

Court of Justice EG, 16 July 2009, Der Grüne Punkt



TRADEMARK LAW – ABUSE OF A DOMINANT POSITION

Abuse dominant position by requiring payment of a fee for all packaging put into circulation in Germany, even if there is no use of the DGP system

• 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.

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Court of Justice EG, 16 July 2009

(V. Skouris, P. Jann, C. W. A. Timmermans, A. Rosas, K. Lenaerts, M. Ilešič, J.-C. Bonichot, T. von Danwitz, J. N. Cunha Rodrigues, R. Silva de Lapuerta, A. Arabadjiev, C. Toader and J.-J. Kasel)

JUDGMENT OF THE COURT (Grand Chamber)

16 July 2009 (*)

Appeals – Competition – Article 82 EC – System for the collection and recovery of used packaging in Germany – ‘Der Grüne Punkt’ logo – Fee payable under a trade mark agreement – Abuse of dominant position – Exclusive right of the proprietor of a trade mark –

Excessive duration of the proceedings before the Court of First Instance – Reasonable time – Principle of effective legal protection – Articles 58 and 61 of the Statute of the Court of Justice

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,

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.'*

36 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.

37 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.'

38 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 B&K judgment of the Bundesgerichtshof and the Hertz 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 *Iseri 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 (*Baustahlgewebe 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.

190 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.

191 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).

192 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.

193 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.

194 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.

* Language of the case: German.

OPINION OF ADVOCATE GENERAL BOT

delivered on 31 March 2009 1(1)

Case C-385/07 P

Der Grüne Punkt – Duales System Deutschland GmbH
v

Commission of the European Communities
(Dominant position – Abuse – System for the collection and recovery of sales packaging marketed in Germany with the Der Grüne Punkt logo – Requirement to pay a fee – Principle that the case must be dealt with within a reasonable time)

1. The present case has as its subject-matter the appeal lodged by Der Grüne Punkt – Duales System Deutschland GmbH ('DSD' or 'the appellant') against a judgment of the Court of First Instance of the European Communities of 24 May 2007. (2) That case concerned an abuse of a dominant position in the recovery of waste packaging.

2. Under a German ordinance, manufacturers and distributors of packaging are required to take back and recover the packaging which they place on the German market. (3) The appellant is an undertaking which provides a packaging collection, sorting and recovery service for those manufacturers and distributors of sales packaging. For that purpose, the manufacturers and distributors must place the Der Grüne Punkt logo on their packaging. In return, the manufacturers and distributors must pay DSD a fee which covers the costs of the collection, sorting and recovery of the packaging taken back by DSD and the associated administrative costs.

3. It was that system put in place by DSD that gave rise to Commission Decision 2001/463/EC of 20 April 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty. (4)

4. The question at issue in the appeal is whether the appellant can rely on the Der Grüne Punkt logo to justify the fact that manufacturers and distributors must pay a fee for all the packaging on which the logo is placed even though part of the packaging is taken back not by the appellant's system but by a competing system.

5. In addition, in the present appeal the Court of Justice is requested to adjudicate on the consequences of the Court of First Instance's failure to determine a case within a reasonable time. The appellant is of the view that these proceedings, which lasted approximately five years and nine months, breach the principle in question.

6. In this Opinion, I shall set out, first of all, the reasons why I consider that it should be dismissed.

7. I shall then explain that, in the context of this dispute, in which the excessive duration of the proceedings had no consequence for the nature of the substantive decision delivered by the Court of First Instance, the appropriate penalty for failure to respect the right of every litigant to have his case determined within a reasonable time lies, in my view, not in annulment of the decision at issue but in recognition that the appellant is entitled to bring an action for damages under the second paragraph of Article 288 EC.

I – Legal framework

A – Community law

8. Article 82 EC is worded as follows:

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
...'

9. Where there is an infringement of the first paragraph or subparagraph (a) of the second paragraph of Article 82 EC, the Commission of the European Communities may, pursuant to Article 3(1) of Council Regulation No 17 of 6 February 1962, (5) 'by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end'.

B – The German rules: the Ordinance on the avoidance of packaging waste

10. On 12 June 1991, the Ordinance on the avoidance of packaging waste (Verordnung über die Vermeidung von Verpackungsabfällen) (6) was adopted; the revised version, which is applicable to the present proceedings, entered into force on 28 August 1998 ('the Ordinance' or 'the Packaging Ordinance'). The Ordinance is intended to avoid and reduce the environmental impact of waste and to that end requires manufacturers and distributors to take back and recover used sales packaging.

11. Under Paragraph 3(1) of the Ordinance, sales packaging is packaging which is provided as a sales unit and is used by the final consumer. Sales packaging

also includes packaging and non-returnable tableware and cutlery used by the distributive trades, restaurants and other service providers which enables or supports the handing-over of goods to final consumers.

12. The manufacturer is defined in Paragraph 3(7) of the Ordinance as someone who manufactures packaging, packaging material or products from which packaging is directly made, or who imports packaging into German territory. Paragraph 3(8) of the Ordinance provides that a distributor is someone who puts into circulation, regardless of the marketing stage, packaging, packaging material or products from which packaging is directly made, or packaged goods. Last, a final consumer is defined in Paragraph 3(10) of the Ordinance as someone who does not sell on the goods in the form in which they are delivered to him.

13. In order to comply with their obligation to take back and recover sales packaging, manufacturers and distributors are required, under Paragraph 6(1) and (2) of the Ordinance, to take back free of charge the packaging used by final consumers at or in the immediate vicinity of the point of sale and to recover it. This arrangement is called 'the self-management solution'. Under this system, the distributor is required, pursuant to the third sentence of Paragraph 6(1) of the Ordinance, to draw the final consumer's attention, by means of clearly visible and legible signs, to the fact that packaging may be returned.

14. According to the first sentence of Paragraph 6(3) of the Ordinance, manufacturers and distributors may also choose to 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 in order for it to be recovered. This arrangement is called 'the exemption system'. According to the second sentence of point 4(2) of Annex I to Paragraph 6 of the Ordinance, manufacturers and distributors must make it known that they are participating in an exemption system by marking packaging or by any other suitable means. They may 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. Where manufacturers and distributors choose to participate in an exemption system, they are exempted from their obligation to take back and recover all packaging covered by that system.

15. Under the 11th sentence of Paragraph 6(3) of the Ordinance, exemption systems must be approved by the competent authorities of the Länder concerned. In order to be approved, those systems must, inter alia, cover the territory of at least one Land, make regular collections in the vicinity of consumers' homes and have entered into agreements with the local bodies responsible for waste management. Any undertaking which satisfies those conditions in a Land may organise an authorised exemption system in that Land.

16. In order to satisfy in full their obligation to take back and recover used sales packaging, manufacturers and distributors must, whatever system they choose, comply with the recovery rates defined in Annex I to

Paragraph 6 of the Ordinance, which vary according to the packaging material. Proof of compliance with those rates is provided, in the case of the self-management solution, in the form of certificates issued by independent experts and, in the case of exemption systems, in the form of verifiable data on the quantities of packaging collected and recovered.

17. In addition, the ninth sentence of Paragraph 6(1) of the Ordinance states that, if a distributor does not comply with its take-back and recovery obligation by means of a self-management solution, it must do so by means of an exemption system.

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

18. DSD is a company which since 1991 has operated an exemption system throughout the whole of the German territory ('the DSD system'). For that purpose, it was approved in 1993 by the competent authorities of all the Länder.

19. The relationship between DSD and the manufacturers and distributors which participate in its system is governed by a standard agreement which covers the use of the Der Grüne Punkt logo ('the Trade Mark Agreement'). Under Article 1(1) of that agreement, the participating undertaking is authorised, in return for a fee, to affix the Der Grüne Punkt logo to sales packaging included in the DSD system.

20. DSD, on behalf of the undertakings which participate in its system, assumes responsibility for the collection, sorting and recovery of the used sales packaging which they decide to include in the DSD system, thus relieving them of their obligation to take back and recover that packaging. To that end, the participating undertakings are required to notify the types of packaging which they wish to dispose of through the DSD system and to affix the Der Grüne Punkt logo on each item of packaging belonging to those types and destined for domestic consumption in Germany.

21. Manufacturers and distributors which use the Der Grüne Punkt logo pay DSD a fee for all the packaging on which they affix that logo and which they place in circulation on German territory. The amount of that fee is calculated 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. The fees are intended solely to cover the costs of collection, sorting and recovery and the associated administrative costs.

22. The Der Grüne Punkt logo was registered as a trade mark by the German Patents and Trade Marks Office in 1991, DSD being the proprietor of that trade mark. For use outside Germany, in particular in the other Member States of the European Community, DSD transferred its rights of use, in the form of a general licence, to ProEurope (Packaging Recovery Organisation Europe SPRL), whose registered office is in Brussels (Belgium).

23. In the context of the DSD system, packaging bearing the Der Grüne Punkt logo can be collected either in special bins, and divided up 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 placed in bins belonging to the public waste disposal system.

24. DSD does not collect or recover the used packaging itself, but subcontracts that service to local undertakings. The relationship between DSD and those undertakings is governed by a standard agreement ('the Service Agreement'). DSD has signed a Service Agreement with more than 500 undertakings.

25. The Service Agreement formed the subject-matter of Commission Decision 2001/837/EC of 17 September 2001 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement. (7) 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, DSD's action for annulment of that decision was dismissed.

II – Facts

26. The facts, as described in the judgment under appeal, may be summarised as follows.

27. On 2 September 1992, DSD notified the Commission of its statutes and also of a number of agreements, including the Trade Mark Agreement and the Service Agreement, with a view to obtaining negative clearance or, failing that, a decision granting exemption.

28. Following the publication in the Official Journal of the European Communities on 27 March 1997 (OJ 1997 C 100, p. 4) of the notice pursuant to Article 19(3) of Regulation No 17, in which the Commission announced that it intended to take a favourable view of the notified agreements, the Commission received observations from interested third parties concerning, in particular, various aspects of the application of the Trade Mark Agreement. In particular, those interested third parties complained of the distortion of competition which might arise if an undertaking were charged twice as a result of participating in the DSD system and the system of another service provider.

29. 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.

30. That commitment was as follows: (8) 'On condition that regional alternative systems to [the DSD system] are created which are formally approved by the highest competent regional authority under Paragraph 6(3) of 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 [Der Grüne Punkt] logo is that protection of the [Der Grüne Punkt] trade mark should not be impaired.'

31. 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 disposal of some of the packaging and not be restricted solely to exemption systems.

32. 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 disposal service has not actually been provided by DSD, constituted an abuse of a dominant position on the part of DSD.

33. 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 opt for a self-management solution for part of their packaging and participate 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 the condition that it was provided with evidence in respect of that second type of collection. That evidence should be furnished in accordance with the requirements laid down in point 2 of Annex I to Paragraph 6 of the Packaging Ordinance. In its letter of 13 March 2000, DSD also stated that it saw no reason to amend the series of commitments given on 15 October 1998. (9)

34. On 3 August 2000, the Commission sent a statement of objections to DSD, to which DSD responded by letter of 9 October 2000.

35. On 20 April 2001, the Commission adopted the decision at issue.

III – The decision at issue

36. The Commission takes as the starting point for its reasoning, first, the possibility that a manufacturer or distributor of packaging may combine different systems in order to satisfy its obligations under the Ordinance (10) and, second, the fact, not disputed by DSD, that DSD is in a dominant position. At the time of the adoption of the decision at issue, DSD was the only undertaking to offer an exemption system throughout the whole of the German territory and the DSD system collected approximately 70% of sales packaging in Germany.

37. The Commission then divides its legal assessment into two parts, the first being devoted to the analysis of DSD's conduct by reference to Article 82 EC and the second to the examination of the measures which will allow the Commission, on the basis of Article 3(1) of Regulation No 17, to bring the abuse found to an end.

38. According to the decision at issue, the abuse of a dominant position is characterised by the fact that the fee charged by DSD to manufacturers and distributors of packaging which participate in the DSD system is not determined by the actual use of that system but calculated on the basis of the number of packages bearing the Der Grüne Punkt trade mark which those

manufacturers and distributors market in Germany, whether or not those packages are recovered by DSD; and under the Trade Mark Agreement the manufacturers and distributors which participate in the DSD system must place that trade mark on each item of the packaging notified to DSD and intended for consumption in Germany.

39. The Commission thus points out that in reality DSD ties the fee solely to the placing of the Der Grüne Punkt trade mark on the packaging, irrespective of whether or not the packaging thus marked is actually taken back by the DSD system, whereas it is stipulated in the Trade Mark Agreement that the fee serves solely to cover the costs linked with the collection, sorting and recovery of the used packaging, and the associated administrative costs.

40. The Commission illustrates its position by reference to three groups of cases, described in the decision at issue.

41. The first group of cases is where a manufacturer or distributor of packaging decides to participate in the DSD system and another exemption system. Thus, for example, an undertaking might wish to use, on the territory of one Land only, a competitor of DSD, whose prices are more advantageous, and to keep DSD for the rest of the federal territory, where only DSD operates. In that hypothesis, the contract with DSD none the less requires the undertaking to pay a fee to DSD, since the packaging placed on the market in the Land in question would bear the Der Grüne Punkt trade mark.

42. The second group of cases concerns the case where an undertaking decides to combine a self-management solution with the DSD system, as, for example, in the context of a fast-food chain. In that type of restaurant, in most cases the consumer is given the choice of consuming the product on the premises or taking away the product and therefore the packaging. In that case, it is quite understandable that the distributor, in the context of a self-management solution, should take back the used packaging which the consumer will have disposed of on the premises, at the point of sale or in the immediate vicinity (for example, in special bins placed outside). For the packaging taken away by the consumer, which will therefore be thrown away at some distance from the point of sale, the distributor makes use of the DSD system.

43. In the third group of cases, a manufacturer or distributor of packaging places that packaging on the German market, but also on the market of the other Member States. For the packaging distributed on the territory of the other Member States, the manufacturer or distributor participates in an exemption system which uses the Der Grüne Punkt trade mark. That may be the case, for example, for packaging placed on the Luxembourg market which, in accordance with the intention of the undertaking placing that packaging on the market, is taken back by the Valorlux system. For various reasons, however, that same undertaking does not wish to participate in the DSD system for the taking-back and recovery of the packaging placed on the German market. It may be imagined that that

undertaking produces plastic bottles which it distributes on Luxembourg territory and in one Land on German territory. In Luxembourg it participates in the Valorlux system and in the German Land it sets up, for example, a self-management take-back and recovery solution.

44. In those three groups of cases, DSD's conduct is, according to the Commission, clearly abusive, in so far as it seeks to impose unfair prices on participating undertakings and to prevent competitors from entering the relevant German market.

45. In effect, in each of the cases just described, the manufacturer or distributor of packaging is faced with the same problem, namely that for the same type of packaging placed on the German market it is required to pay two fees, even though it participates in the DSD system only on the territory of another Member State or for only part of its packaging on the German market. The manufacturer or distributor is, in effect, required to place the Der Grüne Punkt trade mark on all the packaging and must therefore pay the fee for each occasion when the trade mark is placed on a package.

46. The selective marking envisaged, but rejected by the Commission in such a hypothesis, would entail marking with the Der Grüne Punkt trade mark only the packaging taken back by the DSD system and would require the manufacturer or distributor to set up two different production lines for the same packaging, one of which would be reserved for packaging marked with the Der Grüne Punkt trade mark. That, according to the Commission, would result in a significant additional cost for the manufacturer or distributor of that packaging.

47. Pursuing its analysis, the Commission considers that placing the trade mark on all packaging, and then concealing it on packaging intended for local supermarkets or large self-service shops using self-management solutions or a competing exemption system, in order to distinguish it from the packaging taken back by the DSD system, would entail an additional cost for the manufacturer or distributor.

48. Likewise, according to the Commission, since consumer behaviour is not predictable, as a consumer may decide to deposit the packaging at the point of sale or to place it in a container, the path taken by packaging cannot be determined in advance. A plastic bottle bearing the Der Grüne Punkt trade mark may thus end up in a container not belonging to DSD. The manufacturer or distributor would not have the logistical and physical means to trace the path taken by an item of waste and to ensure that it is put in the correct place.

49. The Commission concludes that the fact that the fee is linked to the placing of the Der Grüne Punkt trade mark on the packaging obliges the undertakings subject to the DSD system for a part of their packaging either to have separate production lines and distribution circuits, entailing an additional cost, or to pay a fee for a service which DSD does not supply. DSD thus imposes unfair trading conditions.

50. Last, according to the Commission, the very nature of the mechanism of the system established by

DSD will, owing to the additional cost which would automatically result for them, inevitably deter undertakings subject to the DSD system from making use of competing undertakings. That therefore constitutes a barrier to entry to the relevant market by competing undertakings. If the undertakings in question decide to make use of DSD and another waste packaging disposal system, they would have to pay, for the part of the packaging entrusted to DSD's competitor, two fees, namely DSD's fee for placing the trade mark on their packaging and the competitor's fee for actually collecting, sorting and recovering the packaging.

51. In the light of those factors, the Commission concludes that DSD abused its dominant position within the meaning of Article 82 EC, both towards its customers and towards its competitors.

52. The Commission proceeds to indicate at recitals 136 to 153 to the decision at issue that the finding of abuse is not affected by the need to preserve the distinctive character of the Der Grüne Punkt trade mark. It states at recital 145 that the essential function of the trade mark is fulfilled when it signals to the consumer that he has the option of having the packaging collected by DSD.

53. Following that analysis, the Commission adopted the decision at issue, in the following terms:

'Article 1

The conduct of [DSD], in requiring ... payment of a licence fee for the total quantity of sales packaging carrying the ['Der Grüne Punkt'] trade mark and put into circulation in Germany is incompatible with the common market ... 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 participate in a take-back system using the ['Der Grüne Punkt'] trade mark, and

(b) prove that, in respect of the quantity or partial quantity for which they do not use the exemption service, they fulfil their obligations under the Packaging Ordinance through competing exemption systems or through self-management solutions.
...

54. After finding the existence of an abuse, the decision at issue determines, in application of Article 3(1) of Regulation No 17, the way in which DSD must bring that infringement to an end. The main measure is defined in Article 3 of that decision:

'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 ['Der Grüne Punkt'] trade mark as are put into circulation in Germany for which the exemption service referred to in Article 2 of the Trade Mark Agreement is not used and for which the Packaging Ordinance obligations have demonstrably been fulfilled in another way. ...'

IV – The action before the Court of First Instance and the judgment under appeal

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

56. DSD also submitted an application for suspension of operation of the decision at issue. 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 dismissed that application.

57. By order of 5 November 2001, the Court of First Instance granted *Vfw AG ('Vfw')*, *Landbell AG für Rückhol-Systeme ('Landbell')* and *BellandVision GmbH ('BellandVision')* leave to intervene in the proceedings in support of the form of order sought by the Commission.

58. The written procedure was closed on 9 September 2002.

59. On 19 June 2006, the Court of First Instance decided to open the oral procedure and, in the context of the measures of organisation of procedure, sent the parties a number of questions. The parties were heard at the hearing held on 11 and 12 July 2006.

60. By the judgment under appeal, the Court of First Instance dismissed DSD's action.

61. DSD relied, in essence, on three pleas in law, alleging, first, infringement of Article 82 EC; second, breach of Article 3(1) of Regulation No 17 and of the principle of proportionality; and, third, infringement of Article 86(2) EC.

62. The Court of First Instance rejected the first plea as unfounded.

63. By its first plea, DSD claimed, in substance, that, contrary to the impression given by the decision at issue, a manufacturer or distributor of packaging was not required to obtain a compulsory licence for use of the Der Grüne Punkt trade mark in order to be able to participate in a competing system. Thus, DSD maintained that the selective labelling of packaging, allowing only packaging bearing the Der Grüne Punkt trade mark to be placed in the facilities belonging to the DSD system, was possible.

64. DSD also maintained that the provisions of the Trade Mark Agreement in dispute were necessary to ensure the attainment of the objectives of the Ordinance, to preserve the different functions of the mark Der Grüne Punkt and to enable the DSD system to function properly.

65. After stating at paragraph 139 of the judgment under appeal that it was possible for a manufacturer or distributor of packaging to use a self-management solution and an exemption system in order to comply with the recovery rates, the Court of First Instance, at paragraphs 142 to 163 of the judgment under appeal, set out the reasons why DSD was abusing its dominant position. The Court thus held that the solution of selective labelling was not imposed by the Ordinance and did not make it possible to put an end to abuse found in the decision at issue. It then stated, at paragraph 150 of the judgment under appeal, that the

exclusivity claimed by DSD was not imposed by the Ordinance in the case of use of mixed systems, and made clear that the Der Grüne Punkt logo did not have the effect which DSD claimed it to have.

66. The Court of First Instance further held, at paragraph 156 of the judgment under appeal, that ‘the fact that, in the case of shared use of two exemption systems, the Der Grüne Punkt 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 Der Grüne Punkt 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 DSD’s mark’.

67. The Court of First Instance concluded, at paragraph 164 of the judgment under appeal, that ‘neither the Packaging Ordinance, nor trade mark law [n]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 Der Grüne Punkt 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’.

68. By its second plea, DSD submitted that the measures taken by the Commission in the decision at issue did not satisfy the requirements set out in Article 3 of Regulation No 17.

69. DSD contended, in particular, that the selective marking of packaging depending on the system used was more appropriate than the obligation imposed in the decision at issue. It also submitted that Articles 3 and 4(2) of the decision at issue were disproportionate, because they obliged DSD to grant third parties a licence to use the Der Grüne Punkt trade mark. In addition, it claimed that the decision at issue required it to not charge a fee for merely using that logo where it was proven that the obligations resulting from the Ordinance were complied with in some other way.

70. The Court of First Instance rejected that plea. It held, at paragraph 173 of the judgment under appeal, that ‘the fact that it may theoretically be possible to affix the logo to packaging selectively cannot entail the annulment of the ... measures [taken in the context of 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 and 5 of [that] decision, which seek only to limit the remuneration for the service offered by DSD to the service actually provided by its system’.

71. The Court of First Instance also stated, at paragraph 181 of the judgment under appeal, that the obligations contained in the decision at issue did not seek to force DSD to grant a licence to use the mark Der Grüne Punkt without any restriction in time, but merely to require it to not charge a fee on the total amount of packaging bearing the Der Grüne Punkt logo where it is shown that all or only some of that packaging has been taken back or recovered through another system.

72. In response to DSD’s argument that it could receive an adequate fee for the mere use of the mark, the Court of First Instance stated, at paragraph 196 of the judgment under appeal, that the decision at issue must be interpreted as not precluding the possibility for DSD to levy an adequate fee for merely using the mark where it is shown that the packaging bearing the Der Grüne Punkt logo has been taken back and recovered by another system.

73. 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.

74. 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. The Court further stated, at paragraph 211 of the judgment under appeal, that, since DSD had not relied on Article 86(2) EC in the administrative proceedings, the Commission could not be accused of not having given reasons in that regard in its decision.

75. Consequently, the Court concluded, at paragraph 213 of the judgment under appeal, that the action must be dismissed in its entirety.

V – The procedure before the Court of Justice and the forms of order sought by the parties

76. Pursuant to Article 56 of the Statute of the Court of Justice, DSD, by application lodged at the Court Registry on 8 August 2007, brought an appeal against the judgment of the Court of First Instance.

77. By application lodged at the Court Registry on 16 November 2007, Interseroh Dienstleistungs GmbH (‘Interseroh’), which since 2006 has operated an exemption system throughout the whole of the German territory, 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.

78. 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 so that it can deliver a judgment consistent with the judgment of the Court of Justice; and

- in any event, order the Commission to pay the costs.

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

- dismiss the appeal; and
- order DSD to pay the costs.

VI – The pleas in law and the legal analysis

80. It is now appropriate to analyse the pleas in law in the light of those observations.

81. The appellant puts forward eight pleas in law in support of its appeal.

82. By its first plea, the appellant criticises the Court of First Instance for having breached the obligation to state reasons by making contradictory findings concerning the alleged abuse.

83. By its second plea, DSD contends that the Court of First Instance misinterpreted the Trade Mark Agreement by finding that, under that agreement, DSD grants a licence to use the Der Grüne Punkt trade mark for packaging taken back by competing systems.

84. DSD maintains, by its third plea, that in finding that the Der Grüne Punkt trade mark cannot benefit from the exclusivity claimed for it the Court of First Instance breached its obligation to state reasons and distorted the nature of the Packaging Ordinance.

85. By its fourth plea, the appellant claims that there has been an infringement of Community trade mark law.

86. By its fifth plea, DSD claims that the Court of First Instance infringed Article 82 EC, first by considering, without stating sufficient reasons and contrary to the evidence in the file, that DSD abused its dominant position by granting licences to use the Der Grüne Punkt trade mark for packaging not taken back by its system and, second, by not complying with the necessary conditions of the grant of a compulsory licence.

87. By its sixth plea, the appellant claims that the Court of First Instance breached Article 3 of Regulation No 17 and the principle of proportionality by requiring it to grant a licence for undertakings whose packaging is not taken back by its system and by depriving it of the right to place an explanatory note on packaging bearing the Der Grüne Punkt trade mark which is not taken back by the DSD system.

88. DSD asserts, by its seventh plea, that there has been a procedural defect in that the Court of First Instance substituted its own reasoning for that of the Commission.

89. Last, by its eighth plea, the appellant contends that the Court of First Instance breached its right to have its case determined within a reasonable time.

A – First plea, alleging breach of the obligation to state reasons, owing to contradictory grounds

90. By this first plea, the appellant criticises the Court of First Instance for having made contradictory findings concerning the alleged abuse of a dominant position and for having thus breached its obligation to state reasons

1. Arguments of the parties

91. In the appellant's submission, the contradiction lies in the fact that it follows, on the one hand, from the analysis carried out by the Court of First Instance and, in particular, from paragraphs 48, 50, 58, 60, 119, 163 and 164 of the judgment under appeal that DSD requires the undertakings participating in its waste disposal system to pay a fee for sales packaging not taken back by that system and that, on the other hand, the Court of First Instance found, at paragraph 194 of the judgment under appeal, that 'it cannot be excluded that the mark Der Grüne Punkt affixed to the packaging at issue may have economic value as such' and that

'even if [the] packaging is not actually brought to the DSD system and it is shown that its equivalent in material has been collected or recovered by a competitor system, it is none the less the case that the mark leaves it open to the consumer to dispose of that packaging through the DSD system'. Thus, the Court of First Instance continued, '[s]uch a possibility offered to the consumer for all the packaging put into circulation with the Der Grüne Punkt logo ... is likely to have a price which ... 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'.

92. The Commission contends that this plea is unfounded. It observes that the fee is intended to cover the costs of collection, sorting and recovery, and also the administration costs. On the other hand, the fee does not represent consideration for the use of the trade mark. The decision at issue and the judgment under appeal are not therefore concerned with the question of a fee for using the trade mark. The Court of First Instance logically drew a distinction, at paragraphs 194 to 196 of the judgment under appeal, between the abuse committed by DSD and the possibility for it to charge an appropriate fee solely for the use of the trade mark.

93. Vfw, Landbell and BellandVision submit, like the Commission, that there is no contradiction. Paragraph 194 of the judgment under appeal has no connection with the Court of First Instance's findings concerning the abuse. It is solely concerned with the question whether the mere affixing of the Der Grüne Punkt trade mark to the packaging may have a price, even where DSD provides no disposal service.

2. Assessment

94. In the context of the first plea relating to the infringement of Article 82 EC, the Court of First Instance, at paragraphs 86 to 163 of the judgment under appeal, examined whether DSD was abusing its dominant position on the relevant German market. It concluded, at paragraphs 164 and 165 of that judgment, that 'neither the Packaging Ordinance, nor trade mark law [n]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 Der Grüne Punkt 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'. The Court therefore rejected the first plea.

95. It follows from paragraph 191 of the judgment under appeal that the Court of First Instance adjudicated, in the context of the second plea alleging breach of Article 3 of Regulation No 17 and breach of the principle of proportionality, on DSD's argument that Articles 3 and 4 of the decision at issue precluded the charging of a fee for merely using the trade mark. The Court explained, at paragraphs 194 to 196 of that judgment, the reasons why DSD was able to charge an appropriate fee for merely using the mark where it is shown that the packaging bearing the Der Grüne Punkt logo has been taken back and recovered by another system.

96. The Court thus found at paragraphs 194 to 196 of the judgment under appeal that the Der Grüne Punkt logo could have an economic value and that merely placing that logo on packaging '[was] likely to have a price'.

97. To my mind, the Court of First Instance did not make contradictory findings. It drew a distinction between a fee which covers only the costs associated with the actual use of the system, the only fee at issue in the present case, and an appropriate fee for merely using the Der Grüne Punkt logo, which, being different in nature, is merely a possibility for negotiation in a completely different sphere and extraneous to the matter before the Court of First Instance.

98. Accordingly, in the light of the foregoing elements, I am of the view that the first plea must be rejected as unfounded.

B – Second plea, alleging misinterpretation of the Trade Mark Agreement

99. By this second plea, DSD takes issue with the Court of First Instance for having misinterpreted the Trade Mark Agreement.

1. Arguments of the parties

100. In support of this plea, the appellant puts forward a number of arguments.

101. First, in DSD's submission, the Court of First Instance found that, under the Trade Mark Agreement, DSD grants a separate licence to use the Der Grüne Punkt logo, that is to say, a licence to place the mark on the sales packaging for which the DSD system is not used. The Court of First Instance therefore made an error of law by misinterpreting the Trade Mark Agreement.

102. The appellant criticises the Court of First Instance for having disregarded the arguments whereby the appellant showed that it does not grant a separate licence and that the Trade Mark Agreement merely grants the right to use the logo to participating undertakings so that DSD will assume the take-back and recovery obligations arising under the Packaging Ordinance. Consequently, DSD maintains that if the Trade Mark Agreement merely grants a right to place the logo on the packaging, thus allowing that packaging to be covered by its disposal system, there would be no disparity between the service which it provides and the fee. Any abuse is therefore precluded.

103. Second, DSD contends that the Court of First Instance's interpretation of the Trade Mark Agreement is contrary to the evidence in the file. It follows from the correspondence between DSD and the Commission during the administrative procedure that DSD did not grant a separate licence, but that it refused only to accept that packaging intended for competitor systems might carry the Der Grüne Punkt logo.

104. Third, DSD criticises the Court of First Instance for having distorted the evidence on which it relied and on which it found that DSD offered a separate licence. In particular, the Court of First Instance erred in law in finding in the judgment of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) of 11 August 1998 in Hetzel and in the judgment of the

Bundesgerichtshof (Federal Court of Justice, Germany) of 15 March 2001 in Bäko, in the complaints submitted to it by the Commission, and also in the context of the argument initially defended by DSD, that DSD offered a separate licence.

105. The appellant refers, in fact, to paragraph 163 of the judgment under appeal, where the Court of First Instance held that 'the specific needs of the functioning of the DSD system cannot justify [DSD's] conduct, described in [the Hetzel and Bäko judgments], cited by the Commission ..., the various complaints [submitted to] the Commission ... and DSD's initial submission in its application ..., whereby it requires payment of a fee for all packaging carrying the Der Grüne Punkt 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'.

106. The Commission recalls that, in order to establish the abuse, it relied solely on the fee arrangement defined in the Trade Mark Agreement. It explains that the disproportion between the fee required and the service actually carried out by DSD relates to the use of the logo only in so far as DSD makes use of the Der Grüne Punkt logo to bring economic pressure to bear on the undertakings participating in its system.

107. Vfw, Landbell and BellandVision submit that this plea is inadmissible, in so far as DSD can base its appeal only on breach of legal provisions by the Court of First Instance and not on what the appellant alleges is an incorrect appraisal of the facts.

2. Assessment

108. As I understand it, the appellant takes issue with the Court of First Instance for having concluded from its assessment of the documents in the file and of the evidence that DSD grants a licence to use the Der Grüne Punkt logo to the participating undertakings for packaging which is not taken back or recovered by its system. In the appellant's submission, the Court of First Instance ought to have interpreted the Trade Mark Agreement as an agreement linking the fee solely with the service provided.

109. In my view, the appellant is mistaken as to the findings of the Court of First Instance.

110. After setting out the arguments of the parties, the Court of First Instance stated, by way of preliminary observation, at paragraph 141 of the judgment under appeal, that 'only the provisions of the Trade Mark Agreement concerning the fee are regarded as abusive in the ... decision [at issue] (namely Article 4(1) and Article 5(1) of the agreement). The Court went on to state that '[t]hus, the ... decision [at issue] does not criticise the fact that Article 3(1) of the agreement requires the manufacturer or distributor wishing to use the DSD system to affix the Der Grüne Punkt logo to each piece of notified packaging which is intended for domestic consumption'.

111. In the section headed 'Law', the Court of First Instance stated, at paragraph 17 of the judgment under appeal, that the amount of the fee paid by the undertakings participating in the DSD system serves

only, pursuant to Article 4(2) and (3) of the Trade Mark Agreement, to cover the costs incurred in collecting, sorting and recovering packaging and the associated administrative costs.

112. I understand from the foregoing that the Court of First Instance clearly identified, under that agreement, DSD's obligations and also the consideration to be paid by the manufacturer or distributor, which takes the form of a fee. The criticism of DSD relates to the imbalance between that fee required of the participating undertakings and the service actually provided, since even where certain packaging is taken back by a competitor system, DSD, under the Trade Mark Agreement, charges a fee for that packaging, a fee which, it will be recalled, serves solely to cover the costs of collecting, sorting and recovering the packaging, together with the administrative costs.

113. Accordingly, the Court of First Instance did not, to my mind, interpret the Trade Mark Agreement as having the effect of granting a licence to use the Der Grüne Punkt logo to the participating undertakings for the packaging not taken back or recovered by the DSD system.

114. As the Commission has asserted, the Der Grüne Punkt logo has no relationship with the Trade Mark Agreement save in so far as that logo played an identifying role, as, indeed, the appellant itself maintained before the Court of First Instance. At paragraph 124 of the judgment under appeal, the Court referred to DSD's arguments that '[t]he mark Der Grüne Punkt thus makes it possible, at the same time, to indicate the packaging which is to be transferred to DSD ... and to inform the consumer as to what he is to do with it'.

115. Accordingly, I consider that the Court of First Instance correctly proceeded from the following premiss. The purpose of the Trade Mark Agreement is to allow participating undertakings to be relieved of their obligation to take back and recover packaging. By way of consideration for that service, those undertakings must pay a fee to DSD for all notified packaging, whether or not that packaging is actually taken back by the DSD system, as the trade mark serves to identify the notified packaging.

116. It therefore appears to me that the second plea must also be rejected as unfounded.

C – Third plea, alleging an insufficient statement of reasons and misinterpretation of the Packaging Ordinance owing to the fact that it is impossible to claim exclusivity of the Der Grüne Punkt trade mark

117. By its third plea, the appellant takes issue with the Court of First Instance for not have stated sufficient reasons for its finding that the Der Grüne Punkt trade mark could not benefit from the exclusivity claimed and for having, by that finding, misrepresented the Trade Mark Agreement and infringed trade mark law.

118. In support of this plea, the appellant puts forward a number of arguments.

119. By its first argument, the appellant maintains that, in finding that DSD could not claim exclusivity for the

Der Grüne Punkt trade mark, the Court of First Instance relied solely on the answers to the questions which it put to the parties at the hearing and, accordingly, did not provide sufficient reasons for that finding.

120. By its second argument, the appellant submits that the Court of First Instance's finding that the manufacturer or distributor of packaging transfers a quantity of material to DSD is contrary to the provisions of the Trade Mark Agreement, to the provisions of the Packaging Ordinance and to the requirement arising under trade mark law that packaging covered by the DSD system must be identifiable.

121. By its third, fourth and fifth arguments, DSD takes issue with the Court of First Instance for having misinterpreted the Packaging Ordinance in finding, first, that packaging can be covered by the DSD system and at the same time by another exemption system; second, that a distributor which has participated in an exemption system may subsequently fulfil its take-back and recovery obligations through a self-management solution; and, third, that a distributor which fulfils such obligations through a self-management solution may subsequently participate in an exemption system.

122. By its sixth argument, DSD contends that the Court of First Instance's finding that packaging which is not disposed of by the DSD system may bear the Der Grüne Punkt trade mark deprives that trade mark of its distinctiveness and is manifestly contrary to the principle of transparency set out in the Packaging Ordinance.

123. Last, by its seventh argument, the appellant maintains that the Court of First Instance's refusal to recognise the exclusivity of the Der Grüne Punkt trade mark is incompatible with trade mark law.

1. The first argument put forward in support of the third plea, alleging insufficient reasoning

a) Arguments of the parties

124. DSD maintains that the finding made at paragraph 161 of the judgment under appeal, that the Der Grüne Punkt trade mark could not benefit from the exclusivity claimed, is not supported by a sufficient statement of reasons. In particular, the appellant takes issue with the Court of First Instance for having relied on the answers to the questions which it put to the parties at the hearing, whereas it is impossible, on the basis of the judgment under appeal or the minutes of the hearing, to determine what was the object of that oral argument.

125. The Commission contends that the assessment of the justifications based on trade mark law does not essentially rely on evidence adduced at the hearing.

b) Assessment

126. Like the Commission, I consider that this argument must be rejected as unfounded.

127. In effect, at paragraph 139 of the judgment under appeal, the Court of First Instance stated that the answers to the questions which it put to the parties at the hearing enabled it to make the following finding: '[T]he manufacturer or distributor of packaging does not transfer to DSD a set number of items of packaging intended to bear the Der Grüne Punkt 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 Ordinance’.

128. On the basis of that finding, the Court of First Instance examined DSD’s criticisms of the analysis set out in the decision at issue and, in particular, the justifications relating to trade mark law put forward by DSD.

129. At paragraphs 103 to 114 of the judgment under appeal, the Court of First Instance identified the arguments raised by the parties during the written procedure relating to the justification of the disputed provisions of the Trade Mark Agreement by trade mark law.

130. Then, at paragraph 156 of the judgment under appeal, the Court of First Instance observed that it follows from a judgment of the Kammergericht Berlin (Higher Regional Court, Berlin) of 14 June 1994 that ‘[the Der Grüne Punkt trade mark] “says no more than that the product thus identified may be collected via the DSD system” and gives no indication as to the quality of the service offered’. The Court of First Instance added that, ‘in the case of allocation of part of the packaging to one of DSD’s competitors, the consumer is free to decide whether he has the packaging recovered through the DSD system or a competitor system’.

131. The Court of First Instance concluded, at paragraph 157 of the judgment under appeal, that, ‘since the function of the Der Grüne Punkt logo is to identify the possibility of having the packag[ing] at issue collected by the DSD system and since that logo may be affixed together with other signs of other mechanisms making it possible to identify another possibility for collection by a competitor self-management solution or exemption system, it cannot be claimed that the ... decision [at issue] constitutes a disproportionate impairment of the trade mark right or, in any event, an impairment which is not justified by the need to prevent an abuse of a dominant position within the meaning of Article 82 EC’.

132. Furthermore, at paragraph 158 of the judgment under appeal, the Court of First Instance responded to the argument whereby DSD challenged the assertion in the decision at issue that it follows from the judgment of the Kammergericht Berlin that the essential function of the Der Grüne Punkt trade mark is fulfilled when that trade mark informs the consumer that he can dispose of the packaging through DSD. The Court of First Instance considered that that argument is irrelevant, as ‘[it] merely points to the particular context of the judgment ..., but does not call into question the conclusion arrived at by the Commission, namely that several indications informing the consumer about the steps to be taken in relation to the different take-back and recovery services may feature on the same packaging’.

133. The Court of First Instance proceeded, at paragraph 159 of the judgment under appeal, to explain that the survey results on which DSD relied and which, according to DSD, confirm the distinctive character the trade mark, do not call into question the reasoning in the decision at issue. The Court observed, in that regard, that ‘[i]t is logical that consumers identify the Der Grüne Punkt logo affixed to the packaging as being the indication that that packaging may be placed in the collection facilities situated close to their homes. However, that does not disclose the reactions of those consumers when faced with packaging to which several logos identifying exemption systems are affixed. The Commission and the interveners state in that regard, as was confirmed at the hearing, that the collection facilities used by those systems are generally the same and that, most of the time, the consumer deposits packaging in those facilities on the basis of the material used and not on the basis of the logo on the packaging’.

134. The appellant also maintained before the Court of First Instance that the affixing of the mark Der Grüne Punkt to packaging participating in a competitor system impairs the distinctive function of that mark, since consumers are deceived in all the groups of cases envisaged in the decision at issue. Where there is a combination of a self-management solution and the DSD system, DSD argued that almost 48.4% of consumers would not understand the contradictory information represented by the indication that packaging may be taken back to a shop and the indication transmitted by the Der Grüne Punkt logo that packaging is taken back in the vicinity of the home of the final consumer by the DSD system. (11)

135. The Court of First Instance responded to that argument at paragraph 160 of the judgment under appeal and considered that ‘[that] argument based on deception of the public targeted by the mark cannot be upheld ..., given that the Trade Mark Agreement concerns only users of that logo, namely manufacturers and distributors of packaging which use the DSD system, and not consumers’.

136. The Court of First Instance concluded its analysis by stating, at paragraph 161 of the judgment under appeal, that ‘accepting the exclusivity claimed by [DSD] would have no other effect than to prevent manufacturers and distributors of packaging from using a mixed system, and to legitimise the possibility, for [DSD], of being paid for a service which the interested parties have nevertheless shown that it did not actually provide, they having entrusted it to another exemption system or self-management solution in accordance with the detailed rules laid down in Article 1 of the ... decision [at issue]’.

137. In the light of all those factors, I consider that the reasoning of the Court of First Instance concerning the finding that the Der Grüne Punkt trade mark cannot benefit from the exclusivity claimed by DSD is not, contrary to DSD’s contention, essentially supported by the answers to the questions which the Court of First Instance put to the parties at the hearing and is not insufficient.

138. Accordingly, I am of the view that the first argument of the third plea must be rejected as unfounded.

2. The second argument put forward in support of the third plea, alleging failure to have regard to the evidence in the file and breach of Community trade mark law

a) Arguments of the parties

139. In DSD's submission, the finding made 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 Der Grüne Punkt 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 on notification and on the grant of licences, to the provisions of the Packaging Ordinance on fulfilling the take-back obligation, to the requirement of transparency laid down in that Ordinance and, last, to the requirement resulting from trade mark law that packaging covered by the DSD system must be identifiable.

b) Assessment

140. As the Commission has observed, the appellant, in the context of the second argument put forward in support of the third plea, does no more than refer to its observations relating to the national legal framework and fails to establish a link between that legal framework and its criticisms concerning the findings of the Court of First Instance referred to in this argument. The argument contains no legal argument showing how the Court of First Instance erred in law.

141. It will be recalled that, under Article 225 EC, the first paragraph of Article 51 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court, an appeal must state precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. (12)

142. In those circumstances, I consider that the second argument put forward in support of the third plea must be held inadmissible.

3. The third, fourth and fifth arguments put forward in support of the third plea, alleging misinterpretation of the Packaging Ordinance

143. The appellant takes issue with the Court of First Instance for having misinterpreted the Packaging Ordinance in finding, first, that packaging may be covered by the DSD system and at the same time by another exemption system; second, that a distributor which has participated in an exemption system may subsequently fulfil its obligations through a self-management solution; and, third, that a distributor which fulfils its obligations through a self-management solution may subsequently participate in an exemption system.

a) The third argument put forward in support of the third plea

i) Arguments of the parties

144. DSD maintains that the finding made at paragraphs 129 and 154 of the judgment under appeal, that packaging entrusted to DSD may at the same time be covered by a take-back and recovery system other than the DSD system, constitutes a misinterpretation of the Packaging Ordinance.

145. The appellant maintains that that finding is manifestly contrary to the principle of the law on packaging, that a specific item of packaging is either subject to the take-back obligation or released from that obligation. The appellant therefore submits that, contrary to the finding of the Court of First Instance to which this argument refers, packaging cannot be covered by two or more disposal systems.

146. In that regard, the appellant takes the example cited by the Court of First Instance at paragraph 134 of the judgment under appeal. The Court thus explained that, in the context of a fast-food chain, 'where the final consumer purchases a sandwich sold in packaging intended to retain heat, that consumer is free to decide either to consume the product there and then and to place the packaging in the bins provided by the fast-food chain, in the context of the self-management solution, or to take that product home and to place the packaging into the DSD collection facilities situated in the vicinity of his home'. The Court of First Instance went on to conclude that '[t]hat packaging can thus be put back into [both of the] collection and recovery systems made available by the fast-food chain to comply with its obligations laid down in the Ordinance'.

147. DSD contends that, even in the sphere of fast food, packaging cannot, contrary to the finding of the Court of First Instance, come under two collection systems. While it may happen that the packaging is deposited at the point of sale in the context of a self-management solution or taken back by an exemption system, that can only be the consequence of error on the part of the consumer. The appellant then stresses the importance of indicating clearly what is the means of disposal envisaged for each piece of packaging.

148. The Commission contends that, in the context of a mixed solution which makes use of two exemption systems, the manufacturer or distributor of packaging is bound by the principle of transparency with respect to both systems. The packaging would therefore bear two different signs serving to identify those systems. In the Commission's submission, such a solution is possible because the systems are responsible only for the packaging designated as quantities. The Commission also states that, in the event of competition between exemption systems, the packaging is collected in the same containers.

ii) Assessment

149. I consider that the Court of First Instance's finding at paragraph 154 of the judgment under appeal that a piece of packaging entrusted to DSD may be covered by several disposal systems does not misinterpret the Packaging Ordinance.

150. I would point out at the outset that, at paragraph 10 of the judgment under appeal, the Court of First Instance stated that ‘in their observations of 24 May 2000, sent to the Commission in the context of the administrative proceedings ..., the German authorities stated that the Packaging Ordinance allowed distributors to combine the taking-back of packaging in the vicinity of [their] business, in the context of a self-management solution, and the collection of packaging in the vicinity of the final consumer, in the context of an exemption system, by participating in the exemption system for only part of the packaging which [they] had put into circulation’.

151. Likewise, at paragraph 45 of the judgment under appeal, the Court of First Instance observed that ‘[t]he ... decision [at issue] also points out that it is apparent [from] an earlier response of the German authorities that [Paragraph] 6(3) of the Ordinance does not imply that it is possible to use only one system. It was never the intention of the German authorities that only one exemption system should be created in the whole of the country or in each Land’.

152. It was on the basis of those findings that the Court of First Instance was able, in my view, and correctly, to state at paragraph 131 of the judgment under appeal that, according to Annex I to [Paragraph] 6 of the Ordinance, the recovery rates are calculated as a percentage of the total of the marketed material which is actually taken back and that it is stated at point 1(2) of that annex that the quantities of relevant packaging are determined as a percentage of the total.

153. The Court of First Instance therefore explained at paragraphs 132 to 135 of the judgment under appeal that, since the recovery rates were calculated by reference to the percentage of the total, a division between several systems was possible without there being any need for predetermined quantities of packaging. The Court illustrated its argument with the help of an example concerning a fast-food chain. It thus demonstrated that, in the context of such a chain, a combination of a self-management solution and the DSD system is essential, because the product can be eaten on the premises or taken away. The Court went on to explain that ‘what is important, in the contractual relations between [DSD] and the manufacturer or distributor of packaging, is to ensure that the quantities of material to be recovered which are placed on the market are actually taken back and recovered in order to achieve the rates laid down in the Ordinance’.

154. At paragraphs 136 to 138 of the judgment under appeal, the Court of First Instance explained that there were correction mechanisms which made it possible to fulfil the obligations laid down by the Ordinance. The Court stated, in particular, that if the self-management solution was not sufficient to fulfil the recovery rates, the manufacturer or distributor of packaging could approach an exemption system in order to buy back the missing quantities.

155. For the remainder, the Ordinance itself proposes that solution in Paragraph 6(1), where it states that, if distributors do not comply with their take-back and

recovery obligations at the point of sale, they must do so by means of an exemption system. (13)

156. In the light of the foregoing factors, I consider that the third argument put forward in support of the third plea must also be rejected as unfounded.

b) The fourth and fifth arguments put forward in support of the third plea

i) Arguments of the parties

157. DSD further maintains that the assertion at paragraph 137 of the judgment under appeal that a distributor which has participated in an exemption system could subsequently assume responsibility for taking back and recovering the packaging constitutes a distortion of the evidence in the file. DSD maintains that that assertion is contrary to the basic principle of the Packaging Ordinance that participation in an exemption system to satisfy the recovery obligation entails exemption from disposal obligations. In DSD’s submission, for packaging covered by an exemption system, it is not possible subsequently to use a self-management solution.

158. Likewise, DSD observes that the assertion that a distributor which has decided to use a self-management solution for certain packaging could subsequently discharge its obligations under the Ordinance by buying back quantities of packaging from an exemption system constitutes a misinterpretation of the Packaging Ordinance.

159. The Commission contends that the Court of First Instance does not proceed from the hypothesis that the take-back and recovery obligations are satisfied *ex post facto*, but envisages the hypothesis in which the fee payable to the exemption system is reduced where the amount collected is not consistent with the rate imposed.

ii) Assessment

160. I am of the view that the Court of First Instance did not distort the evidence in the file when it found, at paragraph 137 of the judgment under appeal, that a fast-food chain may request the exemption system to reduce its fee where, by means of the self-management solution, that chain shows that it took back the quantities of packaging which had been entrusted to the exemption system.

161. Contrary to the appellant’s contention, I consider that it is not a question, in that example, of the *ex post facto* use of a self-management solution to take back and recover packaging. I would observe that in that example the Court of First Instance proceeded from the premiss that the fast-food chain combines from the outset a self-management solution and an exemption system.

162. On the basis of that premiss, the Court of First Instance stated that it was possible to put in place correction mechanisms where the self-management solution does not succeed in fulfilling the obligations placed on the distributor or, on the contrary, had been able to collect the determined quantities. In the latter case, the Court explained that ‘the fast-food chain will be able to request the exemption system concerned to reduce its fee, in so far as that chain has shown that it

took back and recovered [the quantities] entrusted [to the exemption system]’.

163. Incidentally, the appellant itself had envisaged that possibility. At recitals 60 and 61 to the decision at issue, it is stated that DSD had, before the adoption of that decision, undertaken not to charge a fee for the quantities of packaging taken back by a self-management solution where the manufacturer or distributor of packaging had decided to combine the DSD system with a self-management solution.

164. As regards the appellant’s argument that the Court of First Instance misinterpreted the Packaging Ordinance by finding that a distributor which has decided to use a self-management solution may subsequently decide to discharge its obligations by buying back quantities of packaging from an exemption system, I consider that it, too, must be rejected.

165. The Court of First Instance observed, at paragraph 9 of the judgment under appeal, that ‘the ninth sentence of Paragraph 6(1) of the Ordinance states that, if a distributor does not comply with his take-back and recovery obligations by means of a self-management solution, he must do so by means of an exemption system’.

166. Consequently, I consider that the fourth and fifth arguments put forward in support of the third plea must be rejected as unfounded.

4. The sixth argument put forward in support of the third plea, alleging breach of the Packaging Ordinance

a) Arguments of the parties

167. DSD maintains that paragraph 154 of the judgment under appeal is vitiated by errors of law, in so far as the Court of First Instance found that packaging not disposed of by the DSD system may bear the Der Grüne Punkt logo. DSD submits that such a possibility deprives the logo of its distinctive character and is manifestly contrary to the principle laid down in the Packaging Ordinance that consumers and the authorities must be in a position to determine clearly whether or not an item of packaging is subject to the take-back obligation at the point of sale.

168. The Commission observes that DSD incorrectly attributes to the Ordinance an approach focused on individual items of packaging. In the Commission’s submission, such an approach does not correspond with the economic conditions applicable to mixed solutions, which are specifically encouraged in order to satisfy the objective of competition.

b) Assessment

169. I consider that this argument must also be rejected.

170. The Court of First Instance observed, at paragraph 124 of the judgment under appeal, that, according to DSD, the Der Grüne Punkt mark makes it possible to indicate the packaging which is to be transferred to DSD and at the same time to inform the consumer as to what he is to do with the packaging, which makes it possible to ensure that DSD is able to carry out the tasks assigned to it by the participating undertaking.

171. At paragraph 153 of the judgment under appeal, the Court of First Instance observed that ‘the different

types of advertising laid down in the Ordinance – namely by marking packaging or other suitable means for exemption systems (point 4(2) of Annex I to Paragraph 6 of the Ordinance) and the indication of the possibility of returning packaging at the point of sale for self-management solutions (third sentence of Paragraph 6(1) of the Ordinance) – make it possible to inform the final consumer about the different possibilities for returning the packaging at issue without thereby validating [DSD’s] arguments that the affixing of the Der Grüne Punkt logo to packaging has the effect of preventing the take-back and recovery by a system other than the DSD system’.

172. The Court of First Instance then pointed out, at paragraph 154 of the judgment under appeal, that ‘it is not stated in the Ordinance that the Der Grüne Punkt logo may not be affixed to packaging collected in the context of a competitor exemption system or a self-management solution if [that packaging complies], in addition, with the conditions laid down in the 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’.

173. Contrary to the appellant’s contention, that does not entail offering competitor systems the possibility of affixing the Der Grüne Punkt logo to packaging which is not taken back by the DSD system. To my mind, the Court of First Instance made the assumption that the manufacturer or distributor of packaging has participated in the DSD system and in another system, whether an exemption system or a self-management solution. Accordingly, in order to comply with the obligation laid down in the Ordinance to indicate the used packaging take-back, it must be possible to indicate the system by which packaging is taken back, so that once the packaging has been used the consumer can be informed of the possibilities available. For example, such indication may take the form of the placing on a plastic bottle of the Der Grüne Punkt logo and of another logo indicating that another system may also take the bottle back, or again by a notice at the point of sale to the effect that the bottle may be deposited at that point of sale.

174. In the light of the indications in the Packaging Ordinance, I am unable to see in what way the Court of First Instance misinterpreted that Ordinance in holding that, for the same packaging, the Der Grüne Punkt logo may exist alongside a different sign. It will be recalled that the Ordinance offers the possibility for a manufacturer or distributor to participate in a number of systems and that it also imposes the obligation to

indicate by what possibility the packaging may be returned.

175. Accordingly, I am of the view that the sixth argument put forward in support of the third plea must be rejected as unfounded.

5. The seventh argument put forward in support of the third plea, alleging infringement of trade mark law

176. DSD also criticises paragraph 161 of the judgment under appeal and observes that the finding that the exclusivity which it claims cannot be accepted, as it would have no effect other than to prevent manufacturers and distributors of packaging from using a mixed system, is incompatible with trade mark law. In that regard, DSD submits that, in accordance with German case-law and as the surveys show, the Der Grüne Punkt logo, as a registered trade mark, refers exclusively to DSD and to the services which it offers. Trade mark law would not be complied with if the Der Grüne Punkt trade mark were deprived of that function of exclusivity solely in order to ensure the possibility of a mixed system.

177. Since the appellant, in its fourth plea, also claims that there has been an infringement of Community trade mark law by the Court of First Instance, I consider that this argument should be dealt with in the context of that plea.

D – Fourth plea, alleging infringement of Community trade mark law

1. Arguments of the parties

178. By its fourth plea, DSD claims that there has been an infringement of Community trade mark law owing to the finding made by the Court of First Instance at paragraph 161 of the judgment under appeal that the Der Grüne Punkt trade mark could not be recognised as having the exclusivity claimed. DSD observes that, under Article 5 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, (14) a registered mark is to confer on the proprietor exclusive rights which entitle him to prevent the use of the mark for goods or services which are identical or similar to those covered by the registered mark.

179. The Commission contends that the exclusivity described in Article 5 of Directive 89/104 bears no relation to that described at paragraph 161 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, for the market in question, the Der Grüne Punkt trade mark says no more than that the product thus identified may be collected via the DSD system and gives no indication as to the quality of the service offered.

180. 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.

181. Vfw submits that the logo is not a trade mark in the classic sense. It claims that a trade mark characterises goods and services which are the same as

or similar to those in respect of which the mark was registered. As regards the Der Grüne Punkt logo, however, each manufacturer uses its own individual trade marks to mark its products. The logo serves only to indicate participation in a collection system and not to identify identical or similar goods or services.

182. Landbell and BellandVision claim that this plea is inadmissible and in any event unfounded.

2. Assessment

183. The appellant maintains that the Court of First Instance was wrong to hold that the Der Grüne Punkt trade mark could not benefit from the exclusivity claimed and thus infringed Community trade mark law.

184. As the Court of First Instance observed at paragraph 124 of the judgment under appeal, DSD takes the view that the Der Grüne Punkt mark makes it possible, at the same time, to indicate the packaging which is to be transferred to the DSD system and to inform the consumer as to what he is to do with that packaging, which makes it possible to ensure that DSD is able to carry out the tasks assigned to it by the manufacturer or distributor of packaging participating in its system. Therefore, in DSD's submission, only packaging for which the DSD system is used should be marked with the Der Grüne Punkt logo.

185. However, at paragraphs 156 to 161 of the judgment under appeal, the Court of First Instance held that the fact that that logo and an indication by a suitable means of another exemption system, or 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 mark, which is to identify the possibility that the packaging in question may be collected via the DSD system. Accordingly, the Court of First Instance considered that since the placing of that logo together with other signs or other devices making it possible to identify another possibility of collection via a self-management solution or a competitor exemption system does not adversely affect the essential function of the mark, DSD cannot claim that there has been an infringement of trade mark law.

186. Furthermore, the Court of First Instance stated, at paragraph 160 of the judgment under appeal, that 'the Trade Mark Agreement concerns only users of that logo, namely manufacturers and distributors of packaging which use the DSD system, and not consumers'.

187. In finding at paragraph 161 of the judgment under appeal that DSD cannot benefit from the exclusivity claimed as otherwise manufacturers and distributors of packaging would be prevented from using a mixed system and DSD could legitimately be paid for a service which it does not provide, the Court of First Instance did not in my view infringe Community trade mark law.

188. It should be borne in mind that, according to consistent case-law, the specific object of trade mark law is, in particular, to guarantee to the owner that he has the exclusive right to use that mark for the purpose of putting a product on the market for the first time and

thus to protect him against competitors wishing to take unfair advantage of the status and reputation of the trade mark by selling products illegally bearing it. (15) 189. It is for that reason that Article 5(1) of Directive 89/104 provides that the registered mark is to confer exclusive rights on the proprietor and that the proprietor is thus to be entitled 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 mark is registered.

190. In the present case, I consider that the undertakings participating in the DSD system for only part of their packaging (first and second groups of cases) or for packaging placed on the market of another Member State (third group of cases) cannot be regarded as competitors of DSD or as third parties which improperly sell goods covered by the Der Grüne Punkt logo.

191. In the first and second groups of cases, the manufacturers and distributors have entered into an agreement with DSD for the take-back and recovery of certain packaging. In the third group of cases, the manufacturers and distributors are holders on the territory of another Member State of a licence to use the Der Grüne Punkt logo.

192. DSD itself set up that system, which requires that that logo be affixed to all packaging, even where some of the packaging is not taken back by the system. Those manufacturers and distributors therefore do not use the Der Grüne Punkt trade mark improperly, but merely fulfil their obligation to affix that logo to all packaging, whether or not it is taken back by the DSD system.

193. Furthermore, the Court of First Instance correctly observed, at paragraph 156 of the judgment under appeal, that the essential function of the Der Grüne Punkt trade mark is to inform the consumer that the packaging bearing that trade mark can be taken back by the DSD system.

194. Since the Der Grüne Punkt logo appears on the packaging, the essential function of the trade mark is satisfied, since the consumer is informed that the packaging can be placed in DSD's containers. Therefore, contrary to the appellant's assertion at the hearing, the trade mark is not 'destroyed'.

195. Moreover, I consider that the Der Grüne Punkt trade mark does not fit into the classic scheme of trade mark law.

196. A trade mark assists the consumer to make an informed choice about the good or service offered by that trade mark. If, for example, the consumer has already purchased a good or a service and derived a certain satisfaction from it, for instance because that good or service was of good quality, the trade mark will serve that consumer as a reference point for future purchases of the same goods or services. The trade mark therefore guides the consumer's choice.

197. In the context of the DSD system, however, the Der Grüne Punkt trade mark does not in my view have the function of guiding the consumer as to the choice of the product purchased. As the Court of First Instance

pointed out at paragraph 156 of the judgment under appeal, the trade mark serves to identify the packaging that may be treated by the DSD system.

198. To my mind, when the consumer purchases a good bearing the Der Grüne Punkt logo, that consumer has chosen that good on account of, for example, the quality which it guarantees and not because he knows that the good can be collected by the DSD system. It can readily be imagined, for example, that a consumer will buy eggs produced by biological farming methods because that system of production excludes the use of pesticides and synthetic fertilisers and thus ensures the quality sought by that consumer, and not because the packaging bears the Der Grüne Punkt logo informing him of the possibility that that packaging can be taken back by the DSD system.

199. The situation would be otherwise, in my view, if the Der Grüne Punkt logo indicated that the product on which it appears is a recyclable product or a product which has already been recycled. It can reasonably be supposed that some consumers, wishing to respect the environment, will prefer to choose products whose packaging is recyclable or has already been recycled. In such a case, a logo which indicates that the packaging of the product bought has been recycled undeniably has an impact on the consumer's choice. That is the case, for example, of a ream of paper on which there is a logo informing the consumer that the paper has been recycled. The consumer will then make an activist choice.

200. In the present case, however, the Der Grüne Punkt logo does not indicate that the packaging is recyclable. It indicates only that the packaging can be taken back by the DSD system, where it will be sorted and recovered if such a possibility exists. (16)

201. Accordingly, I consider that the Court of First Instance was entitled to find at paragraphs 156 and 160 of the judgment under appeal that, on the one hand, "for the market in question" [the] mark "says no more than that the product thus identified may be collected via the DSD system" and gives no indication as to the quality of the service offered' and that, on the other hand, that 'the Trade Mark Agreement concerns only users of that logo, namely manufacturers and distributors of packaging which use the DSD system, and not consumers'.

202. Thus, the Court of First Instance did not in my view infringe Community trade mark law by stating at paragraph 161 of the judgment under appeal that the Der Grüne Punkt trade mark could not benefit from the exclusivity claimed.

203. Consequently, I consider that the fourth plea must be rejected as unfounded.

E – Fifth plea, alleging infringement of Article 82 EC

1. Arguments of the parties

204. In the context of its fifth plea, DSD maintains that the Court of First Instance infringed Article 82 EC.

205. The appellant submits that the Court of First Instance did not state sufficient reasons for its analysis and, moreover, distorted the evidence before it when

holding that DSD adopted abusive conduct in issuing licences to use the Der Grüne Punkt logo independently of the use of the DSD system and requiring payment of a fee for the licence even where the licensee proves that it did not use the DSD system.

206. Furthermore, in DSD's submission, the decision at issue amounts to requiring it to grant a licence to the participating undertakings for the packaging which is neither taken back nor recovered by its system. However, the conditions necessary for the grant of a compulsory licence, as laid down in the case-law of the Court, are not satisfied in the present case. By not explaining in what way the refusal to grant a compulsory licence constitutes an abuse of right, the Court of First Instance therefore made an error of law.

207. In the alternative, the appellant contends that, even though it granted a licence to participating undertakings merely to use the logo, the judgment under appeal would authorise them to participate in the DSD system for a very small quantity of packaging, whereas DSD could not require, by way of consideration, an appropriate fee and could not verify that such a process was legitimate. In particular, the appellant would be unable to verify whether the reasons which, according to the decision at issue, make it necessary to affix the Der Grüne Punkt trade mark to all its packaging (notably in the light of the additional economic costs which selective marking would entail) were satisfied.

208. So far as the first argument is concerned, the Commission contends that the applicant has not explained in what way the findings of the Court of First Instance are not supported by adequate reasoning, how they are contrary to the evidence in the file and how they misinterpret national law.

209. As regards the second argument, the Commission submits that the Court of First Instance dealt with DSD's argument relating to the imposition of a compulsory licence and established that such a licence was not imposed on DSD.

210. As for DSD's alternative argument, the Commission contends that, in this case, the question of a compulsory licence does not arise. It observes that, as the Court of First Instance confirmed, the decision at issue provides that, if an undertaking participates in the DSD system for small quantities of packaging, a fee is justified only in proportion to that low level of participation.

211. Landbell and BellandVision observe that the decision at issue and the judgment under appeal are not based on the hypothesis of a licence to use the Der Grüne Punkt logo independently of the use of the DSD system, but are concerned with the amount of the fee attaching to the services provided.

212. In Vfw's submission, the fifth 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 the licence, but solely to prevent DSD from using its dominant position to exclude competition from other systems.

213. Interseroh observes that at no part of the judgment under appeal did the Court of First Instance suggest

that DSD should offer a licence to use the Der Grüne Punkt logo independently of the use of its system. Nor did that judgment place DSD under any obligation to grant licences. The abuse found by the Court of First Instance is based solely on the fact that DSD offers licences to use that logo only in conjunction with the obligation to pay a fee for using its service, even though the participating undertakings did not make use of the DSD system for certain packaging marked with the DSD logo.

2. Assessment

a) The first argument put forward in support of the fifth plea

214. I consider that, as the Commission has submitted, the first argument put forward in support of the fifth plea must be rejected.

215. In effect, the appellant merely states that the Court of First Instance infringed Article 82 EC in concluding, without stating sufficient reasons, contrary to the evidence in the file and in a way that misinterpreted national law, that the appellant adopted abusive conduct. The appellant sets out no legal argument in support of that argument and merely refers, in a footnote, to paragraph 20 of the appeal, which states that '[t]he findings of the judgment [under appeal] are therefore manifestly contradictory. The Court of First Instance does not make a definitive finding on whether the conduct at issue constitutes an abuse of a dominant position'.

216. In accordance with the case-law referred to at point 141 of this Opinion, an appeal must state precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal.

217. That is manifestly not the position in the present case. I am therefore of the view that the first argument put forward in support of the fifth plea must be rejected as inadmissible.

b) The second argument put forward in support of the fifth plea

218. By its second argument, the appellant submits that the decision at issue and the judgment under appeal oblige it to grant a licence to participating undertakings for packaging which is not taken back or recovered by its system. The appellant maintains that, by failing to explain how the refusal to grant a compulsory licence would constitute an abuse of a dominant position, the Court of First Instance therefore made an error of law.

219. To my mind, the appellant is mistaken as to the characterisation of the abuse which it is found to have committed. I consider, in the light of the analytical approach which it took, that the Court of First Instance, contrary to the appellant's contention, did not identify the abuse as being based on DSD's refusal to grant a compulsory licence, and correctly set out the reasons why DSD was accused of abusing its dominant position.

220. I note that, at paragraphs 176 to 183 of the judgment under appeal, the Court of First Instance responded to the argument which DSD had submitted

to it in the context of its second plea, namely that Articles 3 and 4(1) of the decision at issue are disproportionate, because they oblige DSD to grant to third parties a licence to use the Der Grüne Punkt trade mark, even where they do not participate in the DSD system.

221. The Court of First Instance thus explained the reasons why it considered that the decision at issue, by Articles 3 and 4(1), did not oblige DSD to grant licences to the undertakings participating in its system for the packaging which was not taken back by that system, but sought to put an end to the abuse by requesting it not to charge a fee for a service which it did not supply.

222. In effect, at paragraph 178 of the judgment under appeal, the Court of First Instance recalled that the abuse by DSD consisted, according to the decision at issue, in requiring payment of a fee for the total quantity of packaging carrying the Der Grüne Punkt logo and put into circulation in Germany. The Court went on to state that '[a]ccording to [that] decision, the fee cannot be required when the manufacturers and distributors of packaging which use the DSD system for only some of the packaging put into circulation in Germany show that they fulfil the take-back and recovery obligations laid down in the Ordinance through competitor exemption systems or self-management solutions ([first and second groups of cases]). Similarly, the fee cannot be required when the manufacturers and distributors of packaging which have not used the DSD system in Germany, but put into circulation in that country standardised packaging which they also put into circulation in another Member State for which they participate in a take-back system using the Der Grüne Punkt logo, show that they fulfil the obligations under the Ordinance through competing exemption systems or self-management solutions ([third group of cases])'.

223. In the light of those factors, the Court of First Instance stated at paragraph 180 of the judgment under appeal that the obligations imposed by Articles 3 and 4(1) of the decision at issue do not concern third parties but manufacturers and distributors of packaging which have entered into contracts with DSD or which hold a licence in another Member State to use the mark Der Grüne Punkt in the context of a take-back and recovery system using that logo.

224. At paragraph 181 of the judgment under appeal, the Court of First Instance considered that 'those obligations do not seek to force DSD to grant a licence to use the mark Der Grüne Punkt without any restriction in time, but merely to require it not to charge a fee on the total amount of packaging bearing [that] logo where it is shown that all or only some of that packaging has been taken back or recovered through another system'.

225. The Court of First Instance concluded, at paragraph 182 of the judgment under appeal, that 'as long as the users of the Der Grüne Punkt logo prove that the quantities of packaging for which they do not use the DSD system have actually been taken back and

recovered by the exemption system(s) or self-management solution(s) which they use, [DSD] cannot claim that it is disproportionate to ask it not to be paid for a service which it does not provide'.

226. To my mind, it follows from that analysis that the Court of First Instance correctly identified the abuse of a dominant position by DSD and properly explained that the decision at issue did not have the effect of requiring DSD to grant a compulsory licence to participating undertakings, but of putting an end to the abuse where it has been demonstrated that the packaging bearing the Der Grüne Punkt logo had been taken back by a system other than DSD's.

227. Consequently, I consider that the fifth plea is unfounded and must also be rejected.

F – Sixth plea, alleging breach of Article 3 of Regulation No 17 and of the principle of proportionality

1. Arguments of the parties

228. In support of its sixth plea, DSD takes issue with the Court of First Instance for having undertaken an analysis which was insufficiently reasoned and contrary to the evidence in the file, and for having breached Article 3 of Regulation No 17 and the principle of proportionality. DSD submits, in the first place, that the Packaging Ordinance and trade mark law preclude any requirement on its part to grant a licence to use the Der Grüne Punkt logo; yet the measures imposed by Article 3 et seq. of the decision at issue, which fail to take into account the fact that DSD does not grant separate licences to use the logo, amount precisely to imposing such an obligation on the appellant.

229. In the second place, DSD submits that the Ordinance and trade mark law preclude it being prevented from requiring its customers to place on packaging which bears the Der Grüne Punkt logo but is not disposed of 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 argument that packaging bearing the Der Grüne Punkt logo and disposed of by the DSD system must be capable of being distinguished from packaging bearing the same logo but not disposed of 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.

230. The Commission contends that DSD's first argument, that the Packaging Ordinance and trade mark law preclude it being required to grant a licence to use the Der Grüne Punkt logo, is based on an incorrect premiss, namely that the Court of First Instance relied on the hypothesis of a separate licence to use that logo.

231. Furthermore, with respect to the second argument, the Commission maintains that the Court of First Instance was correct to find that neither the Packaging Ordinance nor trade mark law requires the identification of the different types of packaging for allocation to the DSD system or to another system.

232. Vfw submits that DSD has not sufficiently supported the arguments which it has presented in the context of the present plea.

233. Landbell and BellandVision contend that this plea is inadmissible, since an appeal must state precisely the contested elements of the judgment which the appellant seeks to have set aside or the decision which it seeks to have annulled and also the legal arguments specifically advanced in support of the appeal.

2. Assessment

234. As regards the first argument put forward in support of the sixth plea, whereby the appellant claims that the decision at issue requires the appellant to grant a licence to use the Der Grüne Punkt trade mark, and which is similar to the argument examined in the context of the fifth plea, I refer to the assessment which I made in the context of that plea.

235. Consequently, I consider that the first argument put forward in support of the sixth plea must be rejected as unfounded.

236. By its second argument, DSD takes issue with the Court of First Instance for having rejected its argument that packaging bearing the Der Grüne Punkt logo and disposed of by the DSD system must be capable of being distinguished from packaging on which that logo is affixed but which is not disposed of by that system. DSD maintains that the Court of First Instance's analysis in that regard was insufficient and contrary to the evidence in the file and constituted a breach by that Court of Article 3 of Regulation No 17 and of the principle of proportionality.

237. By this, I understand that DSD maintains that the mere requirement of an effective explanatory note making it possible to neutralise the distinctive effect of the Der Grüne Punkt trade mark on the packaging which is not taken back by the DSD system would be a measure that was appropriate, proportionate and consistent with Article 3 of Regulation No 17.

238. To my mind, the Court of First Instance was correct to reject the complaint relating to the disproportionate nature of Article 3(1) of the decision at issue in that it does not envisage the possibility of placing explanatory notes on the packaging.

239. At paragraph 200 of the judgment under appeal, the Court of First Instance explained that '[s]uch notes are based on the idea that it would be possible to distinguish packaging bearing the Der Grüne Punkt logo, which is part of the DSD system, from that to which [that] logo is indeed affixed but which is not part of the DSD system and which should thus be the subject of a note aimed at drawing the consumer's attention. However, as has been pointed out (see paragraphs 131 to 138 [of the judgment under appeal]), the specific rules for the operation of mixed systems are not based on the identification of packaging by consumers, who remain free to decide which system they are going to bring the packaging back to, but on the allocation of total material to be recovered'.

240. That analysis by the Court of First Instance is in my view consistent with what is stated in the judgment under appeal. We have seen, at point 48 of this

Opinion, that it is not possible to determine in advance what route will be taken by an item of packaging. A plastic bottle may well be purchased on the German market and then thrown away in a container in France belonging to a competitor of DSD. As the Commission has indicated, the consumer's conduct cannot be determined in advance. Accordingly, an explanatory note on packaging bearing the Der Grüne Punkt logo and taken back by a system competing with the DSD system could not have the effect expected of it, since it would be impossible to separate products bearing that logo which are taken back by the DSD system from those bearing the same logo which are taken back by a competitor system.

241. Furthermore, I note that, at the hearing, Landbell stated that, in practice, collection, sorting and recovery take place independently of whether the packaging bears a mark indicating to which system it belongs. It is bulk quantities of material that are divided between the different systems. DSD did not dispute that practice.

242. Consequently, I consider that the sixth plea must be rejected as unfounded.

G – Seventh plea, alleging a procedural irregularity

1. Arguments of the parties

243. In the context of its seventh plea, the appellant claims that there has been a procedural irregularity. It submits that the Court of First Instance substituted its own reasoning for that of the Commission. The appellant also maintains that any addition of new findings by the Court of First Instance constitutes a breach of its right to be heard.

244. In support of its plea, DSD takes issue with the Court of First Instance for having made new findings, based on the assertions made by the parties at the hearing. The appellant thus 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. On the basis of those questions and answers, the Court of First Instance made new fundamental findings on the way in which the mixed systems function, which were not to be found in the decision at issue and which were not mentioned by the Commission or by DSD.

245. DSD has in mind, in particular, two findings, namely the finding that the packaging entrusted to DSD may come under an exemption system and at the same time under a self-management solution, and the finding that the Packaging Ordinance provides numerous correction mechanisms allowing manufacturers and distributors to assume the obligations arising under the Ordinance by attributing packaging ex post facto to a self-management solution or an exemption system.

246. The Commission, supported by Vfw, Landbell and BellandVision, contends that the paragraphs of the judgment under appeal to which the present plea refers contain nothing new by reference to the matters already considered during the administrative procedure and

during the written procedure before the Court of First Instance.

2. Assessment

247. The appellant takes issue with the Court of First Instance for having made new findings which are not to be found in the decision at issue and for having thus substituted its own reasoning for that of the Commission. Those findings are, in DSD's submission, the finding that it is possible to have recourse to an exemption system and a self-management solution, and also the finding that the Packaging Ordinance provides numerous correction mechanisms which allow manufacturers and distributors to fulfil their obligations under the Ordinance by attributing packaging ex post facto to a self-management solution or an exemption system.

248. I consider that this plea must also be rejected.

249. I would observe that the Court of First Instance, at paragraphs 44 to 46 of the judgment under appeal, described how the decision at issue dealt with the possibility of combining more than one take-back and recovery system.

250. More specifically, the Court of First Instance stated at paragraph 45 of the judgment under appeal that '[t]he ... decision [at issue] sets out several facts enabling the finding that it is possible to use mixed systems. Thus, [that] decision states that it is apparent from the observations of the German authorities (recital 20 of the ... decision [at issue]) that the Ordinance makes it possible to combine a self-management solution and an exemption system by participating in an exemption system only for the taking-back of some of the packaging put into circulation. ... The ... decision [at issue] also points out that it is apparent [from] an earlier response of the German authorities that Article 6(3) of the Ordinance does not imply that it is possible to use only one system. It was never the intention of the German authorities that only one exemption system should be created in the whole of the country or in each Land (recital 23 of the ... decision [at issue])'.

251. The Court of First Instance also observed, at paragraph 46 of the judgment under appeal, that '[DSD] does not dispute that a manufacturer or distributor of packaging may use a mixed system'.

252. As regards the findings of the Court of First Instance set out at paragraphs 137 and 139 of the judgment under appeal, according to which the Packaging Ordinance makes it possible to use correction mechanisms, I would observe that, although the Court of First Instance did not expressly cite the recitals to the decision at issue to which it referred, it stated, at paragraph 9 of the judgment under appeal, that 'the ninth sentence of Paragraph 6(1) of the Ordinance states that, if a distributor does not comply with his take-back and recovery obligations by means of a self-management solution, he must do so by means of an exemption system', and a statement to the same effect is also found at recital 21 to the decision at issue.

253. Accordingly, in finding, at paragraph 137 of the judgment under appeal, that, if the recovery rate by the self-management solution is not achieved, the

manufacturer or distributor can buy a quantity of packaging sufficient to reach that rate, the Court of First Instance did not substitute its own reasoning for that of the Commission, as that element clearly emerges from the decision at issue.

254. The appellant also takes issue with the Court of First Instance for having made a new finding when it held that manufacturers and distributors could fulfil their obligations under the Packaging Ordinance by attributing packaging ex post facto to a self-management solution.

255. As I stated at points 160 to 163 of this Opinion, the appellant, to my mind, is mistaken as to the meaning to be ascribed to paragraph 137 of the judgment under appeal. In the analysis which it carried out at paragraphs 134 to 137 of the judgment under appeal, the Court of First Instance proceeds from the premiss that a distributor participates in two systems, one a self-management solution and the other an exemption system. It is thus not a question of the ex post facto use of a self-management solution, but of correcting the quantities of material attributed to the different systems by allowing a distributor which participates in a self-management solution and an exemption system to request the exemption system to reimburse the fee incorrectly levied for the packaging taken back by the self-management solution.

256. Furthermore, the Court of First Instance stated at paragraph 138 of the judgment under appeal that 'concrete expression has been given to those rectification possibilities in a compensation agreement, referred to at the hearing, which enables different system operators to share the quantities of material recovered by the collection undertakings to which they have recourse in respect of the quantities of the material for which they are responsible under the contracts signed with manufacturers and distributors of packaging'.

257. Consequently, in the light of those factors, I consider that the seventh plea must also be rejected as unfounded.

H – Eighth plea, alleging breach of the right to have the case dealt with within a reasonable time

1. Arguments of the parties

258. By its eighth plea, the appellant maintains that the Court of First Instance committed a procedural irregularity and adversely affected the appellant's 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 ('the ECHR'), 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; 'the Charter').

259. According to the appellant, the proceedings, which lasted five years and nine months, seem at first sight to be considerable. In that regard, it cites the judgment in *Sumitomo Metal Industries and Nippon Steel v Commission*. (17) The appellant contends that such

periods can be justified only by exceptional circumstances, within the meaning of the judgment in *Baustahlgewebe v Commission*, (18) which is not the position in the present case.

260. The appellant therefore requests the Court to set aside the judgment under appeal, in accordance with the first sentence of Article 58(2) and the first sentence of the first paragraph of Article 61 of the Statute of the Court of Justice.

261. The arguments which the appellant puts forward in support of this plea will be described in the context of my assessment.

262. The Commission contends that, according to the case-law of the Court, even the excessive length of proceedings cannot entail a judgment being set aside if the duration of the proceedings did not affect the outcome of the proceedings. (19) It maintains that there is no relationship between the length of the proceedings and their outcome and that the length of the proceedings would be further prolonged if the judgment were to be set aside.

263. *Vfw* observes that DSD has suffered no disadvantages on account of the length of the proceedings, since it has been able to continue its activities and its position on the market has not been significantly weakened. Furthermore, even on the assumption that the appellant's interests were adversely affected, to set aside the judgment under appeal would be disproportionate.

264. *Landbell* and *BellandVision* recall that the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the case. In the present case, DSD invented significant complexity by long developments which were substantively distorting and even untrue with respect to trade mark law.

2. Assessment

265. It follows from consistent case-law that, as far as procedural irregularities are concerned, pursuant to Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice, appeals are limited to points of law. According to the latter provision, an appeal may lie on grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affected the interests of the appellant as well as infringement of Community law by the Court of First Instance. (20)

266. Thus, the Court of Justice has jurisdiction to verify whether a breach of procedure adversely affecting the appellant's interests was committed before the Court of First Instance and must satisfy itself that the general principles of Community law and the Rules of Procedure applicable to the burden of proof and the taking of evidence have been complied with. (21)

267. It should be noted that Article 6(1) of the ECHR 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. (22)

268. The general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights, and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law. (23) It is thus for the Court of Justice, in an appeal, to consider pleas on such matters concerning the proceedings before the Court of First Instance. (24)

269. The duration of the proceedings had as a starting point the lodging at the Registry of the Court of First Instance of DSD's application for annulment on 5 July 2001 and ended on 24 May 2007, the date on which the judgment under appeal was delivered. The proceedings before the Court of First Instance therefore lasted approximately five years and nine months.

270. Inspired by the principles identified by the European Court of Human Rights, the Court held in *Baustahlgewebe v Commission* that the reasonableness of the period covered by the proceedings must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant before the Court of First Instance and that of the competent authorities. (25)

271. I shall examine those three criteria in turn in the light of the decision in *Baustahlgewebe v Commission*.

a) The importance of the case

272. The Court has held that, 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. (26)

273. Where the stakes are high for the undertaking concerned and, in particular, where the stakes are high in financial terms, the case must therefore be dealt with rapidly. If we take, for example, the case of an undertaking which, pursuant to a Commission decision, is required to disclose information relating to one of its products in order that competing undertakings can develop their products, there can be no doubt that that decision and the proceedings initiated by the undertaking will have an impact on the latter's activity, as an action against a Commission decision does not have suspensory effect.

274. The same applies where the Commission decides to impose a fine on the undertaking which it considers liable for the infringement.

275. The question which arises in the present case is therefore whether the case was really of the utmost importance for DSD, to the point at which the survival of its economic activity may have been at stake. I do not consider that it was.

276. Unlike the undertaking involved in *Baustahlgewebe v Commission*, DSD was not fined by the Commission. In that regard, the Commission

observes in its response that it has already fully explained its position at point 148 of its statement of objections (27) and that it does not envisage imposing periodic penalty payments either.

277. Nor, to my mind, was the decision at issue of such a kind as to affect the appellant's activity. The purpose of that decision was to put an end to an abuse consisting in charging a fee for all the packaging placed on the market by the participating undertaking, even for the part of the packaging which is not actually taken back by the DSD system. That is why that decision provides that, where it is proved that the packaging is not taken back by that system, the fee is not payable for that part of the packaging.

278. The agreements which DSD signed with the participating undertakings are therefore not called into question and its activity is able to function normally. DSD is merely asked not to charge a fee for a service which it does not provide.

279. The importance of the case is therefore, in my view, real for DSD, as it necessarily has an impact on that undertaking, but it is not fundamental, as it does not threaten the economic survival of its activity.

280. However, that circumstance cannot have the effect that the appellant is deprived of its right to fair process within a reasonable time, in particular, where, as we shall see, the complexity of the case did not in my view require proceedings lasting five years and nine months.

b) The complexity of the case

281. It follows from the case-law of the European Court of Human Rights and of this Court that the complexity of a case must be determined on the basis of a number of factors.

282. The European Court of Human Rights has held that the economic nature of the offences does not, in itself, make the proceedings especially complex. It has also noted that an amendment of the law applicable to the main proceedings made the investigating judge's task easier. The European Court of Human Rights has also observed that the case involved four persons, connected with companies engaged in the same line of business, and that there was no evidence of the use of legal structures sophisticated enough to have impeded the investigators' work to any great extent. It concluded that the length of the proceedings could not be justified by the complexity of the case. (28)

283. In *Baustahlgewebe v Commission*, the Court of Justice took into account, in determining the complexity of the case, the number of persons concerned by the Commission decision and the fact that the appellant's application was one of 11, submitted in three different languages, which were formally joined for the purposes of the oral procedure. (29) The Court also observed that the procedure concerning the appellant called for a detailed examination of relatively voluminous documents and points of fact and law of some complexity. (30)

284. In *FIAMM and Others v Council and Commission*, (31) the Court of Justice stated that the considerable length of the proceedings before the Court of First Instance was capable of being largely explained

by a combination of objective circumstances relating to the number of parallel cases successively brought before that Court and to the importance of the legal questions raised by them. (32)

285. In the context of the present case, it should be noted that DSD, which is the undertaking to which the decision at issue was addressed, was the only applicant. Furthermore, the proceedings took place in a single language, namely German.

286. It is, admittedly, an indisputable fact that the Court of First Instance, in the cases brought before it, is required to deal with complex points of fact and law.

287. However, I consider that the present case was not of such legal complexity that a period of five years and nine months was justified.

288. In effect, I would point out that, while it is true that the system provided for by the Packaging Ordinance and the system set up by DSD may be difficult to assimilate at first sight, it none the less remains that the facts of the present case are not as complex as, for example, the facts with which the Court of First Instance may have to deal in cases involving cartels and concerted practices.

289. Furthermore, the legal question in the present case is limited to the existence of an abuse of a dominant position, as the question of the actual existence of a dominant position is not disputed. The question of the existence of a dominant position often proves to be difficult and complex, notably because it is necessary to study economic data which in themselves are complex.

290. Accordingly, I consider that the complexity of the present case was not such that the duration of the proceedings of five years and nine months before the Court of First Instance was justified.

c) The conduct of the applicant and that of the competent authorities

291. During the judicial proceedings, the conduct of the applicant may serve to prolong the duration of those proceedings. The Court of Justice therefore examines the nature of that conduct in order to take into account the responsibility of each person for the duration of the proceedings.

292. In *Baustahlgewebe v Commission*, in order to determine the applicant's conduct, the Court of Justice examined whether *Baustahlgewebe GmbH* had sought an extension of the deadline initially set for lodging its reply, in order to determine whether it significantly contributed to prolonging the duration of the proceedings.

293. It should be noted, in the present case, that the procedural documents in the file show that DSD did in fact request an extension of the deadline for lodging its reply and that such extension was granted by decision of 21 November 2001.

294. In my view, however, it was not that request for an extension of the deadline for lodging the reply that significantly contributed to prolonging the duration of the proceedings before the Court of First Instance.

295. As regards the conduct of the competent authority, namely the Court of First Instance, it should be noted

that, between notification to the parties of the end of the written procedure, on 9 September 2002, and notice of the hearing, which was served on the parties on 8 June 2006, three years and nine months elapsed. It seems to me that, when the relative complexity of the case and the applicant's conduct are taken into account, such a period is not justified.

296. In that regard, the Court held in *Baustahlgewebe v Commission* that the structure of the Community judicial system justifies, in certain respects, the Court of First Instance, which is responsible for establishing the facts and undertaking a substantive examination of the dispute, being allowed a relatively longer period to investigate actions calling for a close examination of complex facts. The Court further stated, however, that that task does not relieve the Community Court established especially for that purpose from the obligation of observing reasonable time-limits in dealing with cases before it. (33)

297. The Court also examined whether any measures of organisation of procedure or measures of inquiry had been adopted during the period between the end of the written procedure and the decision to open the oral procedure. (34)

298. The Court observed that 32 months had elapsed between the end of the written procedure and the decision to open the oral procedure, and 22 months between the close of the oral procedure and the delivery of the judgment of the Court of First Instance. Such periods, in the Court's view, could be justified only by exceptional circumstances. The Court held that, since there had been no stay of the proceedings before the Court of First Instance, under Articles 77 and 78 of its Rules of Procedure or otherwise, it must be concluded that no such circumstances existed in that case. (35)

299. I note that, in the present case, 45 months elapsed between the end of the written procedure and the decision to open the oral procedure, and that during that period no particular measure of organisation of procedure, and no measure of inquiry, was adopted.

300. Consequently, in the light of all those factors, I consider that even though the importance of the dispute did not imperil the survival of DSD's economic activity, neither the complexity of the case nor DSD's conduct justified the proceedings before the Court of First Instance of five years and nine months. In my view, that period must therefore be considered unreasonable.

3. The consequences of the failure to observe the reasonable time requirement before the Court of First Instance

301. The appellant maintains that failure to observe the reasonable time requirement in the proceedings before the Court of First Instance adversely affected its interests within the meaning of the second sentence of the first paragraph of Article 58 of the Statute of the Court of Justice. It claims that such an irregularity justifies setting aside the judgment under appeal, independently of any consequences which it may have on the outcome of the proceedings, in accordance with

the first sentence of the first paragraph of Article 61 of the Statute of the Court of Justice.

302. I consider that the eighth plea must be rejected as inoperative.

303. While it is true that, in my view, the duration of the proceedings before the Court of First Instance does not correspond with the definition of a reasonable time, I consider that that finding cannot in reality have the setting-aside of the judgment under appeal as a penalty.

304. In that regard, in *Baustahlgewebe v Commission* the award made for the harm caused by failure to observe the reasonable time requirement was purely compensatory.

305. In the present case, to allow the judgment under appeal to be set aside would amount to authorising DSD to reinstate unlawful conduct which was penalised by the decision at issue on grounds which I have just described as well founded.

306. The penalty for breach of the reasonable time requirement in the proceedings cannot in any case lead to an undertaking being allowed to continue or to resume conduct which has been held to be contrary to the Community rules.

307. Consequently, failure to observe the reasonable time requirement in the proceedings can, where appropriate, give rise solely to a claim for compensation for the harm caused.

308. As regards the nature of that harm, in the present case we are not dealing with a situation comparable to that of an undertaking which, owing to the excessive duration of the proceedings, has suffered economic loss. There is therefore, to my mind, no economic harm.

309. The harm sustained by the appellant consists in this case of the actual breach of a general principle of Community law, namely the right to fair process, of which observance of the reasonable time requirement is one of the components. (36)

310. It will be recalled, in that regard, that Article 6(2) EU provides that '[t]he Union shall respect fundamental rights, as guaranteed by the [ECHR]'.

311. Furthermore, according to the consistent case-law of this Court, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, drawing inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. (37)

312. The ECHR has special significance in that respect. (38)

313. To my mind, that right for everyone to have his case dealt with within a reasonable time assumes such importance that the mere fact of depriving a natural or legal person of that guarantee constitutes in itself an independent source of harm.

314. As regards the possible forms of reparation, the means employed by the European Court of Human Rights may, in my view, be transposed to the present case. Thus, recognition of the breach of the principle in

question seems to me to constitute 'just satisfaction' capable in itself, in the absence of material harm, of making good the harm sustained by the appellant. The European Court of Human Rights has already acknowledged that 'in the particular circumstances of the case, [the] finding [that a State has violated Article 6(1) of the ECHR] will constitute in itself adequate just satisfaction. (39)

315. However, if DSD takes the view that the mere recognition of a breach of the reasonable time principle in the proceedings does not constitute just satisfaction, it may, in my view, bring an action for damages before the Community Courts according to the general procedure. Pursuant to the second paragraph of Article 288 EC, '[i]n the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'.

316. Which court, therefore, would have jurisdiction to deal with such an action?

317. The Community texts make no particular provision for actions for compensation for harm caused by the functioning of the Community judicial system.

318. In *Baustahlgewebe v Commission*, Advocate General Léger had stated that, in his view, the Court of Justice retained jurisdiction in such disputes, where they related to judicial acts which the Court of First Instance had itself adopted.

319. The following solution was proposed. Since it was not feasible to entrust a judicial body with the task of determining whether its own conduct is wrongful or unlawful, the jurisdiction of the Court of First Instance must be analysed as not extending to actions for compensation relating to judicial acts of that Court itself. In Advocate General Léger's view, the Court of Justice therefore had jurisdiction in such actions.

320. At the time of the judgment in *Baustahlgewebe v Commission*, the proposed solution came up against an absolute bar, the jurisdiction of the Court of First Instance, which was not set out in the EC Treaty, was determined by decision of the Council of the European Union according to a specific procedure. (40)

321. However, with the entry into force of the Treaty of Nice, the Court of First Instance now has, by a decision of primary law, exclusive jurisdiction in actions for compensation for damage caused by the institutions or by the servants of the Community in the performance of their duties.

322. Accordingly, as Community primary law now stands, I do not see on what legal basis the Court of Justice might hear this type of action, except by creating a new legal remedy.

323. Consequently, I consider that the Court of First Instance continues to have jurisdiction to hear an action for compensation following harm caused by failure to observe the reasonable time requirement in proceedings before the Community judicature.

324. To my mind, moreover, that solution satisfies the principle of the requirement of an impartial court or tribunal. The concept of impartiality developed by the

European Court of Human Rights seems to me to be perfectly compatible with the solution which I propose.

325. The European Court of Human Rights distinguishes two aspects of the concept of impartiality, one subjective and the other objective. (41)

326. The subjective test consists in determining what a particular judge thought in his inner mind in a given circumstance and is therefore concerned with the actual personality of the judge. Subjective impartiality is presumed until there is proof to the contrary. (42) It is therefore difficult to challenge.

327. It is for that reason that the objective impartiality of the court or tribunal will be decisive. The objective test consists in asking whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. (43) The European Court of Human Rights makes clear, in that regard, that even appearances may be of a certain importance. (44)

328. A study of the case-law of that court shows that it analyses the criterion of objective impartiality on a case-by-case basis. It also stated in *Morelv.France* that the answer to the question whether a court is objectively impartial depends on the circumstances of the case. (45)

329. None the less, in each case before that court, a main thread can be found, namely that the decisive factor lies in whether the fears of the person concerned can be held to be objectively justified. (46)

330. In the light of that criterion, the European Court of Human Rights has sometimes accepted that the combination of judicial functions and also the combination of judicial and non-judicial functions were not contrary to the principle of objective impartiality, and has sometimes held that such combinations of functions were not permissible.

331. Thus, for example, in *Gublerv.France*, (47) the impartiality of the disciplinary section of the National Council of the *Ordre des médecins* was challenged by Mr Gubler. That body had lodged a complaint against Mr Gubler and had adjudicated on that same complaint. Mr Gubler maintained that the disciplinary section had been judge and party.

332. The European Court of Human Rights considered that, since the members of the disciplinary section who had formed part of the composition which adjudicated on the complaint lodged against Mr Gubler were unconnected with the National Council's decision to lodge such a complaint, the applicant's doubts as to the independence and impartiality of the members of the disciplinary section could not be objectively justified. (48)

333. In *Procolav.Luxembourg*, (49) the applicant challenged the impartiality of the Judicial Committee of the Luxembourg *Conseil d'État* (Council of State) in an action against a grand-ducal regulation. Four of the five members of that committee had initially given an opinion on the draft regulation in the context of their advisory function.

334. The European Court of Human Rights noted that four members of the *Conseil d'État* had carried out

both advisory functions and judicial functions. It held that the mere fact that certain persons successively performed those two types of function in respect of the same decisions was capable of casting doubt on that institution's structural impartiality, thus justifying the applicant's doubts. (50)

335. The European Court of Human Rights has also stated that Article 6(1) of the ECHR imposes an obligation on every national court to check whether, as constituted, it is an impartial tribunal. (51)

336. That case-law must also be read in conjunction with the effectiveness of other principles, which are also fundamental, namely the right of access to a court or tribunal and a right to an appeal.

337. As the Community bodies with jurisdiction to hear and determine an action for compensation for the damage caused by the functioning of the Community justice system, one at first instance, the other on appeal, number only two, it seems to me reasonable to accept that they have jurisdiction, subject to the express reservation that the composition dealing with the action is different from the one which adopted the act giving rise to the alleged harm.

338. Admittedly, the judgment delivered by the European Court of Human Rights in *Mihalkovv.Bulgaria* (52) may give rise to doubt as to the possibility for the Court of First Instance to hear an action for compensation for the damage caused by a Community Court. The Court of Human Rights considered in that case that even if there was no reason to doubt the personal impartiality of the judges of the City of Sofia court, the fact that they were professionally associated with one of the parties to the proceedings (as the liability of the City of Sofia court was at issue) could in itself cause the applicant to have legitimate doubts as to the objective impartiality of the judges and their independence vis-à-vis the other party to the proceedings. (53) In addition, the applicant's doubts could be strengthened by the fact that, according to the relevant budgetary rules, payment of the compensation which would be awarded to him would have to be charged to the budget of the court of the City of Sofia. (54)

339. I would none the less emphasise that that particular decision cannot be transposed to the present case. Since a State has many courts, an action could easily be assigned to courts which have no connection with the proceedings and are therefore immune to any doubt as to their impartiality. That is not the case at Community level, as we have just seen.

340. If the reasoning of the European Court of Human Rights in that case were to be followed, neither the Court of First Instance nor even the Court of Justice, when the conduct of the latter Court is in issue, would then be able to adjudicate on an action for compensation for the damage caused by a Community Court. That would therefore constitute a denial of justice.

341. To my mind, all those factors argue in favour of retaining the jurisdiction of the Court of First Instance to hear and determine an action of that type.

342. For those reasons, and subject to the conditions mentioned above, I consider that only the general procedure is applicable.

VII – Conclusion

343. In the light of the foregoing considerations, I propose that the Court should:

– dismiss the appeal in its entirety; and
– order *Der Grüne Punkt – Duales System Deutschland GmbH* to pay the costs, pursuant to Article 69(2) of the Rules of Procedure of the Court of Justice of the European Communities.

1 – Original language: French.

2 – Case T-151/01 *Duales System Deutschland v Commission* [2007] ECR II-1607; ‘the judgment under appeal’.

3 – Waste recovery is not the same as recycling. Recycling is a process for treating waste which allows the component materials of a product to be used in the production cycle of a product. Waste recovery involves using that waste as a raw material.

4 – Case COMP D3/34493 – DSD (OJ 2001 L 166, p. 1; ‘the decision at issue’).

5 – First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87).

6 – BGBl. 1991 I, p. 1234.

7 – Cases COMP/34493 – DSD, COMP/37366 – Hofmann and DSD, COMP/37299 – Edelhoff and DSD, COMP/37291 – Rethmann and DSD, COMP/37288 – ARGE and five others and DSD, COMP/37287 – AWG and five others and DSD, COMP/37526 – Feldhaus and DSD, COMP/37254 – Nehlsen and DSD, COMP/37252 – Schönmakers and DSD, COMP/37250 – Altvater and DSD, COMP/37246 – DASS and DSD, COMP/37245 – Scheele and DSD, COMP/37244 – SAK and DSD, COMP/37243 – Fischer and DSD, COMP/37242 – Trienekens and DSD, COMP/37267 – Interseroh and DSD (OJ 2001 L 319, p. 1).

8 – See recitals 4, 58 and 59 to the decision at issue.

9 – See recitals 7, 60 and 61 to the decision at issue.

10 – See recital 20 to the decision at issue. See also the communication of the German Government to the Commission of 24 May 2000 (Annex K 21 to the application initiating the action). The German Government indicates, in particular, that ‘an individual disposer may however combine take-back “in the vicinity of the business” and collection in the vicinity of the final consumer by participating in a dual system under Paragraph 6(3) of the Packaging [Ordinance] for only part of the packaging which it has placed on the market’.

11 – See paragraph 111 of the judgment under appeal.

12 – See, in particular, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraph 426.

13 – See paragraph 9 of the judgment under appeal.

14 – OJ 1989 L 40, p. 1.

- 15 – See, in particular, Case C-115/02 Rioglass and Transremar [2003] ECR I-12705, paragraph 25 and the case-law cited.
- 16 – See the website of Eco-Emballages, the holder of the licence to use the Der Grüne Punkt logo in France (<http://www.ecoemballages.fr>).
- 17 – Joined Cases C-403/04 P and C-405/04 P [2007] ECR I-729, paragraphs 118 and 119.
- 18 – Case C-185/95 P [1998] ECR I-8417.
- 19 – The Commission cites Baustahlgewebe v Commission, paragraph 49.
- 20 – Baustahlgewebe v Commission, paragraph 18.
- 21 – Ibid., paragraph 19.
- 22 – Ibid., paragraph 20.
- 23 – Ibid., paragraph 21.
- 24 – Ibid., paragraph 22.
- 25 – Ibid., paragraph 29.
- 26 – Ibid., paragraph 30. See also Eur. Court H.R., Kemmachev.France, 27 November 1991, Series A no. 218, § 60.
- 27 – Annex R 24 to the appeal.
- 28 – See Eur. Court H.R., Péliissier and Sassiv.France [GC], no. 25444/94, ECHR 1999-II, § 71.
- 29 – Baustahlgewebe v Commission, paragraph 35.
- 30 – Ibid., paragraph 36.
- 31 – Joined Cases C-120/06 P and C-121/06 P [2008] ECR I-0000.
- 32 – Paragraph 213.
- 33 – Baustahlgewebe v Commission, paragraph 42.
- 34 – Ibid., paragraph 45.
- 35 – Ibid., paragraphs 45 and 46.
- 36 – See point 268 of this Opinion.
- 37 – See, in particular, Case C-112/00 Schmidberger [2003] ECR I-5659, paragraph 71.
- 38 – Ibid.
- 39 – See Eur. Court H.R., Hauschildtv.Denmark, 24 May 1989, Series A no. 154, § 58.
- 40 – The jurisdiction of the Court of First Instance was set by the Council, at the request of the Court of Justice and after consulting the European Parliament and the Commission. Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), thus provided, in Article 3(1)(c), that the Court of First Instance was to have jurisdiction, at first instance, in actions brought by natural or legal persons seeking to establish the non-contractual liability of the Community for damage caused by its institutions.
- 41 – See Eur. Court H.R., Piersackv.Belgium, 1 October 1982, Series A no. 53, § 30.
- 42 – See Eur. Court H.R., Hauschildtv.Denmark, § 47.
- 43 – Ibid., § 48. See also Eur. Court H.R., Morelv.France, 18 October 2000, § 42.
- 44 – Ibid.
- 45 – § 45.
- 46 – See Eur. Court H.R., Hauschildtv.Denmark, § 48, and Hirschhornv.Romania, no. 29294/02, ECHR 2007-, § 73.
- 47 – See Eur. Court H.R., Gublerv.France, no. 69742/01, 27 July 2006.
- 48 – Ibid., §§ 28 and 30. For examples of situations in which the European Court of Human Rights has held that the combination of judicial functions was acceptable, see Eur. Court H.R., Nortierv.theNetherlands, 24 August 1993, Series A no. 267, and Depietsv.France, no. 53971/00, ECHR 2004-I. 49 – See Eur. Court H.R., Procolav.Luxembourg, 28 September 1995, Series A no. 326.
- 50 – Ibid., § 45. For examples of cases in which the combination of judicial functions has been held to constitute a violation of the ECHR, see Eur. Court H.R., Findlayv.theUnited Kingdom, 25 February 1997, Reports of Judgments and Decisions 1997-I, and Tierce and Othersv.San Marino, nos. 24954/94, 24971/94 and 24972/94, ECHR 2000-IX.
- 51 – See Eur. Court H.R., Remliv.France, 23 April 1996, Reports of Judgments and Decisions 1996-II, § 48.
- 52 – See Eur. Court H.R., Mihalkovv.Bulgaria, no. 67719/01, 10 April 2008.
- 53 – Ibid., § 47.
- 54 – Ibid., § 48.