COMMISSION DECISION

of 16 October 2003

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

(notified under document number C(2003) 3703)

(Only the German text is authentic)

(Text with EEA relevance)

(2004/208/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by Regulation (EC) No 1/2003 [2], and in particular Articles 2, 6 and 8 thereof,

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

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

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

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

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

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

Whereas:

FACTS

I. INTRODUCTION

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

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

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

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

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

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

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

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

II. THE PARTIES

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

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

1. ARA

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

2. The BRGs

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

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

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

[6] BGBl. No 102/2002.

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

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

ARGEV Arbeitsgemeinschaft Verpackungsverwertungs-Gesellschaft mbH

ÖKK Österreichischer Kunststoff Kreislauf AG (ÖKK)

Aluminium-Recycling GmbH (ALUREC)

Arbeitsgemeinschaft Verbundmaterialien GmbH (AVM)

Verein für Holzpackmittel (VHP)

Ferropack Recycling GmbH (FERROPACK)

Altpapier-Recycling-Organisations-gesellschaft mbH

Austria Glas Recycling GmbH (AGR)

ARGEV Arbeitsgemeinschaft Verpackungsverwertungs-Gesellschaft mbH

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

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

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

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

ÖKK Österreichischer Kunststoff Kreislauf AG (ÖKK)

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

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

Aluminium-Recycling GmbH (ALUREC)

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

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

Arbeitsgemeinschaft Verbundmaterialien GmbH (AVM)

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

Verein für Holzpackmittel (VHP)

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

Ferropack Recycling GmbH (FERROPACK)

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

Altpapier-Recycling-Organisations-gesellschaft mbH

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

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

Austria Glas Recycling GmbH (AGR)

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

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

III. THE LEGAL CONTEXT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. THE NOTIFIED AGREEMENTS

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

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

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

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

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

1. Dispensation and licence agreements

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2. *Dispensation and licence agreement for service packaging*

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

1.3. *Supplementary agreement for small quantities of packaging*

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

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

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

2. **Waste disposal contracts**

2.1. *The relationship between ARA and BRGs*

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

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

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

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

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

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

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

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

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

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

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

2.2. *BRG-BRG relations*

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

(a) Cooperation contract between ARGEV and ÖKK

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

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

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

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

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

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

(b) Cooperation contract between ARGEV and ALUREC

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

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

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

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

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

2.3. *Relations between BRGs and regional partners*

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

ARGEV agreement

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

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

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

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

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

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

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

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

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

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

ARGEV — collection partners

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

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

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

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

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

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

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

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

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

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

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

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

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

(108) Regarding the term of the contract, ARGEV has entered into undertaking 4 set out in paragraph 139.

(109) ARGEV has also stated that the collection partner agreements do not contain any exclusive obligations on disposers, either in the near-household or commercial sectors. Disposal companies are free to provide similar services for other dispensation systems or as part of self-disposal solutions. As regards shared use of collection containers, ARGEV has entered into undertaking 3 set out in paragraph 139.

ARGEV — sorting partners

(110) The standard agreement for sorting partners very closely resembles the agreement for collection partners.

(111) Pursuant to Article 1.5, ARGEV entrusts the task of operating collection systems for light and metal packaging from households and similar establishments in defined collection regions (as a rule political subdivisions or major cities) throughout the country to the collection partner responsible. The quantities collected by collection partners are transferred direct or via a transport company to the sorting partner. Only one sorting partner is contracted per collection region.

(112) In order to optimise the collection, sorting and transport system, the quantities collected by certain collection partners or from certain collection regions are allocated to certain sorting partners or sorting facilities under Article 1.6. Through corresponding provisions in the separate collection partner agreements, ARGEV will ensure that the packaging collected by collection partners from households and similar establishments in certain collection regions (as specified in Annex 5 to the agreement) are sorted only in the sorting partner's sorting facility.

(113) Pursuant to Article 2.1.1, the sorting partner is required to take and sort all quantities of packaging made available or collected from households (Module 1) and similar establishments (Module 2) by the collection partner(s) in the collection regions. The sorting partner must take unsorted waste collected under Modules 1/2 ARGEV collection only from collection partners or from collection regions specified in Annex 5 to the agreement. Under Article 2.2, the sorting partner must, at the site of the sorting facility, operate a regional transfer point where packaging from commercial sources (Module 3), from recycling yards (Module 4) and problem material collections (Module 5) is accepted free of charge.

(114) Pursuant to Article 2.4.2, the sorting partner merely takes charge of the packaging for ARGEV and does not, therefore, acquire ownership of the packaging. Consequently, the sorting partner may not treat the used material in any manner other than that provided for in the agreement; any contravention constitutes grounds sufficiently serious for ARGEV to terminate the agreement without notice under Article 5.5.2(a).

(115) In reply to a Commission request for information, ARGEV stated that the ownership clause did not entail any prohibition on the use of the sorting facilities for third parties. If, in any event, the disposer were, through the granting of shared use, to jeopardise the dispensation of the ARA licensees, this would be in breach of contract.

(116) The provisions concerning the engagement of subcontractors (Article 2.4.1) and the duration/termination of the contract (Article 5) are similar to those in the collection partner agreement.

(117) Pursuant to Article 3.1, the sorting partner receives the input fees indicated in Annex 6 to the contract within the specified quantity ranges. The input fees constitute the consideration for taking charge of the collected waste from the ARGEV household system and near-household system, input control, a share of the facility's fixed costs by reference to the agreed annual input quantities, removal and proper disposal of intrusive material from collected waste, and the conditioning, temporary storage, making available and loading of all output waste types, free of intrusive material or positively sorted. A ceiling applies to the sorting input quantity chargeable annually to ARGEV, being the sum of the quantities collected from households in certain collection regions. For positive sorting of output waste types from households and similar establishments, the sorting partner receives specific fees for each type of material. These output fees also apply to the acceptance of deliveries, input control, re-sorting, conditioning, temporary storage, making available, loading etc. of specified waste types from business sources, recycling yards and problem material collections.

(118) ARGEV has also stated that the sorting partner agreements do not contain any exclusive obligations on sorting partners. Disposal companies are free to provide similar services for other dispensation systems or as part of self-disposal solutions. ARGEV has also entered into undertaking 3 set out in paragraph 139 and has entered into undertaking 4 regarding the term of the agreements.

ARO agreement

ARO — collecting partners

(119) The agreement concerns the operation of a collection system for paper packaging to satisfy the obligations flowing from the Waste Management Act, the Packaging Ordinance, the ARA/ARO waste disposal contract and the official authorisations. Only one regional partner is contracted per collection region.

(120) Pursuant to Article 1.1, the agreement does not cover the collection of waste paper and paper packaging from households and establishments accumulating similar waste. Rather it covers commercial street disposal (Article 2.4), transport of packaging from recycling yards (Article 2.5) and individual enterprise disposal (Article 2.6).

(121) Pursuant to Article 1.5, ARO's take-back obligation is confined to the quantity of paper, cardboard, board and corrugated-board packaging licensed with ARA. However, ARO is prepared to take the entire quantity of packaging delivered to the collection and recycling system. If this means that it exceeds its obligations under the official authorisation, namely making available sufficient take-back capacity for paper packaging, with a collection quota of 90 % in the commercial sector and 80 % in the household sector, and a recycling quota of 85 % in the commercial sector and 75 % in the household sector, and this conflicts with the licensee's economic and legal interests, ARO reserves the right to adapt its take-back guarantee and the corresponding fee payments to the requirements of the official authorisations; it must inform the collection partner accordingly in good time.

(122) Commercial street disposal concerns the disposal of pure-paper packaging from small business sources. What are known as supervised take-back sites (recycling yards, scrap collection centres, etc.) are run by the local authority and take packaging from private individuals and small business sources. The ARO collection partner takes packaging from recycling yards and handles its removal. For individual enterprise disposal the ARO disposal partner operates what are known as ARO transfer points, where business sources can bring their packaging into the collection and recycling system free of charge.

(123) Pursuant to Article 2.7, the collection partner is required to take all paper packaging covered by the agreement at the ARO transfer points. Article 2.7.4 stipulates that the business source must confirm by appropriate means that the packaging handed in is licensed with ARA. Additional transfer points must be authorised by ARO.

(124) Pursuant to Article 2.8, ARO decides on the disposal companies and the transport arrangements for packaging. The partner must therefore secure written agreement with ARO in this respect. The collection partner guarantees ARO a certain minimum quality of paper packaging on delivery to the recycler (Article 2.9).

(125) Article 2.10 states that the partner collects the paper packaging for ARO and that the collected waste is therefore the sole property of ARO. Consequently, the material collected may not be treated in any manner other than that provided for in the agreement; any contravention constitutes grounds sufficiently serious for ARO to terminate the agreement without notice.

(126) Pursuant to Article 2.15, ARO guarantees, by means of its bilateral contracts with recyclers, to take from collection partners the paper packaging they present and ensure its proper recycling according to the type of packaging. Should the recycling guarantees given to ARO be withdrawn, it must ensure an adequate substitute for disposal companies.

(127) Pursuant to Article 4, the agreement started to run from 1 January 2002 for an indefinite period. Subject to six months' notice, it can be terminated with effect from 31 December 2004. It can also be terminated without notice on serious grounds.

(128) Regarding the term of the contract, ARO has entered into undertaking 4 set out in paragraph 139.

(129) ARO has also stated that the collection partner agreements do not contain any exclusive obligations on collection partners. Collection partners are free to provide similar services for other dispensation systems or as part of self-disposal solutions.

ARO — local authorities

(130) The agreement concerns cooperation between ARO and the local authority in the operation of the municipal waste paper systems for paper packaging from households and establishments accumulating similar packaging waste in the area covered by the agreement. Account is taken of the obligations stemming from the Waste Management Act, the Packaging Ordinance, the ARA-ARO waste disposal contract and the official authorisations.

(131) Pursuant to Article 2.1, ARO's take-back obligation is confined to the quantity of paper, cardboard, board and corrugated-board packaging licensed with ARA. However, ARO is prepared to take the entire quantity of packaging delivered to the collection and recycling system, subject to retrospective readjustment in line with the obligations under the official authorisation, of which the local authority must be informed in good time.

(132) In the municipal waste paper collection run by the local authority, packaging together with non-packaging from the same material (newspapers, magazines, catalogues, etc.) is collected regularly pursuant to Article 2.2. The share of the costs for collection of paper, cardboard, board and corrugated-board packaging is borne by ARO; the other costs of municipal waste paper collection are borne by the local authority.

(133) Pursuant to Article 2.4, fundamental changes to the collection system described in the collection scheme (e.g. switch from a bring-it-yourself to a collection system) must be agreed between the local authority and ARO if it entails substantially higher costs for ARO. The local authority takes charge of putting the collection services out to tender or renegotiating them after consulting ARO. Selection of the disposal company (collector) rests with the local authority.

(134) The local authority must provide the following services: collecting paper packaging as part of the municipal waste paper collection (Article 3.1); providing sites for collection containers together with the necessary permits (Article 3.2); providing and maintaining the collection containers (Article 3.3); taking packaging via supervised recycling yards, used-material centres, etc. (Article 3.4); and guaranteed quality of packaging plus bearing the cost in the event of the need for re-sorting the packaging taken over in the recycling yards (Article 3.5). For its

part, ARO guarantees recycling in accordance with the Packaging Ordinance through bilateral contracts with recyclers (Article 3.6).

(135) Article 3.7 governs the transfer of ownership of the packaging: as regards packaging waste collected from households and establishments accumulating similar waste, ownership passes from the local authority to ARO on delivery of the packaging to the ARO transfer point. Ownership of material collected under supervision in recycling yards, used-material centres, etc., passes to ARO when it is picked up by the ARO disposal partner; if the local authority provides transport, ownership does not pass from the local authority until acceptance by the ARO transfer point.

(136) The local authority may not treat paper packaging in any manner other than that stipulated by ARO; any contravention constitutes grounds sufficiently serious for ARO to terminate the agreement without notice. Paper packaging may be recycled separately from non-packaging material of the same type or mixed with such material.

(137) Pursuant to Article 5.1, the contract begins to run from 1 January 2002 for an indefinite period and can be terminated no earlier than 31 December 2003, subject to six months' notice. It can also be terminated without notice on serious grounds.

(138) The contract contains no provision ruling out the possibility of another collection and recycling system sharing use of the municipal waste paper collection containers. ARO has stated that for the most part in the sector of near-household paper collection it purchases only quantities from municipal collection. There is no obvious reason, it says, why the local authorities should not conclude similar agreements with other dispensation systems.

V. **UNDERTAKINGS GIVEN**

(139) The Commission indicated that it had reservations regarding the implications for competition of some aspects of the contracts notified. In the course of the procedure the parties have given the Commission the following undertakings:

— (undertaking 1) with effect from 29 November 2000 ARGEV and ARO will refrain from invoking the most-favoured clauses which were agreed in supplementary agreements or addenda to the waste disposal contracts concluded with the disposal companies with which the company concerned had contractual relations,

— (undertaking 2) ARA undertakes not to invoke its licence rights to the Green Dot mark vis-à-vis firms inside or outside Austria (a) that participate with marked or similar packaging in collection and recycling systems within the meaning of Directive 94/62/EC on packaging and packaging waste which require the use of the Green Dot; or (b) that are required by regulations to affix the Green Dot to packaging. This obligation applies provided that the firm concerned can show that it collects and recycles the packaging marked with the Green Dot in Austria in accordance with the Packaging Ordinance (BGBl 648/1996, as amended) — whether by means of a self-disposal solution within the meaning of the Packaging Ordinance or by participating in an authorised collection and recycling system — and grants ARA the corresponding monitoring rights by contract. The monitoring rights may not extend beyond the rights granted under the standard ARA contract. In exercising these monitoring rights, ARA will not impose requirements stricter in terms of providing evidence that collection and recycling comply with the Ordinance than the obligations of the firms concerned vis-à-vis the authorities responsible for implementation of the Packaging Ordinance,

— (undertaking 3) ARGEV will not prevent local authorities and/or disposal companies from working for competitors of the ARA system. Further, ARGEV will not prevent local authorities and/or disposal companies from concluding and fulfilling contracts with competitors of the ARA system concerning the shared use of containers or other facilities for the collection and/or sorting of used packaging from households and similar establishments. This undertaking does not restrict ARGEV's right to enforce contractual arrangements for the shared collection and recycling system and to take all necessary measures to fulfil its obligations as a collection and recycling system, whether imposed by the law or by the official authorisations, in spite of shared use. Furthermore, this undertaking applies only if:

(a) the local authorities and/or disposal companies declare their willingness to reduce the charges to be paid by ARGEV for the provision and operation of collection/sorting facilities, and/or for collection/sorting, in proportion to the use of containers and other facilities, and to reimburse ARGEV an appropriate share of the other costs directly attributable to collection/sorting (that is, costs for ongoing engineering and management of the shared collection system, costs for waste consultants, costs for R & D, etc.); ARGEV will produce an attestation from an independent chartered accountant regarding the amount and chargeability of the costs charged;

(b) the local authorities and/or disposal companies declare their willingness to reimburse ARGEV for the additional costs incurred by the companies in the ARA system and/or their contractors as a result of shared use (for instance, additional analysis costs or sorting costs in order to maintain the quality of the packaging collected and sent for recycling on behalf of ARGEV). ARGEV will produce an attestation from an independent chartered accountant regarding the amount and chargeability of the costs charged. Additional costs incurred by the companies in the ARA system and/or their contractors simply by virtue of reductions in the licenced quantity will not be taken into account. This undertaking will be implemented on a case-by-case basis through supplementary agreements to individual service contracts,

— (undertaking 4) ARGEV and ARO will terminate their contracts with disposal partners when the contracts have run for three years, unless the contracting parties agree on extension of the contract for no more than a further two years. No later than at the end of a five-year contract period ARGEV and ARO will again put the service contracts out to tender through a competitive, transparent and objective procedure (invitation to tender of whatever kind, invitation to submit quotations, etc.).

VI. THE RELEVANT MARKET

(140) For the purposes of assessing the agreements covered by this proceeding, the relevant product and geographic markets are defined as follows.

Product market

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

(142) The business purpose of the ARA system is the organisation and operation of a countrywide take-back system in Austria for used packaging. The agreements underlying the ARA system have economic effects at various stages in the value-added process. Furthermore, a distinction is made in the contracts within the ARA system between both individual types of packaging and different sources of the packaging to be disposed of. The assessment pursuant to Article 81(1) of the EC Treaty of the individual contracts and of the relevant source of the packaging must be carried out on the basis of different, autonomous relevant markets.

1. *Markets for systems or self-disposal solutions for the collection and recycling of used packaging*

(143) Through the operation of the collection and recycling system, ARA makes it possible for its licensees to be 'dispensed' from the obligations laid down in the Packaging Ordinance for the contracted packaging (dispensation system) and accordingly acts as a trustee for its licensees vis-à-vis the BRGs obliged to take back and recycle packaging. The demand-side customers are the companies obligated under the Packaging Ordinance.

(144) Since ARA acts as a trustee for the obligated undertakings, it is at the same time a customer for the organisational management of a dispensation system. The operation of a dispensation system is offered by the BRGs, which hold the official notices of approval. Both the trustee activity of ARA and the operation of the dispensation system by the BRGs must be ranked on the supply side at the same level of the value-added chain. If ARA were not intervening as a trustee, the BRGs could not offer the dispensation service direct to the obligated undertakings. Since ARA and the BRGs thus operate on a single market, discussion below will refer to the supply of the dispensation service by the ARA system.

(145) Undertakings which do not wish to join a countrywide collection and recycling system are still required under their own responsibility to perform the obligations laid down by the Packaging Ordinance. The same applies to registered major sources as regards the packaging they accumulate. However, the companies not participating in systems can charge third parties with the task of performing the disposal of used packaging incumbent on them. As a result, such third parties offer to organise the individual performance of the collection and recovery obligations relating to used packaging under the Packaging Ordinance (self-disposal solution).

(146) The question of whether dispensation systems and self-disposal solutions operate on the same market or on different, but neighbouring markets can be left open. This is because, as explained below, with regard to the agreements to be assessed here, neither of these two definitions of the relevant product market involves any restriction of competition within the meaning of Article 81(1) of the EC Treaty. The precise market definition as regards the organisation of the taking-back and recycling of used packaging can accordingly be left open.

(147) The market on which dispensation systems and self-disposal solutions operate can be referred to as a 'system market'. The system market is confined to packaging waste, since this can be distinguished from other waste on the basis of the specific obligations imposed on customers in the Packaging Ordinance.

(148) Within this 'system market', the following relevant markets should be distinguished as regards the source of the packaging.

(149) The ARA system offers on the one hand participation in a system for the disposal of used packaging that accumulates in private final consumers' households and in near-household establishments. On the other, the ARA system offers participation in a system for the disposal of packaging that accumulates in trade and industry. The ARA system has been given separate authorisations for its household and commercial systems.

(150) A company wishing to be dispensed from the obligations imposed by the Packaging Ordinance brings packaging into circulation that accumulates either in the household sector, or in the large-business industrial sector or, in definable quantities, in both sectors. It can therefore participate only in a collection and recycling system that is set up for the relevant sources. From the point of view of the demand-side company, therefore, there is no substitutability between participation with packaging in a system for household packaging and in a system for packaging in the trade and industry area for the purpose of achieving dispensation from the obligations imposed by the Packaging Ordinance.

(151) On the supply side, the organisation of a dispensation system for the 'dispensation' of licensees must basically be geared to the legal specifications, which distinguish between household and commercial systems and impose differing requirements. The fields of business must be separated in organisational or at least accounting terms (paragraph 41) and only household systems must endeavour to have as high a participation rate as possible, are obliged to enter into contracts, must meet greater reporting requirements and are subject to more far-reaching monitoring (paragraph 40).

(152) Against this background, the Commission concludes that, from the point of view of the system operator, the dispensation service offered to an undertaking within the framework of a system for household packaging is not functionally interchangeable with that offered to the undertaking within the framework of a system for packaging stemming from the trade and industry sector.

(153) It is not necessary to take the above differentiation any further by breaking down the two relevant markets on the basis of individual types of material (e.g. paper, glass, etc.), since this would not produce any other competition assessment pursuant to Article 81(1) of the EC Treaty.

(154) The Commission therefore finds that, with regard to the organisation of systems for the disposal of used packaging (system market), the market for systems for household packaging must be distinguished from the market for systems for packaging stemming from the trade and industry sector.

2. *Markets for the collecting and sorting of used packaging*

(155) Within the ARA system, a number of BRGs are responsible for organising the collection and sorting of used packaging. Since they do not themselves carry out disposal, they are customers for this service. The suppliers of the disposal service are disposal companies and municipal authorities (referred to below as disposers).

(156) In the collection and sorting of used packaging, a distinction must be made in terms of categories of material on the one hand and between household and commercial sectors on the other.

(157) Paper and board packaging accumulating in households is collected jointly with similar non-packaging material (newspapers, magazines, etc.). Collection is performed by the local authorities. These therefore also enter into contracts with the disposal companies. ARO purchases only certain quantities of the local authorities' used-paper collection. The local authorities' used-paper collection already existed before the setting-up of the ARA system. For the most part, used paper fetches a favourable market price. As a rule, paper and board waste is collected in the bring-it-yourself system in collection containers set up on local authority land. Where re-sorting has to be carried out, it is relatively simple. On the basis of these features, the Commission assumes that a separate market for the collection and sorting of used-paper accumulating in households exists which comprises paper and board packaging together with newspapers, magazines and other used paper. Paper and board packaging arising in the commercial sector is taken either in recycling yards or used material centres, collected at the transfer points set up by the systems or collected direct from major sources. The disposer enters into a contract with ARO, with competing systems or with the major source. Overlaps with household collection arise to only a limited extent.

(158) Glass involves particular features which make it appropriate to identify this type of material as a subcategory as well. Used-glass collection already existed before the setting-up of the ARA system. As a rule, used glass is collected in the bring-it-yourself system in collection containers set up on local authority land. Where re-sorting has to be carried out, this is relatively simple. Used-glass collection is largely confined to used-glass accumulating in households.

(159) The collection of light packaging (in particular plastic, bonded material, aluminium, tin plate and steel), by contrast, is carried out on a separate basis from household-waste collection only after the ARA system has been set up. The collection is carried out mainly using a pick-up system in containers or bags set up near households. Light packaging made from plastic and bonded material has predominantly a negative market price. Consequently, the conditions for the collection and sorting of household packaging waste made from these types of material must, in terms of disposal logistics, be clearly distinguished from those applicable both to the household collection of used paper and used glass and those applicable to the collecting and sorting of packaging in the trade and industry sector.

(160) Since in the collection of light packaging in the household sector all households must normally be serviced direct, there are substantial network effects, i.e. substantial economies of scale and scope. As a result of these specific supply-side conditions, sources in the household sector can as a rule be serviced on an optimum cost basis only by a limited number of disposers. Furthermore, as far as the latter are concerned, normally only one collection container can be provided per category of material. By contrast, the number of sources in trade and industry is smaller and, because of the large volume of waste to be disposed of, can also be serviced by different disposers.

(161) Furthermore, the sales packaging arising in households differs significantly in terms of its used-material value from the packaging arising in trade and industry. Various types of material accumulate in small quantities in the case of private final consumers and are collected by them with the result that the material must subsequently be sorted in comparatively capital-intensive sorting facilities. In the case of packaging in trade and industry, which usually accumulates in large quantities and is already sorted into individual types of materials, sorting facilities are not necessary in this type of technical configuration.

(162) Against this background, there is no functional interchangeability between collection and sorting services for packaging collected from private final consumers and those in trade and industry.

(163) The market for the collection and sorting of used household packaging must be differentiated from household waste and rubbish collection, which, following the adoption of the Packaging Ordinance, has remained within the sphere of responsibilities of the local authorities that have to provide disposal services. The market for the collection and sorting of used packaging differs from the latter through a much broader service profile, since the sorting of the collected packaging by type of material provided on this market in accordance with specific rules and the provision of the collected used materials for further recycling involve an autonomous value-added chain which as a rule requires extensive and demand-specific investment in an appropriate sorting infrastructure. Furthermore, a separate collection infrastructure exists for each sector, since household waste and rubbish in private households is collected in different containers than used packaging.

(164) In the household sector, therefore, the following markets can be distinguished: the market for the collection of used paper, the market for the collection of used glass and the market for the collection and sorting of light packaging.

(165) In the commercial sector, the customers for disposal services are the BRGs involved in collection (ARGEV and ARO) and competing systems. Systems demand only disposal services for packaging and, because of requirements, cannot substitute other disposal services for this demand. Other customers are self-disposers and large sources. These accumulate both packaging waste and other commercial waste. Because of the specifics of the legal requirements applicable to packaging disposal, however, this is, from the customers' point of view not interchangeable with the disposal of other commercial waste.

(166) From the point of view of disposal service suppliers, there are considerable differences between the collection and sorting of commercial packaging and the disposal of other commercial waste. Although in terms of disposal logistics the parameters are to some extent comparable (source location, collection frequency, waste characteristics), the differing legal requirements have an effect at collection and sorting level. Packaging waste is subject to reporting rules, which collectors and sorters are responsible for fulfilling. They must therefore prove and document to their clients that minimum amounts have been collected and prepared for recycling. This requires planning, not just in terms of the waste that accumulates, but also to ensure a steady provision of sufficient quantities of waste. Furthermore, because of the reporting requirements, the collection of packaging and non-packaging of similar types of material in the

same container is difficult. This is either ruled out by the contractor or a proportionate allocation must be undertaken that meets the legal requirements as to quota record-keeping.

(167) It must therefore be assumed that the market for the collection and sorting of packaging accumulating in the commercial sector must be distinguished from the market for the disposal of other commercial waste. The question of whether, on the market for the collection and sorting of commercial packaging, a further distinction must be made in terms of types of materials can be left open, since this is not relevant to the competition assessment pursuant to Article 81(1) of the EC Treaty.

(168) For all that, in addition to the household markets, a market must be distinguished for the collection and sorting of used packaging from large business and industry. There is no need to carry out any further differentiation in terms of elementary value-added chains (e.g. collecting, transporting, sorting) since the competition assessment pursuant to Article 81(1) of the EC Treaty would not be any different.

3. *Markets for recycling services and secondary raw materials*

(169) The ARA system intervenes in the markets for recycling services and/or secondary raw materials insofar as, with regard to the reusable materials collected under the system, the BRGs except for ARGEV organise, on a long-term basis and regardless of the relevant market situation, provision of the sorted used materials for recycling, in line with the specifications of the Packaging Ordinance. The recycling companies, as contract partners of the BRGs, provide the reusable materials for recycling in accordance with the Packaging Ordinance.

(170) It must be assumed that the markets here are separate markets in line with the types of reusable material involved. Furthermore, no differentiation is made at recycling level between household and industrial packaging of one and the same type of material, since the technical and economic requirements involved in recycling are largely identical. For the same reason, other products of the same type of material intended for recycling can be included in the recycling market. In the case of paper and board waste, for example, this would include newspapers and magazines.

(171) Furthermore, the organisation itself of the recycling of a given type of material by the BRGs and the actual carrying-out of the recycling of the used material or the supply of secondary raw materials are each different levels of a given product market.

Geographic market

(172) The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of or demand for products and services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

(173) It has to be assumed that the objective supply and demand conditions on the relevant markets here differ distinctly from those in other areas of the common market. Consequently, in the application of the Community competition rules to the product markets covered by the ARA system, the territory of Austria must be taken as the relevant geographic market insofar as system markets and the markets for collection and sorting are involved.

(174) With regard to the markets for recycling services and secondary raw materials, the Commission starts from the assumption that these markets are, to some extent, already clearly marked by internationalisation tendencies and cross-border elements and that therefore the territory of the European Economic Area must be taken as the relevant geographic market. However, the exact definition of the relevant geographic market can ultimately be left open here.

VII. **MARKET STRUCTURE**

(175) The number of licensees in the ARA system was 10 994 in 1997, 11 479 in 1998, 12 027 in 1999, 12 295 in 2000 and 12 652 in 2001. ARA's licensing revenue amounted to ATS 2 608,1 million/ EUR 189,6 million in 1997, ATS 2 673,0 million/ EUR 194,2 million in 1998, ATS 2 694,2 million/ EUR 195,8 million in 1999, ATS 2 543,3 million/ EUR 184,8 million in 2000 and EUR 162,7 million in 2001.

(176) In the household sector, the ARA system is the only countrywide collection and recycling system in Austria that covers all types of materials (except for bonded drinks cartons).

(177) In the household sector, in addition to ARA, Öko-Box Sammel GmbH is the only other countrywide operator of a collection and recycling system for used light drinks-packaging, cooperating with ARGEV in order to ensure countrywide collection. In addition, Bonus Holsystem für Verpackungen GmbH & Co. KG operates a disposal system in the building sector for packaging left at building sites with private final consumers and in the farming sector for packaging left with farmers.

(178) In the household sector, there are no self-disposal solutions in operation pursuant to Section 3(6) of the Packaging Ordinance on any significant scale.

(179) In the field of commercial and industrial packaging, the ARA system has several competitors, though they bear no comparison with the ARA system in terms of their economic importance. They are:

— EVA Erfassen und Verwerten von Altstoffen GmbH (EVA), a subsidiary of the INTERSEROH group in Germany, which disposes of metal, plastic, paper, wood and bonded materials,

— Bonus Holsystem für Verpackungen GmbH & Co KG (Bonus — formerly FRS Folien-Rücknahme-Service GmbH & Co KG), Kufstein, which disposes of metal, plastic, paper, wood and textile packaging; this is, however, confined to packaging left with a commercial end-user (in the building sector also with private final consumers at bare-shell buildings and in the farming sector with farmers),

— RUG Raiffeisen Umweltgesellschaft mbH, Kornneuburg, which disposes of reusable wine bottles and agricultural film,

— GUT Dr Klaus Galle Umwelttechnik & Ökoconsulting (GUT), Klosterneuburg, which disposes of metal, plastic, paper, wood, bonded materials and bio-packaging,

— Pape Entsorgung GmbH & Co KG, Hannover, Germany, which disposes of packaging for automobile OEM spare parts.

(180) Only EVA, Bonus and GUT have their own system authorisation for the entire commercial sector.

(181) There are also some self-disposal solutions, including for what are known as major sources.

(182) Tables on licensed and collected quantities

Packaging wastes, licensed volumes and system volumes, 2001 ([9])

	Market volume (total volume of packaging brought onto the market in Austria) (tonnes)	Licensed volume, other systems (tonnes)	Licensed volume, ARA (tonnes)	ARA-licensed packaging as a proportion of packaging brought onto the market in Austria (%)
Paper and board	535 000	13 300	[...]* (*)	[... 50-60 % ...]*
Glass	230 000	0	[...]*	[... 80-90 % ...]*
Wood	70 000	1 600	[...]*	[... 65-75 % ...]*
Ceramics	28	0	[...]*	[... 90-100 % ...]*
Metals	85 000	900	[...]*	[... 50-60 % ...]*
Textiles	—	34	[...]*	[... 15-25 % ...]*
Plastic	210 000	7 100	[...]*	[... 50-60 % ...]*
BM ([10])	40 000	23 600	[...]*	[... 15-25 % ...]*
Other	—	54	0	[... 0-10 % ...]*
Total	1 170 028	46 700	[...]*	[... 55-65 % ...]*

— = no figures available.

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

([9]) Figures in this table are according to information from the Austrian Federal Ministry for Agriculture and Forestry, the Environment and Water Resources, situation as at 2001.

([10]) Bonded materials.

Volumes of packaging wastes collected, 2001 [11]

	Total volume collected by ARA (tonnes)	Volume collected by other systems	Volume collected Annex 3 (= commercial)	Landfill and incineration	Total	ARA's share of total packaging wastes collected (%)
Paper and board	297 400	11 500	102 200	92 000	503 100	59 %
Glass	174 400	0	900	39 000	214 300	81 %
Wood	15 600	600	12 100	40 000	68 300	23 %
Ceramics	9	0	0	0	9	100 %
Metals	29 500	700	4 600	27 000	61 800	48 %
Textiles	7	27	300	0	334	2 %
Plastic	102 800	6 000	6 900	78 000	193 700	53 %
BM [12]	5 000	17 200	100	5 000	27 300	18 %
Other	0	45	200	0	245	0 %
Total	624 716	36 072	127 300	281 000	1 069 088	58 %

VIII. COMMENTS FROM THIRD PARTIES

(183) Following publication of a notice pursuant to Article 19(3) of Regulation No 17 and Article 3 of Protocol 21 to the EEA Agreement, a total of eight interested third parties submitted their comments to the Commission. The comments focused on the following points.

(184) Third parties suggested that the undertakings given by ARA should be backed up by the imposition of obligations. This concerned in particular the shared use of the collection infrastructure in the household sector. They also regarded the scope of the undertakings as being insufficient.

(185) It was also argued that the ARA system used the household sector to cross-subsidise the commercial sector so as to drive competitors from the market. There was no clear separation between the two sectors either as regards charges or as regards calculation. ARA should therefore be prohibited from operating in the commercial sector.

(186) Lastly, it was alleged that ARA gave preferential treatment to certain groups of licensees by selectively refunding these contributions, while other licensees were allowed only the general reductions in charges.

(187) The list of charges was not notified by ARA. Consequently, the charge system and any cross-subsidising are not covered by the Decision.

(188) The Commission has carefully examined the comments submitted by third parties and, where necessary, taken account of them in this Decision.

[11] Figures in this table are according to information provided by the Austrian Federal Ministry for Agriculture and Forestry, the Environment and Water Resources, situation as at 2001. According to oral information provided by the official responsible in the Austrian Federal Ministry for Agriculture and Forestry, the Environment and Water Resources in June 2003, about one third of the volume of paper and board collected by ARA is accounted for by the household sector and about two thirds by the commercial sector; about 7/10 of the volume of plastics collected by ARA are accounted for by the household sector and 3/10 by the commercial sector.

[12] Bonded materials. Bonded materials include bonded drinks cartons. Öko-Box collected 16 600 tonnes of bonded drinks cartons, the ARA system did not collect any bonded drinks cartons.

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

(189) Agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited as being incompatible with the common market.

Agreements between undertakings

(190) ARA and obligated undertakings under the Packaging Ordinance are engaged in economic activity. The dispensation and licence agreements concluded between ARA and obligated firms are therefore agreements between undertakings.

(191) The BRGs are engaged in economic activity. Since ARA's shareholding in some BRGs is only 11 %, it cannot exercise control over them under company law. And since the firms participating in the ARA system are not linked through any group or parent-subsidiary relationship (except for AVM, which is owned by ÖKK and ARO, each with a 50 % stake), both the waste disposal agreements between ARA and the BRGs and the cooperation agreements between ARGEV and ÖKK, ALUREC, FERROPACK and VHP constitute agreements within the meaning of Article 81(1) of the EC Treaty.

(192) In order to provide the actual collection, sorting and disposal services the BRGs in turn conclude contracts with disposal undertakings. Some of these undertakings are local authorities. They, too, are therefore engaged in economic activity. All the contracts between the BRGs and the collection/sorting and disposal undertakings are therefore agreements between undertakings within the meaning of Article 81(1) of the EC Treaty.

Restriction of competition

1. *System market for household packaging*

1.1. Restriction of competition through dispensation and licence agreements

(193) ARA operates on the household packaging market by concluding dispensation and licence agreements with firms that release them from their obligations under the Packaging Ordinance to take back and recycle the packaging material in question that is accumulated by final consumers in private households.

(194) ARA uses several variants of the dispensation and licence agreements. In what follows, the dispensation and licence agreement for transport, sales, and outer packaging (ELV) will serve as a model for closer examination.

Evidence of use of a parallel dispensation system or self-disposal solution

(195) Pursuant to Article I.2 of the ELV the only permitted exception to the licensees' obligation to participate in the ARA collection and disposal systems is if they can produce evidence that they are using a parallel dispensation or self-disposal system. Regarding the evidence required, ARA has indicated that a certificate issued by the system operator pursuant to Section 3(5) of the Packaging Ordinance suffices as evidence of use of a parallel dispensation system, while the evidence of return that has to be submitted to the Ministry of the Environment pursuant to Section 3(6)(2) of the Packaging Ordinance suffices as evidence of use of a self-disposal solution (see paragraph 52).

(196) Pursuant to Article II.1 of the ELV the fee payable by the licensee is based on the volume of packaging that the licensee puts into circulation within the country. ARA has indicated, however, that Article II.1 of the ELV is applied in such a way that the fee is paid only for packaging in respect of which the licensee is seeking dispensation through the ARA system, in other words for the volume notified to ARA pursuant to Article II.4 as the basis for calculating the licence fee (see paragraph 55). Moreover licensees can correct the amounts declared for the year just ended retroactively and apply for a corresponding adjustment of their licence fee if they have disposed of certain quantities by other means. The danger with this flexible system for determining the licence fee is that firms participating in the ARA system could subtract a certain quantity of packaging material from the licence fee calculation retroactively without ensuring that it is disposed of by some other means. As ARA accepts corrections to packaging material declarations, and especially retroactive corrections, the Commission considers it reasonable for ARA to require licensees to produce evidence in order to prevent them from undermining the flexible declaration system.

(197) In view of these facts, the requirement of Article I.2 of the ELV for licensees to produce evidence is not contrary to Article 81(1) of the EC Treaty.

Use of the Green Dot mark

(198) There could be restriction of competition within the meaning of Article 81(1) of the EC Treaty if licensees had to pay a licence fee for all packaging carrying the Green Dot mark. In that case problems would arise for licensees who used ARA's dispensation services only in respect of part of their packaging, or who did not use any dispensation service at all in Austria, but who distributed uniform packaging bearing the Green Dot in other EEA Member States. They would then either be forced to pay ARA a licence fee even for those quantities in respect of which they were not participating in the ARA system in addition to the fee paid to the competing system; or they would have to introduce separate lines of packaging and distribution channels, which would not be practical or economic.

(199) The ELV does not contain any provision requiring packaging that comes under the ARA system and is brought into circulation in Austria to carry the Green Dot mark. The Packaging Ordinance, too, makes no provision for any such compulsory labelling of packaging covered by a collection and disposal system.

(200) Furthermore, according to the information given by ARA, Article II of the ELV is taken to mean that licensees' payment obligation is not a consideration for the right to use the Green Dot mark but rather for the dispensation service provided by the ARA system. It is thus a service fee and not a fee for the use of a mark.

(201) This means that firms can turn to a competing dispensation system or a self-disposal solution for part or all of their packaging bearing the Green Dot without having to pay a licence fee to ARA provided that they can prove to ARA that they have disposed of the packaging in accordance with the Ordinance.

(202) To ensure that ARA does not take any other measures against firms which are not ARA licensees but which are obliged to mark the packaging they put into circulation with the Green Dot either under a contract with a collection and disposal system in another Member State or under the national law of another Member State, ARA has confirmed that it has no objection if packaging not licensed with ARA carries the Green Dot provided it can be shown to have been disposed of in accordance with the Ordinance and that ARA is supplied with the proof. This applies irrespective of whether non-participation in the ARA system is partial or total. Even in the case of total non-participation in the ARA system, that fact does not have to be indicated on the packaging.

(203) In the light of the foregoing, it has to be assumed that the provisions of the ELV regarding the use of the Green Dot on packaging brought into circulation do not hamper current or potential competing collection and disposal systems or self-disposal solutions for household packaging and therefore do not constitute a restriction of competition within the meaning of Article 81(1) of the EC Treaty.

Ordinary right to terminate contracts for foreign licensees from other Member States

(204) Pursuant to Article 7 of the Directive 94/62/EC, return systems must also be open to imported products, which may not be discriminated against. The detailed arrangements and any tariffs imposed for access must avoid discrimination. Section 32(2) AWG accordingly makes contracting compulsory for the household sector. Consequently ARA cannot, in principle, exercise the right to terminate agreements. Where this does occur in the exceptional cases described by ARA (see point 60), ARA is subject to control against abuse. Seen in this light, the ordinary right of termination granted to foreign licensees under the agreements cannot be deemed an appreciable restriction of competition within the meaning of Article 81(1) of the EC Treaty.

1.2. Restriction of competition through disposal agreements between ARA and BRGs

(205) Article 5 of the disposal agreement between ARA and ARGEV, which was notified as a model for all the agreements concluded between ARA and BRGs, includes exclusive provisions for the benefit of both ARA and the BRGs. Article 6(13) of the agreement also includes a most-favoured clause for the benefit of ARA.

Exclusivity for the benefit of ARA

(206) The exclusive provisions for the benefit of ARA during the lifetime of the agreement contained in Article 5(2) of the disposal agreements between ARA and the BRGs mean that potential competitors of ARA cannot contract with BRGs, which hold the system operator licences. However, this ability to contract is not an essential requirement for access to the system market in terms of competition law. The key factor is that competitors can conclude contracts with the firms that do the actual collection and sorting. This market, downstream of the system market, will be examined in more detail below.

(207) Scrutiny of the exclusive arrangement in Article 5(2) of the disposal agreements leads to the conclusion that it does not pose an appreciable restriction of competition within the meaning of Article 81(1) of the EC Treaty.

Exclusivity for the benefit of the BRGs

(208) The exclusive provisions in Article 5(1) for the benefit of the BRGs for the lifetime of the agreement mean that no other firm can become a BRG under the ARA system and can avail itself of ARA's trustee services. Since what competitors want is precisely to conclude contracts with obligated undertakings rather than with ARA, it is impossible to see what interest they might have in making use of ARA's services. The Commission therefore concludes that, here too, there is no appreciable restriction of competition within the meaning of Article 81(1) of the EC Treaty.

(209) Furthermore, each BRG is assigned certain categories of material and stages of disposal. Pursuant to Article 5(3) of the disposal agreement, each BRG undertakes not to provide any disposal services that fall within another BRG's area of responsibility. This means that BRGs may not compete with one another, which primarily affects the organisation within the ARA system. Outside the ARA system the arrangement has no impact beyond the exclusivity discussed above. And although the BRGs' freedom of action is further restricted within the ARA system, this can be justified on the grounds of the need for a clear allocation of responsibilities and reasonable specialisation within the system. At system level, it would be effectively impossible to perform tasks such as tendering with collecting, sorting and recycling firms or ensuring that quotas are observed if the lines of responsibility were not clearly drawn. Another important point is that the commitment by BRGs to keep to their own area of responsibility ceases to apply after the agreement expires. The arrangement under Article 5(3) of the disposal agreement is therefore not in contradiction with Article 81(1) of the EC Treaty.

Most-favoured clause

(210) A further point that has to be considered is whether the most-favoured clause in Article 6(13) of the disposal agreement between ARA and the BRGs, under which BRGs are forbidden to offer or provide their services to a third party on more favourable terms than for ARA or its licensees, constitutes an appreciable restriction of competition on the system market for the purposes of Article 81(1) of the EC Treaty. The most-favoured clause, like the exclusive clause, is incapable of any impact by itself, as the BRGs are forbidden by the exclusive clause from working with any collection system other than ARA. Consequently the question of more favourable terms does not arise at all. By itself, therefore, the most-favoured clause cannot pose an appreciable restriction of competition within the meaning of Article 81(1) of the EC Treaty.

1.3. Restriction of competition through the cooperation agreement between ARGEV and BRGs

(211) The exclusive clause agreed between ARGEV and ÖKK/ALUREC could amount to a restriction of competition if it prevented potential competitors from entering the market. Pursuant to Article 15 of ARGEV's disposal agreement with ÖKK, which is responsible for organising the recycling of plastic packaging, the parties undertake for the lifetime of the agreement not to set up, operate or participate in any collection and recycling system within the meaning of the Packaging Ordinance other than the ARA system, except with the other party's permission. Article V of the agreement between ARGEV and ALUREC contains a similar exclusive provision.

(212) Potential competitors are therefore excluded from the organisational arrangements for recycling or marketing secondary raw materials, but not from access to the market. Competitors could build up their own organisational structures themselves. In particular, there is nothing to suggest that there might be any impediment to potential competitors of the ARA system concluding contracts with recycling firms. The exclusive clause for the benefit of ARGEV does not constitute a restriction of competition within the meaning of Article 81(1) of the EC Treaty.

2. *System market for packaging from the large-business and industrial sector*

2.1. Restriction of competition through dispensation and licence agreements (ELVs)

(213) The ELV is used for licensing of household packaging and large-business and industrial packaging.

(214) The analysis, in paragraph 193 et seq., of the ELV's provisions concerning existence of use of a parallel dispensation system or self-disposal solution also applies therefore to large-business for commercial and industrial packaging. Consent to use of the Green Dot can be given if an item of packaging occurs in the household sector and therefore has to carry the Green Dot in at least one other Member State.

(215) The Commission therefore concludes that the relevant provisions of the ELV do not result in a restriction of competition on the system market for large-business and industrial packaging and as such are not caught by Article 81(1) of the EC Treaty.

2.2. Restriction of competition through disposal agreements between ARA and BRGs

(216) The disposal agreements between ARA and the BRGs, for which the agreement between ARA and ARGEV was notified as a model, concern the disposal of packaging not only from households but from the commercial sector as well. The legal assessment of the problem of exclusivity in respect of household packaging given in paragraphs 206 et seq. applies equally to this sector. As in the household sector, the clauses examined do not constitute a restriction of competition within the meaning of Article 81(1) of the EC Treaty in the commercial sector.

2.3. Restriction of competition through the cooperation agreements between ARGEV and BRGs

(217) The cooperation agreements between ARGEV and the BRGs, for which the agreements between ARGEV and ÖKK, and ARGEV and ALUREC were notified as models, make no distinction between the household and commercial sectors. The legal assessment is no different from that arrived at as regards the market for the collection and sorting of household packaging (paragraph 211 et seq.). For the reasons stated there the reciprocal exclusive arrangements contained in the agreements do not constitute a restriction of competition within the meaning of Article 81(1) of the EC Treaty.

3. *Market for the collection and sorting of used household packaging*

(218) The ARA system operates on the market for collecting and sorting used light packaging accumulating in households primarily through regional partner agreements between ARGEV and collectors and sorters.

(219) Pursuant to the agreements valid from 1 January 2002 ARGEV concluded separate contracts with disposal firms for the collection and sorting of packaging.

3.1. Restriction of competition through the regional partners agreement between ARGEV and the collection partners

Exclusivity for the benefit of collection partners

(220) The sorting partner agreement is concluded between ARGEV and individual partners covering a particular region for which the partner in question has sole responsibility.

(221) Because of the obligation entered into by ARGEV to seek all collection services during the lifetime of the contract from one single disposal firm for the area covered by the contract, and in view of ARGEV's dominant market position in terms of demand (see paragraph 182), other suppliers of collection services for light household packaging are denied substantial supply opportunities.

(222) Contracting only a single collection partner per disposal region amounts to a self-imposed restriction by ARGEV in terms of demand for collection services for light household packaging. The result of this restriction is to exclude competing suppliers of collection services for light household packaging from supplying the major source of demand for such services and so restricting competition on the supply side between collection partners in the contract areas concerned. Even though collection has been separated from sorting in the contracts valid since 2002, bundling of demand does occur through the ARA system. At the same time, moreover, collectors are operating for the ARA system in the commercial sector as well, on the basis of a standard collection partners agreement.

(223) ARGEV's contracts with the collection partners are not limited in time at all and merely provide for an ordinary right to terminate after three years. In undertaking 4 described in paragraph 139, ARGEV has committed itself to terminating its contracts with the disposal partners after a period of three years unless the parties jointly agree to extend them by a maximum of two years in any event. ARGEV will put the service contracts up for tender again through an objective procedure after a period of five years. Although this undertaking prevents parties from binding themselves for an indefinite period, contracts can run for up to five years. This means that excluded disposal firms are denied access to the main source of demand for three to five years, noticeably restricting competition in the contract region.

Appreciable effect

(224) However, the exclusivity for the benefit of collection partners is contrary to Article 81(1) of the EC Treaty only if it affects competition to an appreciable extent. How appreciable the restriction of competition is depends primarily on the position of the contracting parties on the relevant market and the duration of the exclusive connection.

(225) Altogether ARGEV has concluded collection partner agreements for 64 areas, creating a network of agreements covering the whole of Austria. This means that only the ARA system currently has a countrywide collection and disposal system covering all categories of material in the near-household packaging sector in Austria and is therefore the main customer for such disposal services both in each collection area and throughout Austria as a whole. In the light household packaging sector, only Öko-Box has set up a competing system. But it is confined to bonded drinks cartons, which account for around 20 % of all light packaging accumulating in households (see paragraph 182).

(226) As ARGEV has covered the entire relevant geographical market with a network of similar contracts, the bundling of exclusive arrangements that they contain prevents third parties from entering the market for the lifetime of the contracts. The cumulative impact of all the contracts taken together has the effect of closing off the market to excluded disposal firms.

(227) On the supply side, moreover, spatial and logistic reasons militate against the establishment of another collection structure for final consumers alongside the one set up by ARGEV's collection partners (see paragraphs 160 and 281 et seq.). Even Öko-Box makes partial use of the ARGEV disposal firms' collection infrastructure. Alternative supply opportunities for excluded collection service providers must therefore be regarded as rather unlikely for the moment. Realistically any dispensation system wishing to compete with ARA is more likely to work together with the collection partners who already perform the collection of packaging for the ARA system under the sorting partner agreement. Against this background, it has to be considered unlikely that new supply opportunities will arise on the relevant market for excluded collection service providers to any appreciable, i.e. substantial, extent during the lifetime of the sorting partner agreement in each area.

(228) An important factor in assessing the effects of the exclusivity on competition is its duration. Under undertaking 4 given by ARGEV (see paragraph 139), future collection partner agreements will have to be put out to tender again after a maximum of five years. This means that other suppliers of collection services who are not successful when contracts are awarded are excluded from central supply opportunities for the same period of time.

(229) The Commission therefore concludes that the exclusivity in the collection partner agreements for the benefit of the respective disposal partners does appreciably restrict competition.

Access to collection partners' collection facilities

(230) Because of the bottleneck in the near-household collection infrastructure, as described in paragraph 227, free and unhindered access to these facilities by competitors of the ARA system is especially important for competition. In particular, there would be a restriction of competition within the meaning of Article 81(1) of the EC Treaty if the collection partner agreement were so worded as to exclude competitors of the ARA system from access to the disposal infrastructure.

(231) The service contracts contain no exclusive provision for the benefit of ARGEV, which means that disposal firms may offer their services to other dispensation systems or as part of self-disposal systems. In the undertaking reproduced at paragraph 139, ARGEV confirmed that it was not requiring an exclusive obligation for its own benefit.

(232) The remaining question that has to be considered is whether the sorting partner agreement frustrates shared use of the collection partners' containers by competitors of the ARA system.

(233) A possible problematic point is the ownership clause in Article 2.5.2 of the sorting partner agreement, under which collection partners take charge of packaging on behalf of ARGEV and may therefore deal with material collected for ARGEV only in the way provided for in the agreement. Furthermore ARGEV pays a fee in consideration of container costs and reserves the right to require their positioning to be decided in agreement with it. Under these provisions ARGEV could claim to have a certain degree of control over the containers, yet they do not expressly rule out shared use. Also, ARGEV has stated that disposal firms are not prevented from making space in the same container available for another

system provided this does not affect fulfilment of their obligations towards ARGEV (see paragraph 103). Regarding the ownership clause, ARGEV has made it clear that this applies only to the quantities of packaging licensed for ARA and so does not prevent competitors of the ARA system from making unrestricted use of packaging collected through shared use of disposal facilities. The ownership clause should therefore be interpreted as meaning that it does not frustrate the dividing up of the quantities of packaging collected in one container for several systems.

(234) Consequently, it cannot be argued that provisions in the sorting partner agreement prevent disposers from concluding and fulfilling contracts with competitors of the ARA system for shared use of the collection containers. However, the restrictions in undertaking 3 on shared use justify the fear that ARGEV could try to make it difficult for collection partners to open up access to containers for competitors without a specific link to a provision of the sorting partner agreement. This risk will have to be taken into account when deciding whether the tests of exemption are satisfied in respect of the exclusive arrangements for the benefit of collection partners (see below, paragraph 278 et seq.).

3.2. Restriction of competition through the regional partner agreements between ARGEV and sorting partners

(235) Because of the distinction made in the collection and sorting partner agreement since 1 January 2002, collection and sorting partners may in both cases be different firms. In terms of their content, ARGEV's contracts with its sorting partners are similar to those with its collection partners.

(236) Article 5 of the sorting partner agreement provides for the same duration as the collection partner agreement. In addition, only a single sorting partner per collection region is contracted by ARGEV to sort used sales packaging. Undertaking 4, which is reproduced at paragraph 139 and concerns the duration of the contract and re-tendering after no more than five years, also applies to the sorting partner agreement. As regards the legal assessment of the exclusive arrangement for the benefit of sorting partners, reference should be made to the explanation given concerning the collection partner agreement. The end result is that the exclusive arrangement contained in the sorting partner agreement amounts to an appreciable restriction of competition on the relevant market within the meaning of Article 81(1) of the EC Treaty.

3.3. Restriction of competition through agreements between ARO and local authorities

(237) ARO has concluded an agreement with local authorities on the operation of municipal wastepaper systems for paper packaging from households and establishments with similar volumes of waste packaging. Under the agreement, however, the local authorities do not provide their collection services for ARO but operate their own municipal wastepaper collection and disposal system, which also covers non-packaging (e.g. newspapers and magazines). As regards near-household collection of paper and board packaging, ARO confines itself to buying up quantities from the municipal collection. The agreement with the local authorities contains no provisions excluding any other collection and disposal system from sharing the municipal wastepaper collection containers. The local authorities are therefore not prevented from making contracts with competitors of ARO for the collection and disposal of paper packaging.

(238) Given these facts, the Commission has concluded that the agreements concluded by ARO with local authorities do not contain any clauses restricting competition and are therefore not contrary to Article 81(1) of the EC Treaty.

4. *Market for the collection and sorting of commercial packaging*

(239) The ARA system operates on the market for the collection and sorting of commercial packaging especially through the regional partner agreements concluded between the BRGs and collection/sorting partners.

(240) The contracts concluded by ARGEV and ARO with collection/sorting partners for the actual implementation of the requirements for collection and recycling systems laid down in the Packaging Ordinance cover commercial packaging.

4.1. Restriction of competition through regional partner agreements between ARGEV and collection partners

(241) The exclusive provision for the benefit of collection partners also has to be examined in respect of commercial packaging to determine whether it is compatible with Article 81(1) of the EC Treaty.

(242) In view of the undertaking given by ARGEV to seek to obtain all collection services including in the commercial sector from a single disposal firm, other competing suppliers of collection services for commercial packaging are denied supply opportunities and thus competition between collection partners/disposers in the commercial sector is restricted.

(243) Unlike in the household packaging disposal sector, on the market for commercial packaging and other commercial waste ARGEV is not the completely dominant customer for disposal services. For commercial packaging there are other systems that are also in the market for disposal services. Disposal firms can also offer their collection services to major sources of waste.

(244) Although ARGEV is not the completely dominant customer for disposal services in the commercial sector, the competing collection and recycling systems and major sources of waste in the field of commercial packaging bear no comparison with the ARA system in terms of their economic importance (see paragraph 182). It must therefore be assumed that the exclusive arrangements deny disposal firms not insignificant supply opportunities and therefore have an appreciable impact on the common market for disposal services for commercial packaging.

(245) Since the collection partner agreements provide for a standard contract for the collection of both household and commercial packaging, disposal firms will be able to become ARGEV collection partners for commercial packaging only if they are also able to provide the infrastructure for household collection. Smaller, less powerful disposal firms are thus at a disadvantage in terms of the services they can offer to ARGEV. This kind of arrangement in effect reinforces the restriction of competition just described.

(246) Another important factor in assessing the effects of the exclusivity on competition is the duration of the collection partner agreements. Under the undertaking given by ARGEV, the agreements will have to be put out to tender again after, at most, five years. This means that other suppliers of disposal services are denied significant supply opportunities during that period.

(247) This leads to the conclusion that the exclusive arrangements for the lifetime of the contract do amount to an appreciable restriction of competition under the terms of Article 81(1) of the EC Treaty on the market for the collection and sorting of commercial packaging.

4.2. Restriction of competition through the regional partner agreement between ARGEV and the sorting partners

(248) The sorting partner agreement also covers both the household and commercial sectors.

(249) As regards the exclusive arrangements for the benefit of sorting partners, reference should be made to the observations made above in paragraphs 241 et seq. The outcome is that they do constitute an infringement of Article 81(1) of the EC Treaty.

4.3. Restriction of competition through the agreement between ARO and the collection partners

(250) The agreement between ARO and collection partners for paper and board packaging from the commercial sector contains an exclusive provision for the benefit of the collection partners, subject to the limitation of the five-year maximum contract period under the commitment given. This provision denies excluded suppliers of collection services in the commercial sector access to ARO, a major source of demand. For the collection of paper and board packaging there are, admittedly, other systems on the market which use disposal services. But it is also true for this sector that the competing collection and recycling systems are not comparable with the ARA system in terms of their economic importance (see paragraph 182). It must therefore be assumed that the exclusive arrangements deny disposal firms not insignificant supply opportunities. This amounts to an appreciable restriction of competition on the relevant product market within the meaning of Article 81(1) of the EC Treaty.

5. *Markets for recycling and marketing secondary raw materials*

(251) ARA is active on the market for recycling and marketing secondary raw materials in so far as the BRGs organise the recycling of the material in the packaging collected under the system. ARGEV is responsible for light and metal packaging from households and similar establishments and for plastic, bonded metal, wood, textile and ceramic packaging from commercial sources, while ARO is responsible for packaging made of paper, cardboard, board, and corrugated board from the household and commercial sectors.

(252) The question to be considered is how far the control of the packaging flow embodied in the contracts between ARGEV/ARO and the collection partner has an impact on the recycling and marketing market and whether it is compatible with Article 81(1) of the EC Treaty.

5.1. Agreements between ARGEV/ARO and collection partners

(253) Pursuant to ARGEV's and ARO's agreements with the collection partners, the latter may only dispose of packaging in the manner laid down in the agreement, thus restricting their freedom of choice as regards sorting facilities, transhipment stations and recycling firms (Article 2.5.2 read in conjunction with Article 2.2.5 in ARGEV's agreements and Article 2.8 in ARO's).

(254) Pursuant to the agreement concluded by ARO with local authorities, which mainly relates to the collection of packaging from the household sector, the local authorities are not allowed to dispose of paper packaging in any other manner than that specified by ARO (Article 3.7).

(255) The fact that the flow of packaging is controlled under the contracts between ARGEV or ARO and the collection partners does not restrict the latter's scope for disposal or recycling, since they never acquire ownership of the packaging. ARGEV and ARO have the right to dispose freely of the packaging which they own.

(256) Given the position of the BRGs on the relevant markets for recycling and marketing secondary raw materials, and bearing in mind the structure of those markets, the agreements cannot be said to foreclose the market.

(257) The market share of Ferropack Recycling GmbH for ferrous metal packaging (tinplate and steel) is under 10 %, while ALUREC's market share for aluminium packaging is only 1,7 %. The amount of paper, cardboard, board and corrugated board packaging recycled by ARO each year amounts to 22 % of the total volume for Austria. In view of these low market shares, the arrangements cannot be said to foreclose the market in these categories of material.

(258) Only in the plastics category does the competent BRG, ÖKK, have a 40 % share of the annual recycling market. However, it has to be borne in mind that until the Packaging Ordinance was enacted and the ARA system set up, this type of waste, unlike others such as glass or paper, used to come under the ordinary domestic waste collection and was not collected and recycled separately. The Packaging Ordinance created a new field of enterprise for the collection and recycling of plastic packaging, motivated by environmental concerns. However, most of the plastic packaging collected under the ARA system does not fetch much on the market, and so ÖKK has to pay extra in order to recycle this material in accordance with the Ordinance. In view of the structure of the recycling market in respect of plastic waste, ÖKK's market share cannot be said to constitute a restriction of competition.

(259) Account also has to be taken of the fact that the disposal industry, in so far as it is part of the ARGEV association committee, has no voting rights and is excluded from meetings when legal business is discussed between the recycling BRGs and association members. Consequently the industry cannot exert any influence for its own benefit.

(260) In view of the above, the Commission has concluded that the relevant provisions of the agreement between ARGEV or ARO and the collection partners do not constitute an appreciable restriction of competition within the meaning of Article 81(1) of the EC Treaty on the relevant product market for recycling and marketing secondary raw materials.

5.2. Agreements between ARGEV and BRGs

(261) The contracts between ARGEV and ÖKK/ALUREC also contain an exclusive clause for the latter's benefit, under which ARGEV undertakes not to pass on collected packaging to any third undertaking for the lifetime of the contract. As a result, no other firm can operate in the field of organising recycling for ARGEV. However, this does not rule out performing actual recycling services for the ARA system. The contracts between recycling BRGs and recycling undertakings which actually perform the recycling itself are awarded annually by competitive tender. Furthermore, the small market shares of the recycling BRGs in the overall market for recycling and marketing secondary raw materials tend to suggest that the exclusive clauses do not have the effect of foreclosing the market.

(262) The exclusive clause in the ARGEV's contracts with ÖKK and ALUREC for the benefit of the recycling BRGs does not, therefore, pose an appreciable restriction of competition on the market for the recycling and marketing of secondary raw materials within the meaning of Article 81(1) of the EC Treaty.

Effects on trade between Member States

(263) Since the exclusive obligations in ARGEV's and ARO's collection and sorting partner agreements have a restrictive effect on competition, the question arises whether it is also liable to have an appreciable effect on trade between the Member States.

(264) ARGEV and ARO have concluded exclusive collection partner agreements for 64 contractual areas, thereby establishing a disposal network for the collection of used packaging that covers the whole of Austria. Throughout the lifetime of the contract this makes market access much more difficult for other collection service providers, especially those from other Member States of the European Economic Area. The exclusive arrangement has a very negative impact on the scope for foreign disposal firms to establish themselves in the relevant markets for the collection and sorting of household packaging and commercial waste. Consequently the exclusive arrangement in the collection partner agreement is liable to have an appreciable effect on trade between the Member States.

(265) For the same reasons, the exclusive arrangement contained in the sorting partner agreement is liable to have an appreciable effect on trade between Member States.

Conclusion

(266) Examination of the exclusive arrangement in the collection and sorting partner agreement for the benefit of the undertakings providing collection and sorting services shows that it makes it considerably more difficult for domestic and foreign disposal firms to enter the relevant market and therefore contributes significantly to foreclosure of a substantial part of the common market. The exclusive arrangement contained in the collection and sorting partner agreement is therefore caught by Article 81(1) of the EC Treaty.

X. APPLICATION OF ARTICLE 81(3) OF THE EC TREATY AND ARTICLE 53(3) OF THE EEA AGREEMENT

(267) Since the exclusive arrangement under the collection and sorting partner agreement for the benefit of collection and sorting partners is caught by Article 81(1) of the EC Treaty, it has to be examined whether the provision satisfies the conditions for the application of Article 81(3). In what follows, the potential positive effects arising from the exclusive arrangement of the collection partner agreement, which is prohibited under Article 81(1), will be balanced against the arrangement's restrictive effect on competition.

1. Market for the collection and sorting of used household packaging

1.1. *Regional partner agreement between ARGEV and the collection partners*

Improving production or distribution and promoting technical or economic progress

(268) ARA currently operates the only countrywide collection and recycling system for household packaging in Austria and its business aim is to implement national and Community environmental policy in terms of preventing, reusing and recycling packaging waste. The collection partner agreement is therefore designed to fulfil the requirements of the Austrian Packaging Ordinance and to apply Community Directive 94/62/EC. The purpose of these pieces of legislation is to prevent and mitigate the impact of packaging waste on the environment and thereby to secure a high level of environmental protection.

(269) The collection partner agreements concluded between ARGEV and the collection partners is intended to implement these environmental requirements regarding the collection of used light packaging in operational terms. It is essential in order for ARA and ARGEV to be able to fulfil the obligations they have entered into in connection with their system activities. To this end the collection partner agreement requires the establishment of collection infrastructure that entails a considerable investment (see paragraph 160 et seq.). The regular collection of used sales packaging from final users, broken down by type of reusable material, is therefore a direct means of implementing environmental requirements.

(270) The exclusive arrangement examined allows the contracting parties to undertake the long-term planning and organisation of their services. Since the positive network effects in the area of collecting used light household packaging, as described in paragraph 160, allow considerable economies of scale and scope to be achieved, contracting a single disposal firm for each area for the term of the contract leads to efficiency gains. At the same time ARA/ARGEV, as the service customer, obtains the assurance that its needs will be met regularly and reliably in what is a sensitive sector formerly run by the public authorities.

(271) In view of the above, the Commission has concluded that the exclusive arrangement in favour of collection partners in the service agreements contributes to improving production and promoting technical and economic progress.

Benefits for consumers

(272) The purpose of the collection partner agreement is the practical implementation of a countrywide system for collecting the various types of sales packaging materials from final consumers that come under the ARA system. This is in line with final consumers' past disposal habits and can therefore be described as very consumer-friendly. Secondly, because of the economies of scale and scope described in paragraph 160, the participation of manufacturers and distributors who are subject to the take-back and recycling obligation in a countrywide system dispensing them of that obligation is likely, when viewed realistically, to result in cost savings compared to the option of fulfilling their obligation individually. It can therefore be assumed that, where there is competition on the markets for packaged products, the cost savings attained over the term of the contract will be properly passed on to the consumer.

(273) The Commission has therefore concluded that the collection partner agreement benefits consumers and that they enjoy a fair share of the gains.

Indispensability of the restriction

(274) As its basis for examining the exclusive arrangement contained in the collection partner agreement the Commission took the revised duration of the contracts, as given in undertaking 4 cited at paragraph (139), including re-tendering after five years at most, and concludes that this duration is indispensable.

(275) Assessing whether the exclusive arrangement is indispensable or not depends on the economic and legal circumstances in which the agreement under consideration was made. From ARA's point of view there are management and efficiency considerations, but the prime argument in favour of contracting with only a single partner per disposal region for the entire contract period is to ensure lasting and reliable collection services, which are indispensable for the success of the system as a whole.

(276) Crucial to deciding whether the agreed exclusivity is indispensable is the need for planning and investment certainty for the investment required in order to fulfil the collection partner agreement. To maintain the system, ARA's collection partners have to make substantial investment in setting up and maintaining the collection infrastructure for used packaging. In particular, mention should be made of suitable collection vehicles and containers.

(277) Taking account of the special circumstances involved in implementing the requirements of the Packaging Ordinance and, in that connection, establishing a countrywide take-back and dispensation system, the Commission has reached the conclusion that an exclusive arrangement of at least three years is indispensable on economic grounds. On the other hand, this is no longer the case after a five-year contract period, and for this reason putting the contracts out to tender again after that period, as agreed in the undertaking given, is justified and constitutes a necessary condition of exemption under Article 81(3) of the EC Treaty.

Non-elimination of competition

(278) Even if the market position of the ARA system on the markets concerned is taken into account, the exclusive arrangement in the collection partner agreement is not such as to eliminate competition on the market for the collection and sorting of household packaging.

(279) In assessing whether competition is likely to be eliminated, the specific supply situation on the market in question has to be considered. As described in paragraph 160, the market for the collection and sorting of light packaging accumulated by final consumers is characterised by substantial economic network effects, i.e. economies of scale and scope. From an economic point of view, it is therefore reasonable, within one and the same dispensation system at any rate, for a contract to be concluded with only one disposal firm per area.

(280) While competition between collection service providers within a given disposal area may be unlikely for the reasons described above, there is every chance that the new arrangements under the undertaking given, whereby ARGEV will put its service contracts out to tender again through an open, transparent and objective procedure at the latest once contracts have run for five years, will at least lead to 'competition for disposal areas' in the course of such a tendering procedure. This makes allowance for the special supply situation prevailing in the market for the collection and sorting of household waste.

(281) With regard to demand-side competition on the market for the collection and sorting of household packaging, it has to be borne in mind that it would be almost impossible in practice and in economic terms to duplicate the collection infrastructure in the household sector across the whole of Austria.

(282) First, setting up a further collection system would be uneconomic. The cost of establishing one or even several parallel collection systems would be unacceptably disproportionate in economic terms to the relatively small quantities of reusable waste material obtained from final consumers when entering the market, so that the necessary incentives for competitors to enter the market would be lacking. From a national economic perspective, duplicating systems would simply mean higher costs, while the volume of recyclable waste would not increase significantly if competitors to the ARA system were to enter the market. Firstly, that volume is dependent on consumption by final consumers and, secondly, it is probable that competitors would capture at least some of the ARA system's current customers.

(283) Moreover, setting up another parallel collection system would be truly impossible because of local conditions and final consumers' traditional disposal patterns. In private households there is often no room for additional collection containers for light packaging. Similarly, introducing collection sacks would not bring about any fundamental change, as full sacks take up almost as much space as solid receptacles. The same would apply if an alternative bring-it-yourself system were introduced at the public sites for glass and paper collection containers. This spatial constraint would become especially marked if a third or fourth competitor were to enter the market: whether on private or public sites, there is not enough space for containers belonging to three or four dispensation systems for collecting identical types of material.

(284) Duplication of disposal systems would also give rise to serious problems in terms of acceptance. It would be difficult for final consumers to understand — and contrary to their current habits — if they were expected to collect packaging of the same types of material in different containers. It would also be unclear what criteria final consumers should apply in order to decide what system they should use to dispose of their various types of packaging.

(285) In its comments of 15 January 2003 ([13]), Austria points out that setting up additional containers in the proximity of final consumers had to be ruled out in practice because of lack of space, to protect localities and the countryside, and because of the greater volume of traffic involved (separate trips to empty the containers) and the greater environmental burden. In addition, with collection more complicated and the increased demands placed on consumers to separate their waste, proper separation would be jeopardised. The increased burden on the environment and the heavier demands in terms of separation are considerations that also apply to separate sack collections.

(286) There are, then, substantial practical, legal and economic reservations that militate against setting up either another parallel collection system or an alternative bring-it-yourself system. Because of the special supply situation on the relevant market the containers put in place close to households for used sales packaging often create a competitive bottleneck. Viewed realistically, the likelihood is that dispensation systems entering the market would often collaborate with disposal firms already providing collection services for ARGEV. Free and unhindered access to the collection infrastructure set up is therefore a crucial precondition both for greater competition in terms of demand for collection services and for greater competition on the vertical upstream market for organising the take-back and recycling of used sales packaging from private final consumers.

(287) Competition in terms of demand for collection services for used sales packaging can develop only if ARGEV does not forbid its collection partners from concluding contracts with competitors of the ARA system for shared use of containers. Consequently ARGEV may not prevent its partners from allowing shared use, whether on the basis of specific provisions in the collection partner agreement (see paragraph 230 above) or on any other grounds.

Obligations

(288) Although ARGEV has stated that disposers are not prevented from making space available in the same containers for competing systems, it wishes to impose considerable restrictions in respect of shared use (see undertaking 3, paragraph 139). In view of the key importance of unhindered access to the disposal infrastructure for the development of competition on this market characterised by a special supply situation, it is therefore necessary to impose certain obligations in connection with the present decision. The aim is to ensure that the competitive effects do indeed come about and that competition in terms of demand on this market is made possible, so satisfying the tests of exemption in Article 81(3) of the EC Treaty.

([13]) See Annex, pp. 4 and 5.

(289) ARGEV is instructed not to prevent disposal firms from concluding and fulfilling contracts with competitors of ARA and ARGEV for the shared use of containers or other facilities for the collection and sorting of used sales packaging (obligation (a)).

(290) In addition, ARGEV may only require disposal firms to provide evidence of packaging quantities corresponding to the ARA system's share of the total quantities of packaging licensed by systems in the household sector for given types of material (obligation (b)). ARGEV may not require disposal firms to provide evidence of quantities of packaging that are not collected for the ARA system. This obligation is necessary to ensure that ARGEV does not bind the entire volume of collected packaging to itself and so make it impossible for competitors to meet their quotas, and to ensure that competitors of the ARA system have unrestricted access to the sales packaging collected for them.

(291) In this case ARGEV may reduce the fee provided for in Article 3.1.1 of the collection partner agreement by the proportion indicated in obligation (b). The fees pursuant to Articles 3.1.2 and 3.1.3 of the same agreement are determined by the quantities in respect of which evidence is supplied to ARGEV. This is intended to prevent collection partners from charging ARGEV for services that can be shown to have been performed for third parties. For that reason ARGEV can make a suitable reduction in the fee in respect of its collection partners.

(292) Obligation (b) relates not only to disposal firms that allow shared use but to all disposal firms with which ARGEV has concluded a collection partner agreement. This applies to the extent that a competing system in the particular collection area wishes to obtain shared use under obligation (a) at all and once the system licence has been granted. As a result, disposers are given an incentive to conclude a contract with a competing system, and there is a guarantee that the competing system can then access the packaging quantities, if this is necessary for fulfilling its quota.

(293) These obligations are essential in order to prevent the elimination of competition on the relevant markets; they constitute a clarification of the contractual relationship between ARGEV and its collection and sorting partners that serves to ensure legal certainty. The obligations do not restrict ARGEV's other contracting possibilities vis-à-vis its collection and sorting partners. In particular, they do not obstruct ARGEV's right to determine the categories of materials that are to be collected for it.

(294) ARGEV takes the view that there is no legal basis for these obligations, that they cannot be implemented and are disproportionate, and that they affect the legal position of third parties.

No legal basis

(295) ARGEV again emphasises that there is no exclusive right to the packaging collected in the containers available. Since ARGEV's collection and sorting partner agreements do not therefore restrict competition, the obligation is not valid.

(296) The restriction of competition derives from the exclusive arrangements for the benefit of the collection and sorting partners (paragraphs (229) and (236)). For it to be possible to exempt this restriction, competition must not be eliminated from the market for the collection and sorting of household packaging. Demand-side competition on this atypical market is possible only if ARGEV does not prevent the collection and sorting partners from concluding contracts with competitors of the ARA system for the shared use of containers (paragraphs (281) and (287)). ARGEV, however, does place considerable restrictions on shared use and could obstruct it by so doing (paragraphs (288) and (304) et seq.). The obligation is therefore necessary, if the conditions for exemption are to be restored; the legal basis for the obligation is to be found in Article 8(3)(b) of Regulation No 17.

Impracticability and unreasonableness

(297) ARGEV contends that the obligations are impracticable, since neither it nor the disposers know what the ARA system's share is of the total volume of systems-licensed packaging in the household sector for particular categories of material.

(298) Competing systems will communicate to disposers the licensed quantities for which they are trying to obtain shared use. The disposer will pass that figure in anonymous forms) on to ARGEV. On the basis of this information, ARGEV will be able to calculate its licensing share.

(299) ARGEV also considers the obligations to be unreasonable, since they would inevitably mean it could no longer comply with its authorisation to operate a collection and recycling system. If a competing system licensed additional quantities of waste, ARGEV would not achieve its collection quotas, since the available infrastructure could not automatically absorb more packaging waste. If a new system installed its own collection facilities either wholly or in part, ARGEV would have to accept that the quantities it collected would diminish, although the competing system would have no need at all of the packaging arising in the facilities make available by ARGEV.

(300) Even if the containers were shared, ARGEV would still be able to fulfil its obligations towards the public authorities. The Packaging Ordinance contains no indication that containers should be made available to one system only. Austria has also stated, in its comments of 15 January this year, that the shared use of containers for household collection was basically permissible under the conditions of the licensing system set out in AWG 2002. It will also be noted that the significance attached in the interpretation of the Packaging Ordinance to shared use as a means of stimulating competition on the basis of the Community competition rules should also be taken into account ([14]).

(301) If a competing system licenses additional quantities, this would be reflected in the instructions to such systems regarding the volumes collected. Where appropriate, container capacity would be adjusted in order to receive a larger collection volume. If a competing system does not seek shared use but builds its own collection facilities, the obligations do not apply.

(302) ARGEV also submits that the obligations are grossly prejudicial, since it would receive no compensation for its current optimisation of the collection system, although these services would also proportionately benefit the competitor. Further, it is assumed that the packaging material behaviour of competing systems in the household sector would match that of the ARA system; there is no empirical basis for this, and it is not borne out by previous experience.

([14]) See Commission Decision 2001/463/EC of 20 April 2001 in Case COMP/34493 — DSD, OJ L 319, 4.12.2001, p. 1, paragraph 171.

(303) ARGEV's legitimate interest in ensuring that it is not charged for any services demonstrably supplied by the collection partners to third parties is recognised, because obligation (b) allows ARA to reduce the fee paid to its collection partners by an appropriate amount.

(304) It is not necessary that disposers reimburse ARGEV for any other costs directly attributable to collection, as provided for in undertaking 3(a) (paragraph (139)). The said other costs are system costs, which ARGEV incurs by maintaining its system. As contractual partners of ARGEV, collectors perform certain services and receive remuneration for them. ARGEV's other system costs are not relevant to them and are not covered by the partner agreement. Moreover, where shared use is permitted for disposers, partial passing on would result in a non-calculable financial risk. Competitors do not derive an unjustifiable advantage from this, since they will also incur costs from setting up their own system. Furthermore, it should be possible for competitors to conclude agreements with local authorities direct and in an independent manner on, say, the payment of waste advisers.

(305) Nor is it appropriate for disposers to reimburse ARGEV for costs which the companies in the ARA system or their contractual partners incur as a result of shared use (see undertaking 3(b), paragraph (139)). Such costs are not the reponsibility of the disposers. If disposers were to assume them, they would incur a non-calculable financial risk.

(306) Furthermore, the Commission assumes that shared use does not give rise to any additional analysing and sorting costs. Austria stated, in its comments of 15 January this year, that the quotas should be substantiated by reporting the collection and recycling of those packaging wastes that were covered by the system. In particular, the extent to which the packaging can be technically recycled will be determined by the contents, the size of the labels used and the volumetric proportion of plastic packaging materials. It was therefore necessary to analyse the quantities collected in the individual containers as accurately as possible and subsequently to separate them. This leads to considerably higher costs, estimated at up to 25 % of total costs.

(307) The Packaging Ordinance contains no provision, however, that links quota recording to the collection and recycling exclusively of the packaging belonging to a particular system. Pursuant to Section 11 of the Packaging Ordinance, a collection and recycling system for transport or sales packaging must ensure the collection and recycling of those packaging materials for which contracts have been signed with the packaging manufacturers. Packaging materials are defined in Section 2(6) of the Packaging Ordinance as certain categories of materials from which the packaging is made, e.g. paper and board, glass or plastics.

(308) Further, compulsory shared use would not be practicable where quotas are recorded on the basis only of packaging actually belonging to the system. The principle cannot be made the subject of an obligation therefore. Instead, it should be assumed that the quantities collected per category of materials are divided between the systems in proportion to the quantities licensed per category of materials ([15]). Additional analysing and sorting stages are then not needed. This impact of the obligation should also be taken into account by Austria, since shared use is crucial for stimulating competition as far as interpreting the Packaging Ordinance and issuing licences are concerned.

(309) The mechanism of the obligation, which is dictated by competition law, does not place ARGEV at an unjustifiable disadvantage. There is nothing to indicate that, in the event of shared use, there could be a qualitative change generally in the categories collected. It should be expected, rather, that systems which want to establish themselves in the household sector as major competitors and hence seek to achieve shared use will try to offer contracts across the entire packaging range. The bonus system mentioned by ARGEV as an example focuses on commercial packaging and, in the household sector, operates only on the periphery of the market at quite specific sources (see paragraph (179)). Moreover, when granting licences in accordance with the current tariffs, the ARA system too distinguishes only by category of material and size of packaging, not by content or industry.

Encroachment on the rights of third parties

(310) Lastly, ARGEV claims that the obligations restrict disposal partners' rights, since their volume-dependent remuneration might be reduced if they find no other interested partners, and since they would then have to accept a proportionate reduction in the remuneration for providing containers. While this would basically be legitimate, disposers should at least have an opportunity to give their opinion.

(311) Obligation (b) relates to all disposers, so that — assuming shared use is indeed the objective — disposers have an incentive to contract with competing systems. Where a disposer decides to allow shared use, the obligations will not affect it more than the conditions provided for in undertaking 3 (see undertaking 3(a) and (b), paragraph (139)).

(312) Disposal partners were given an opportunity to express their opinion before the decision was adopted. The Association of Austrian Disposal Companies (Verband Österreichischer Entsorgungsbetriebe — VÖEB) commented on behalf of the majority of collection and sorting partners that it was in favour of shared use. It considers, however, that obligation (b) imposes administrative costs on disposers and could lead to a reduction in the remuneration of those disposers which have not concluded contracts with alternative system operators.

(313) As explained in paragraph (298), the competing system will communicate to the disposer the licensed quantity, which the disposer then passes on to ARGEV. This does not involve excessive expense for the disposer. It would also be conceivable, however, for both ARGEV and disposers to notify licensed quantities to an independent agency, which determines the licensed shares. Remuneration will be reduced only if the competing system seeks to obtain shared use in the particular collection region and only once it has been granted a licence (see paragraph (301)).

(314) The VÖEB also points out that the collection and sorting infrastructure is provided in part by the municipalities. It considers that the competing system should share the use of all the infrastructure facilities necessary for collection and sorting, irrespective of who provides them. Dividing into quantities can take place only after sorting.

([15]) Further subdivision by specific types of packaging within each category of materials would be conceivable if they were treated separately at the licensing, collection and/or sorting stages.

(315) The obligations concern the relation between ARGEV and collection and sorting partners. A competing system has to create the conditions for shared use within its area of responsibility. Dividing into quantities after sorting seems particularly appropriate, if a category of material is further subdivided by types of packaging and these are separated only after sorting (see paragraph (308)).

1.2. *Agreement between ARGEV and the sorting partners*

Conditions of exemption

(316) The exclusive arrangements in the sorting partner agreement likewise satisfy, for the reasons given, the tests of exemption, taking into account the obligation attached to exemption. Sorting partners must make a considerable investment in order to build/expand sorting infrastructure for light packaging. The separation of light packaging by reusable materials is technically demanding. The necessary investment for construction and expansion can be used for other sorting processes to a limited extent only.

Obligation

(317) Although ARGEV has stated that disposers are not prevented from making sorting facilities available to competing systems, it would like to make shared use conditional on substantial restrictions (see undertaking 3, paragraph (139)). The Commission therefore considers it necessary, since unimpeded access to sorting facilities is important for stimulating competition, to attach the following obligation to this Decision: ARGEV should not prevent disposers from concluding and fulfilling contracts with competitors of the ARA system for the shared use of facilities for the sorting of used sales packaging. Reference is made to the explanations concerning ARGEV's collection partner agreements. Here too, the obligation is meant to ensure that the effects on competition actually occur, demand-side competition actually becomes possible on this market and, hence, the tests of exemption in Article 81(3) of the EC Treaty are satisfied.

(318) The ARA system's competitors rely on shared use of sorting facilities for fulfilling their sorting and recycling obligations, in particular when they take up their activity. The construction of new sorting facilities would require large investment, which would constitute a not inconsiderable entry barrier for them. The introduction of competition on the market for disposal services would at least be considerably delayed. Further, because they can offer their services to competitors of the ARA system, ARA sorting partners are able to benefit from the scale and scope effects on the market for sorting sales packaging arising at private final consumers.

2. **Market for the collection and sorting of commercial packaging**

2.1. *Collection partner agreement between ARGEV and the collection partners*

(319) Since, in the commercial packaging field as well, the exclusive provision for the benefit of collection partners in the collection partner agreement is also caught by Article 81(1) of the EC Treaty, it has to be examined whether the provision satisfies the tests for the application of Article 81(3).

Improving the production or distribution of goods or promoting technical or economic progress

(320) In the commercial sector too, ARA provides a country-wide collection and recycling system for packaging in Austria, which is governed by the Packaging Ordinance and the Austrian Waste Management Act; these transpose Directive 94/62/EC. The Directive applies to household packaging and commercial packaging. The regular collection of used packaging in the commercial sector broken down by specific categories of reusable material therefore promotes the direct application of environmental provisions.

(321) As in the household sector, the exclusive arrangements examined enable the contract partners to plan and organise for the long term the services they supply. Expanding the logistics for the collection of commercial packaging and waste requires a not inconsiderable investment. A certain period for amortisation is necessary in order to stimulate such investment. Even if in the commercial packaging sector the network effects are less than in household packaging, economies of scale and scope that lead to efficiency gains can be achieved by commissioning a single disposer for the duration of the contract. With regard to the obligations assumed by the packaging manufacturers pursuant to the Packaging Ordinance, it is important for the ARA system as a services customer to ensure some planning certainty so that demand can be satisfied on a regular, reliable basis. Planning certainty thus ensures that all parties involved will reliably meet their obligations under the Packaging Ordinance.

(322) The Commission therefore concludes that the exclusive arrangements for the benefit of the collection partners in the service contracts help to improve the production of goods and promote technical or economic progress.

Advantages for the consumer

(323) The collection partner agreement seeks to give practical effect to the countrywide collection, differentiated by reusable material, of ARA-system sales packaging, including that from the large-business and industrial sector.

(324) For the purposes of Article 81(3) of the EC Treaty, consumers are not just final consumers of the services provided but all direct or indirect customers for the products or services in question, including firms in the large-business and industrial sector. The collection partner agreement benefits these, since it ensures regular disposal in compliance with the Ordinance of the packaging accumulating at them.

(325) The Commission therefore concludes that the collection partner agreement allows consumers a fair share of the resulting benefit within the meaning of Article 81(3) of the EC Treaty.

Indispensability of the restriction

(326) As its basis for examining the exclusive arrangements contained in the collection partner agreement the Commission took, for the commercial sector as well, the revised duration of the contract, as given in undertaking 4 cited at paragraph (139), including re-tendering after five years at most, and concludes that this duration is indispensable.

(327) The assessment of whether the exclusive obligation is indispensable depends on the economic and legal circumstances in which the agreement was concluded. Crucial to the assessment is planning and investment certainty for the investment needed to fulfil the collection partner agreement. In the commercial sector, regional take-back centres and a collection system have to be set up, and the logistics of collection-rounds have to be agreed. The collection partner is therefore dependent on being able to plan its investment and operations for a definite period. Likewise, from ARA's point of view, in order to provide a sustainable, reliable collection service for commercial packaging, it is indispensable for the success of the system as a whole to commission only one collection partner per disposal area for the ARA system during the lifetime of the contract. In the commercial sector, while the necessary investment for building and expanding the infrastructure is not so large as in the household sector, the restraint of competition resulting from the exclusive obligation is less, because ARGEV's buyer power is limited. Where a contract's term is a minimum of three years and a maximum of five, an exclusive obligation is indispensable in the commercial sector as well. After five years, however, this is no longer the case, which is why a new invitation to tender within the meaning of the undertaking is justified and is also essential for an exemption under Article 81(3) of the EC Treaty.

Non-elimination of competition

(328) Even in the context of ARGEV's position on the markets in question, the exclusive obligation in the collection partner agreement is not likely to eliminate competition on the market for the collection and sorting of household packaging.

(329) The suppliers of collection services excluded by ARGEV can offer their disposal activities both to other collection and recycling systems in the commercial sector and to self-disposal systems and large sources.

(330) In the commercial sector too, care should be taken to see that disposers are allowed to collect licensed packaging in their containers from competitors of the ARA system and that, in contrast to the household sector, joint collection is already taking place.

(331) It remains to examine what the effects on competition are of linking the collection service for commercial packaging to the collection of packaging in the household sector. In such circumstances a firm may become a collection partner of ARGEV's in the commercial sector, only if it is able to make the necessary investment in setting up a collection infrastructure for the household sector. However, even the requirement to provide an infrastructure for the household sector in order to become an ARGEV collection partner in the commercial sector does not lead to elimination of competition on the market for commercial packaging and other commercial waste. Disposal companies that are not able to set up a suitable infrastructure for household collection can, as already explained, offer their collection services to other collection and recycling systems, for whom it is not necessary to set up a collection infrastructure for the household sector, and to self-disposers and large sources.

(332) It should also be noted that the ARA system has put out separate tenders for the disposal of different categories of material, so that bidders can offer their services for specific categories in a limited fashion. In the commercial sector this applies in particular to light packaging and paper and board packaging.

(333) The residual competition will thus not be eliminated by the exclusive obligation from the common market for the collection of commercial packaging and other commercial waste.

(334) The tests of exemption pursuant to Article 81(3) of the EC Treaty are consequently satisfied where the term of the contract is between three and five years.

2.2. *Sorting partner agreement between ARGEV and the sorting partners*

(335) For the reasons described, in view of the competitive conditions on the market for sorting commercial waste, the exclusive obligation in the sorting partner agreement also satisfies the tests of exemption.

2.3. *Agreement between ARO and the collection partners*

(336) The exclusive obligation in the agreement between ARO and the collection partners ensures a degree of planning and investment certainty for the disposal companies involved and, hence, that all parties involved regularly and reliably fulfil their obligations under the Packaging Ordinance. A contractual term of three to five years is to be regarded as necessary, given the significance of the restriction of competition resulting from the exclusive obligation. For the reasons given (paragraphs (329) to (332)), competition is not excluded on the market concerned. Thus the tests of exemption under Article 81(3) are satisfied where the term of the contract is, at most, five years.

XI. **RETROACTIVE EFFECT, DURATION OF THE EXEMPTION, OBLIGATIONS**

(337) The collection and sorting partner agreements of ARGEV and ARO were notified to the EFTA Surveillance Authority on 30 June 1994 and transferred to the Commission in accordance with Article 172(3) of the Act of Accession. The amended versions of the collection and sorting partner agreements were notified to the Commission on 28 August 2001. The Commission finds that since the date of their notification the collection and sorting partner agreements satisfy the tests for the application of Article 81(3) of the EC Treaty.

(338) Under Article 8(1) of Regulation No 17, exemptions must be issued for a specified period and conditions and obligations may be attached thereto. Pursuant to Article 6 of the Regulation, the date from which such a decision takes effect may not be earlier than the date of notification in accordance with Article 81(1) and (3) of the EC Treaty. The exemption should apply from the entry into force of ARGEV's and ARO's current collection partner agreements until 31 December 2006, in order to give ARA, ARGEV, ARO and the disposers sufficient legal certainty under the Community's competition rules to protect their investment.

(339) To ensure access by third parties to the disposal facilities of ARGEV's and ARO's collection and sorting partners and to prevent the elimination of competition on the relevant markets, the obligations mentioned should be communicated to ARGEV. The obligations are essential for preventing the elimination of competition on the relevant markets. They will remain in force for the duration of the exemption. Pursuant to Article 8(3)(b) of Regulation No 17, the Commission may revoke this Decision if the parties do not fulfil the obligations.

(340) This Decision is without prejudice to the application of Article 82 of the EC Treaty.

(341) This Decision is issued, furthermore, irrespective of any pending or future Commission proceedings against the Packaging Ordinance or other State provisions,

HAS ADOPTED THIS DECISION:

Article 1

In the light of its current knowledge, and taking account of the undertakings given by Altstoffrecycling Austria AG (ARA), ARGEV Verpackungsverwertungs-Gesellschaft mbH (ARGEV) and Altpapier-Recycling Organisationsgesellschaft mbH (ARO), the Commission finds that it has no reason pursuant to Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement to proceed against the dispensation and licence agreements between ARA and the firms covered by the Austrian Packaging Ordinance, the waste disposal contract between ARA and the BRGs, the disposal or cooperation contract between ARGEV and the BRGs, or against the contract between ARO and the local authorities.

Article 2

The provisions of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement are declared to be inapplicable, pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, to individual collection and sorting contracts of ARGEV and ARO with their respective regional disposal partners which contain an exclusive obligation and expire at the latest on 31 December 2006.

The exemption shall run from 30 June 1994 to 31 December 2006.

Article 3

The exemption in Article 2 is conditional on the following obligations:

(a) ARGEV does not prevent disposers from concluding and fulfilling contracts with competitors of the ARA system for the shared use of containers or other facilities for the collection and sorting of used sales packaging arising at households;

(b) ARGEV may ask disposers for evidence only of those packaging quantities that correspond to the ARA system's share of the total packaging quantities licensed by systems in the household sector for specific categories of material. In that case it may reduce the remuneration in accordance with point 3.1.1 of the collection partner agreement in the proportion mentioned in the first sentence of this point. As regards the remuneration referred to in points 3.1.2 and 3.1.3 of the collection partner agreement, the quantities reported to ARGEV shall be authoritative. This obligation relates to all disposers with whom ARGEV has concluded a collection partner agreement.

Article 4

This Decision is addressed to the following firms:

Altstoffrecycling Austria AG
Mariahilfer Straße 123
A-1062 Vienna

ARGEV Verpackungsverwertungs-GmbH
Lindengasse 43/12
A-1071 Vienna

Altpapier-Recycling Organisationsgesellschaft mbH
Gumpendorfer Straße 6
A-1061 Vienna

Done at Brussels, 16 October 2003.

For the Commission

Mario MONTI

Member of the Commission