, but solely to prevent DSD from using its dominant position to exclude competition from other systems.

140 Interseroh also observes that at no part of the judgment under appeal does the Court of First Instance suggest that DSD should offer a licence to use the DGP logo independently of the use of the DSD system. Nor does that judgment place DSD under any obligation to grant such a licence.

## Findings of the Court

141 As the Court of First Instance stated at paragraph 121 of the judgment under appeal, it is apparent from point (a) of the second paragraph of Article 82 EC that the abuse of a dominant position may consist, inter alia, in directly or indirectly imposing unfair prices or other unfair trading conditions.

142 In the same paragraph of the judgment under appeal, the Court of First Instance noted the settled case-law, according to which an undertaking abuses its dominant position where it charges for its services fees which are disproportionate to the economic value of the service provided (see, inter alia, Case 226/84 *British Leyland v Commission* [1986] ECR 3263, paragraph 27, and Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 46).

143 As the Court of First Instance held at paragraph 164 of the judgment under appeal, following its analysis set out at paragraphs 119 to 163 of that judgment, the conduct of DSD which is objected to in Article 1 of the decision at issue and which consists in requiring payment of a fee for all packaging bearing the DGP logo and put into circulation in Germany, even where customers of the company show that they do not use the DGP system for some or all of that packaging, must be considered to constitute an abuse of a dominant position within the meaning of the provision and the case-law referred to above. It is also apparent from paragraphs 107 to 117 and 126 to 133 of this judgment that the findings made by the Court of First Instance are sufficiently reasoned and are not vitiated by the errors of fact or law invoked by DSD as regards the exclusive rights attached to the DGP logo.

144 The Court of First Instance also correctly held at paragraph 91 of the judgment under appeal that where there is an abuse of a dominant position the Commission has the power, under Article 3(1) of Regulation No 17, to require DSD to put an end to the infringement that has been established.

145 As the Court of First Instance observed in the same paragraph of the judgment under appeal, the obligation imposed on DSD by Article 3 of the decision at issue to undertake vis-à-vis all parties to the Trade Mark Agreement not to charge any licence fee for such partial quantities of sales packaging bearing the DGP logo as are put into circulation in Germany for which the exemption service is not used, and for which the obligations imposed by the Packaging Ordinance have demonstrably been fulfilled in another way, is nothing other than the consequence of the finding of an abuse of a dominant position and of the exercise by the Commission of its power to oblige DSD to put an end to the infringement.

146 Moreover, contrary to what DSD submits, the obligation imposed by Article 3 of the decision at issue does not amount in any way to an obligation to grant a licence to use the DGP logo. There is nothing in the decision which affects DSD's freedom of choice as to the persons with which it is to enter into a Trade Mark Agreement and to which, consequently, it is to grant that licence. The decision at issue merely obliges DSD not to claim payment from its contractual partners for take-back and recovery services which it has not provided.

147 In the light of all of the above considerations, it must be held that the Court of First Instance did not fail to have regard to Article 82 EC and the fifth plea in law must accordingly be rejected.

*The sixth plea in law, alleging infringement of Article 3 of Regulation No 17 and the principle of proportionality*

Arguments of the parties

- 148 DSD submits, first, that the Packaging Ordinance and trade mark law preclude its being required to grant a licence to use the DGP logo; yet the measures imposed by Article 3 et seq. of the decision at issue amount to imposing such an obligation on it. By failing to accept that these measures are unlawful, the Court of First Instance infringed Article 3 of Regulation No 17, which provides that, where the Commission finds that there is infringement of Article 81 EC or Article 82 EC, it may by decision require the undertakings concerned to bring such infringement to an end.
- 149 Secondly, DSD submits that the Packaging Ordinance and trade mark law preclude its being prevented from requiring its customers to affix to packaging which bears the DGP logo, but is not processed by the DSD system, a notice which enables the distinctive effect of that logo to be neutralised. By rejecting, at paragraph 200 of the judgment under appeal, DSD's essential argument that packaging bearing the DSD logo and processed by the DSD system must be capable of being distinguished from packaging bearing the same logo but not processed by that system, the Court of First Instance disregarded the fact that Article 3 of the decision at issue constitutes a breach of Article 3 of Regulation No 17 and of the principle of proportionality.
- 150 According to the Commission, Landbell and BellandVision, the first argument put forward under this plea is based on the incorrect premiss that the Court of First Instance relied on the hypothesis of a separate licence to use the DGP logo.
- 151 With respect to DSD's second argument, the Commission maintains that neither the Packaging Ordinance nor trade mark law require the identification of the different types of packaging for allocation to the DSD system or to another service provider.

Landbell and BellandVision share that view and add that an explanatory note to the effect that the packaging is not part of the DSD system would not be capable of remedying DSD's abusive conduct.

## Findings of the Court

- 152 As was held at paragraph 146 of this judgment, the decision at issue does not impose any obligation on DSD to grant the licence to use the DGP logo.
- 153 The first argument relied on in support of the sixth plea in law therefore cannot be accepted.
- 154 As regards DSD's argument that the packaging bearing the DGP logo and processed by the DSD system must be capable of being distinguished from packaging on which that logo is affixed but which is not processed by that system, the Court of First Instance held at paragraph 200 of the judgment under appeal that, having regard to the existence of mixed systems, it is not possible to make the distinction which DSD wishes to draw.
- 155 That finding is not incorrect. As was stated at paragraph 129 of the present judgment, DSD itself requires its contractual partners to affix the DGP logo to all packaging which is notified to it. As the Advocate General stated at point 240 of his Opinion, it is not possible to determine in advance what route will be taken by an item of packaging. It is therefore not possible, at the time at which a product bearing the packaging is packaged or sold, to distinguish products bearing the DGP logo and actually processed by the DSD system and those which bear the same logo but which will be processed by another system.

156 Consequently, the second argument put forward in support of the sixth plea in law is also unfounded.

157 That plea in law must therefore be rejected.

*The seventh plea in law, alleging a procedural irregularity*

Arguments of the parties

158 DSD objects that the Court of First Instance substituted its own reasoning for that of the Commission and that it failed to have regard to the rules governing the administrative procedure, in particular the right to be heard.

159 The Court of First Instance made new findings, based on the submissions made by the parties at the hearing. DSD refers to answers given to detailed questions which the Court of First Instance had put, either barely three weeks before the hearing or during the hearing, without indicating what consequences it proposed to draw from those answers or in what way those questions were connected with the findings made in the decision at issue.

160 Those findings of the Court of First Instance are also new by reason of the fact that their subject-matter appears neither in the decision at issue nor in the written pleadings of DSD or the Commission.

- 161 DSD refers, in particular, to two findings, namely the finding set out at paragraphs 139 and 154, in particular, of the judgment under appeal that packaging entrusted to DSD may come under an exemption system and at the same time under a self-management solution, and the finding set out in paragraphs 137 and 139, in particular, of that judgment that the Packaging Ordinance provides numerous correction mechanisms allowing manufacturers and distributors to assume the obligations arising under that ordinance by attributing packaging *ex post facto* to a self-management solution or an exemption system.
- 162 According to the Commission, Vfw, Landbell and BellandVision, the judgment under appeal contains nothing new as regards the matters already considered during the administrative procedure and during the written procedure before the Court of First Instance.

### Findings of the Court

- 163 It must be recalled that the Court of First Instance is the sole judge of any need to supplement the information available to it in respect of the cases before it. Whether or not the evidence before it is sufficient is a matter to be appraised by it alone and is not subject to review by the Court of Justice on appeal, except where that evidence has been distorted or the substantive inaccuracy of the findings of the Court of First Instance is apparent from the documents in the case (see, inter alia, Case C-315/99 P *Ismeri Europa v Court of Auditors* [2001] ECR I-5281, paragraph 19, and Joined Cases C-75/05 P and C-80/05 P *Germany and Others v Kronofrance* [2008] ECR I-0000, paragraph 78).
- 164 Therefore, the Court of First Instance cannot be criticised for having put, before and at the time of the hearing, a series of detailed questions to the parties in order to supplement the information already available to it and for having drawn certain conclusions from the replies given by the parties to those questions.



165 It is also clear that the Court of First Instance had regard to the subject-matter of the dispute, as set out in DSD's application, and refrained from introducing issues which were not covered by the decision at issue. As regards, in particular, the possibility of combining a number of take-back and recovery systems, it is apparent in particular from recitals 20 and 23 to that decision that the question of mixed systems was examined by the Commission in its investigation and that that question does not, as a result, constitute a new element added to the file by the Court of First Instance.

166 It follows that the seventh plea in law must be rejected.

*The eighth plea in law, alleging infringement of the fundamental right to have the case dealt with within a reasonable time*

#### Arguments of the parties

167 DSD maintains that the Court of First Instance committed a procedural irregularity and adversely affected its interests by failing to have regard to the fundamental right to have a case dealt with within a reasonable time, as recognised by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and by Article 47 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

168 DSD points out that the proceedings before the Court of First Instance started on 5 July 2001 and ended on 24 May 2007. Even allowing for the constraints that are inherent in proceedings before the Community judicature, that period is excessively long. Between the notification of the end of the written procedure on 9 September 2002 and the

decision taken on 19 June 2006 to open the oral procedure and to ask the parties to reply to certain questions at the hearing, more than 45 months passed without any measure being adopted.

169 DSD also states that the excessive duration of the proceedings constitutes a serious infringement of its interests, since, inter alia, its contractual and business model were adversely affected and it was deprived of the possibility of receiving an adequate fee simply for the use of the DGP logo.

170 According to DSD, it is clear from a reading of Article 58, in conjunction with Article 61, of the Statute of the Court of Justice that where a plea, relied on in support of an appeal and alleging a breach of procedure before the Court of First Instance which has adversely affected the interests of the appellant, is well founded, the judgment of the Court of First Instance must be set aside by the Court of Justice. That rule is justified, as was recognised by the Court of Justice in *Baustahlgewebe v Commission*, for reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity of that kind.

171 Again relying on Articles 58 and 61 of the Statute of the Court of Justice, DSD claims that such a procedural irregularity before the Court of First Instance justifies the setting aside of the judgment of that Court, irrespective of whether that irregularity has affected the outcome of the proceedings.

172 The Commission, Landbell and BellandVision contend that there is nothing in the present case which allows it to be concluded that there was a relationship between the length of the proceedings and their outcome. Furthermore, setting aside the judgment under appeal would only further prolong the proceedings.

173 In any event, the length of the proceedings was justified by the complexity of the dispute, for which DSD itself was responsible, inasmuch as its written pleadings were voluminous and were accompanied by numerous annexes. The same was true of Case

T-289/01 *Duales System Deutschland v Commission*, where judgment was delivered on 24 May 2007 and which the Court of First Instance dealt with in parallel with Case T-151/01, in which the judgment under appeal was delivered.

- 174 As regards DSD's assertions regarding the adverse effect on its interests, the Commission considers these to be incorrect. With respect, in particular, to DSD's contractual model, the Commission states that every provision adopted under Article 82 EC which requires that an abuse be terminated necessarily requires that the commercial policy of the undertaking concerned be changed.
- 175 Vfw contends that DSD has suffered no disadvantage by reason of the length of the proceedings, in so far as it has been able to continue its activities and its position on the market has not been significantly weakened. Moreover, even if it were to be accepted that the appellant's interests had been affected, the setting aside of the judgment under appeal would be disproportionate.

### Findings of the Court

- 176 As is apparent from the first paragraph of Article 58 of the Statute of the Court of Justice and from the case-law, the Court of Justice has jurisdiction to verify whether a breach of procedure adversely affecting the appellant's interests was committed by the Court of First Instance and must satisfy itself that the general principles of Community law have been complied with (*Baustahlgewebe v Commission*, paragraph 19, and Case C-13/99 P *TEAM v Commission* [2000] ECR I-4671, paragraph 36).
- 177 With respect to the irregularity relied on in the present plea, Article 6(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms provides that, in the determination of his civil rights and obligations or of any criminal

charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

178 As a general principle of Community law, such a right is applicable in the context of proceedings brought against a Commission decision (*Baustahlgewebe v Commission*, paragraph 21, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste v UFEX and Others* [2008] ECR I-0000, paragraph 45).

179 That right has, moreover, been reaffirmed in Article 47 of the Charter of Fundamental Rights of the European Union. As the Court of Justice has held on several occasions, that article relates to the principle of effective judicial protection (Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-0000, paragraph 335; and Case C-47/07 P *Masdar (UK) v Commission* [2008] ECR I-0000, paragraph 50).

180 In so far as the Commission and Vfw dispute the existence of a link between the length of the proceedings and the interests of DSD and thus raise the question whether this plea in law truly concerns a breach of procedure adversely affecting the interests of the appellant within the meaning of the first paragraph of Article 58 of the Statute of the Court of Justice, it must be held that an undertaking which brings proceedings for the annulment of a decision which has obliged it to adapt the standard form of contract which it enters into with its customers will have, on self-evident commercial policy grounds, a clear interest in having a line of argument, by which it submits that that decision is unlawful, adjudicated upon within a reasonable period. The fact that the Court of Justice has, in other cases, examined the question of the length of the proceedings in actions brought against Commission decisions imposing fines for the infringement of competition law (see, inter alia, *Baustahlgewebe v Commission*, paragraph 21; Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, paragraph 154; and *Sumitomo Metal Industries and Nippon Steel v Commission*, paragraph 115), whereas no such fine was imposed on DSD in the present case, is irrelevant in that regard.

- 181 It must also be borne in mind that the reasonableness of the period for delivering judgment is to be appraised in the light of the circumstances specific to each case, such as the complexity of the case and the conduct of the parties (see, to that effect, *Sumitomo Metal Industries and Nippon Steel v Commission*, paragraph 116 and the case-law cited, and order of 26 March 2009 in Case C-146/08 P *Efkon v Parliament and Council*, paragraph 54).
- 182 The Court has held in that regard that the list of relevant criteria is not exhaustive and that the assessment of the reasonableness of a period does not require a systematic examination of the circumstances of the case in the light of each of them, where the duration of the proceedings appears justified in the light of one of them. Thus, the complexity of the case or the dilatory conduct of the applicant may be deemed to justify a duration which is *prima facie* too long (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraph 188, and *Thyssen Stahl v Commission*, paragraph 156).
- 183 In the present case, it must be stated that the length of the proceedings before the Court of First Instance, which amounted to approximately 5 years and 10 months, cannot be justified by any of the particular circumstances of the case.
- 184 It appears, in particular, that the period between the notification, in September 2002, of the end of the written procedure and the opening, in June 2006, of the oral procedure lasted for 3 years and 9 months. The length of that period cannot be explained by the circumstances of the case, whether it be the complexity of the dispute, the conduct of the parties or by supervening procedural matters.
- 185 As regards, in particular, the complexity of the dispute, the proceedings brought by DSD against the decision at issue and Decision 2001/837, while requiring a detailed examination of the Packaging Ordinance, DSD's contractual links, the Commission decisions and the arguments relied on by DSD, were not of a difficulty or scope which

prevented the Court of First Instance from scrutinising the documents in the case and preparing for the oral procedure within a period of less than 3 years and 9 months.

186 Moreover, as the Court of Justice has already held, in the case of proceedings concerning infringement of competition rules, the fundamental requirement of legal certainty on which economic operators must be able to rely and the aim of ensuring that competition is not distorted in the internal market are of considerable importance not only for an applicant himself and his competitors but also for third parties, in view of the large number of persons concerned and the financial interests involved (*Baustahlge-webe v Commission*, paragraph 30). In the present case, having regard to DSD's dominant position, the size of the market for services on which DSD and its competitors were carrying on business, the possible effects of the outcome of the dispute on the practice to be followed and the fees to be paid by manufacturers and distributors of packaged products and the questions raised by the dispute as regards the extremely widespread use of the DGP logo, the period of time between the end of the written procedure and the next phase of the procedure was excessive.

187 Furthermore, as the Advocate General stated at points 293 to 299 of his Opinion, that period of time was not interrupted either by the adoption by the Court of First Instance of measures of organisation of procedure or by procedural issues raised by the parties.

188 In the light of the above, it must be held that there was a failure, in the proceedings before the Court of First Instance, to have regard to the requirement that the case be dealt with within a reasonable time.

189 As regards the consequences that arise where proceedings before the Court of First Instance fail to be completed within a reasonable time, DSD invokes the rule laid down in the first paragraph of Article 61 of the Statute of the Court of Justice that where an appeal is well founded the Court is to quash the decision of the Court of First Instance. Since the present plea alleges that judgment was not delivered within a reasonable time

and that the failure to do so constitutes a breach of procedure which adversely affects the interests of the appellant within the meaning of Article 58 of the Statute, a finding that such a breach occurred must necessarily lead, in DSD'S view, to the setting aside of the judgment under appeal, irrespective of whether that breach of procedure had an effect on the outcome of the dispute. Were the judgment not to be set aside, the Court of Justice would not be acting in compliance with Article 61 of the Statute.

<sup>190</sup> By that argument, DSD proposes that the Court should reconsider its case-law, according to which failure to deliver judgment within a reasonable time will lead to the setting aside of the judgment under appeal only where there are indications that the excessive length of the proceedings affected their outcome (see, to that effect, *Baustahlgewebe v Commission*, paragraph 49). In the present case, DSD has not established that such indications exist.

<sup>191</sup> Admittedly, it is true, as DSD has pointed out, that failure to adjudicate within a reasonable time constitutes a procedural irregularity (see, to that effect, *Baustahlgewebe v Commission*, paragraph 48).

<sup>192</sup> It none the less remains the case that the first paragraph of Article 61 of the Statute of the Court of Justice should be interpreted and applied purposively.

<sup>193</sup> In so far as there is nothing to suggest that the failure to adjudicate within a reasonable time may have had an effect on the outcome of the dispute, the setting aside of the judgment under appeal would not remedy the infringement of the principle of effective legal protection committed by the Court of First Instance.

<sup>194</sup> In addition, as the Advocate General stated at points 305 and 306 of his Opinion, having regard to the need to ensure that Community competition law is complied with, the Court of Justice cannot allow an appellant to reopen the question of the existence of an infringement, on the sole ground that there was a failure to adjudicate within a

reasonable time, where all of its pleas directed against the findings made by the Court of First Instance concerning that infringement and the administrative procedure relating to it have been rejected as unfounded.

195 Conversely, as the Advocate General stated at point 307 et seq. of his Opinion, the failure on the part of the Court of First Instance to adjudicate within a reasonable time can give rise to a claim for damages brought against the Community under Article 235 EC and the second paragraph of Article 288 EC.

196 Consequently, DSD's argument that, where a reasonable period is exceeded, that fact must, in order for that procedural irregularity to be remedied, lead to the judgment under appeal being set aside, is unfounded. Consequently, the eighth plea in law must be rejected.

197 As none of the pleas in law put forward by DSD has been upheld, the appeal must be dismissed.

## **Costs**

198 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission, Interseroh, Vfw, Landbell and BellandVision have applied for costs against DSD, and the latter has been unsuccessful, the appellant must be ordered to pay the costs of these proceedings.



On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the appeal;**
  
2. **Orders Der Grüne Punkt — Duales System Deutschland GmbH to bear its own costs, together with the costs of these proceedings incurred by the Commission of the European Communities, Interseroh Dienstleistungs GmbH, Vfw GmbH, Landbell AG für Rückhol-Systeme and BellandVision GmbH.**

[Signatures]