



CASE AT.39759 – ARA Foreclosure

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 20/09/2016

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COMMISSION DECISION

of 20.9.2016

relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement

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(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, and in particular Article 7 and Article 23(2) thereof,

Having regard to Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty²,

Having regard to the Commission decision of 12 July 2011 to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known their views on the objections raised on 17 July 2013 by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Regulation (EC) No 773/2004,

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

Having regard to the final report of the Hearing Officer in this case³,

Whereas:

1. INTRODUCTION

(1) This Decision concerns an abuse of a dominant position by the Austrian company Altstoff Recycling Austria Aktiengesellschaft ("ARA"), which constitutes an

¹ OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("the Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the Treaty will be used throughout this Decision.

² OJ L 123, 27.2.2004, p. 18.

³ Final report of the Hearing Officer of 5 August 2016.

infringement of Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the Agreement on the European Economic Area (the EEA Agreement). The infringement consists of a refusal to give access to an indispensable infrastructure covering the territory of Austria. It lasted from 1 March 2008 until at least 2 April 2012.

- (2) In Austria, producers of goods have a legal obligation to collect and recycle the packaging waste emanating from their customers' use of their products. This obligation is also referred to as "producer responsibility". ARA is an exemption system that collects and recycles the packaging used for goods on behalf of the producers of those goods at the places where the packaging occurs as waste ("end-use sites"). It thereby exempts the producers of their legal obligation to collect and recycle such packaging waste themselves.
- (3) The relevant services are exemption services for packaging waste. Producers pay a licensing fee for those services. In exchange for payment of the licence fee, ARA ensures the collection, recovery and recycling of packaging on the basis of the Austrian Packaging Ordinance (Verpackungsverordnung - "VerpackVO") and ARA's authorisation by the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management⁴ ("the Ministry"). By entering into the licence agreement, producers fulfil their obligations in this respect under Austrian law.
- (4) Packaging may occur as waste in households ("household packaging waste") or at commercial end-use sites ("commercial packaging waste"). The service concerned by the infringement is the exemption of lightweight⁵ and metal packaging which occurs as waste in households ("exemption of household packaging waste").
- (5) ARA does not itself collect, sort and recycle the packaging that it has licensed. Those activities are contracted out to a variety of organisations, principally to collection service providers ("collectors"), sorters, recyclers and municipalities. In this respect, a distinction needs to be made between different materials. With regard to **paper**, the collection is entirely organised by the municipalities. ARA basically purchases a portion of the collected material from the municipalities, which reflects the share of paper packaging in the communal paper collection infrastructure⁶. **Glass** packaging was collected, in the period of infringement, not by ARA but by Austria Glas Recycling GmbH ("AGR"). ARA basically acted as a reseller of AGR's services to producers, without direct contact with collectors, sorters, and municipalities. With regard to lightweight and metal packaging waste, ARA has organised its own collection at households by setting up a household collection infrastructure consisting of the provision of waste containers and collection bags as well as collection services via a network of contracts with collectors and municipalities in the whole of Austria ("household collection infrastructure"). The larger part of the household collection infrastructure is owned by collectors and municipalities, but

⁴ Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft - BMLFUW

⁵ Lightweight packaging comprises mainly of plastics and composites, and to some extent textile fibres, ceramics, wood and packaging materials on a biological basis. See ARA Performance Report 2010, p. 31, ID 1892, as published at:http://www.ara.at/uploads/tx_wxfilelist/ARA_Leistungsreport2010_A4.pdf

⁶ The main part of collected paper concerns newspapers and magazines.

controlled by ARA. ARA itself owns a smaller part of the household collection infrastructure.

- (6) This Decision establishes that ARA has abused its dominant position in the market for the exemption of household packaging waste by refusing potential competitors access to the household collection infrastructure which cannot be duplicated. ARA has done so by imposing unjustified access conditions on the shared use of the household collection infrastructure ("shared use") by its competitors and in particular, by limiting potential access to its household collection infrastructure to individual regions, despite the fact that the household collection infrastructure can be duplicated neither in individual regions nor on a nationwide basis in the whole of Austria and is indispensable for market entry.
- (7) This Decision is addressed to ARA.

2. THE UNDERTAKING CONCERNED

- (8) ARA, with registered offices at Mariahilfer Straße 123 in 1062 Vienna, Austria, was founded in 1993 by Austrian trade and industry to carry out the obligations of the Austrian waste law (the Abfallwirtschaftsgesetz - "AWG") and the Packaging Ordinance (Verpackungsverordnung - "VerpackVO") on their behalf (the AWG⁷ and the VerpackVO⁸, as applicable during the period of infringement, that is 1 March 2008 until at least 2 April 2012, will also be referred to as the "Austrian legal framework"). ARA is owned by different companies and associations, the main one being the association "ARA-Verein" with a shareholding in ARA of 80.02% (status as of March 2016). Members of the ARA-Verein are various producers of goods, retailers and producers of packaging⁹.
- (9) The history of ARA can be divided into three periods, from 1993 until the end of 2008, from 2009 until the end of 2014 and from 1 January 2015 onwards. During the first period, from 1993 to 2008, alongside ARA there were eight independent sectoral recycling companies (Branchenrecyclinggesellschaften — "BRG"), which held minority shareholdings in ARA. ARA and the BRG together formed the "ARA-system" on the basis of cooperation agreements. In the ARA-system, the licensing was done exclusively by ARA whereas the collection and recycling of the packaging was organised by the different BRG exclusively for ARA¹⁰. The BRG organising the collection of lightweight and metal packaging was ARGEV Arbeitsgemeinschaft Verpackungsverwertungs-Ges.m.b.H. ("ARGEV"). On 1 October 2008, most BRGs

⁷ AWG of 2002 (BGBl. I. No. 102/2002 of 16 July 2002) in its version of 2008 (BGBl. I No. 54/2008 of 9 April 2008), 2009 (BGBl. I No. 115/2009 of 17 November 2009) and 2011 (BGBl. I No. 9/2011 of 15 February 2011). The provisions relating to packaging waste (Section 5 AWG) have not changed throughout the period of infringement (1 March 2008 – 2 April 2012).

⁸ VerpackVO of 1996 (BGBl. Nr. 648/1996) in its version of 2006 (BGBl. II No. 364/2006 of 26 September 2006).

⁹ Expert opinion in accordance with Article 35 AWG concerning ARA Altstoff Recycling Austria AG ("Expert opinion"), March 2012, p. 24, Annex 34-3 to the response from ARA to the Commission's request for information of 28 March 2012, ID 700; list of members of the ARA-Verein, Annex 48-14 to the response from ARA to the Commission's request for information of 15 July 2011, ID 1950.

¹⁰ Commission Decision 2004/208/EC of 16 October 2003 in cases COMP D3/35470 — ARA, COMP D3/35473 — ARGEV, ARO, OJ L 75, 12.03.2004, recital 64.

merged with ARA, with effect from 31 December 2008. During the subsequent second period, only the BRG AGR, which bore responsibility for collecting and recycling glass, remained as a separate legal entity within the ARA-system. In 2014, ARA became the majority shareholder of AGR¹¹. Since 1 January 2015 (beginning of the third period), four new exemption systems were authorised by the Ministry and since then have captured a market share of about 20%.

- (10) In 2015, ARA had a consolidated worldwide turnover of EUR 190,0 million¹².

3. PROCEDURE

- (11) At the end of 2009 and the beginning of 2010, the Commission received submissions from one of ARA's competitors in the field of exemption of commercial packaging waste, EVA Erfassen und Verwerten von Altstoffen GmbH, which was later renamed Interseroh Austria GmbH ("Interseroh/EVA"¹³). Interseroh/EVA informed the Commission about concerns regarding the market as well as the new draft waste law which was under discussion in Austria at that time¹⁴. Between 23 November 2010 and 25 November 2010, and with the support of the Austrian Competition Authority (Bundeswettbewerbsbehörde — "BWB"), the Commission carried out unannounced inspections at the offices of ARA in Vienna, Austria, pursuant to Article 20(1) and (4) of Regulation (EC) No 1/2003. At the same time, unannounced inspections were also carried out at the premises of Holding Graz - Kommunale Dienstleistungen GmbH, including its controlled company AEVG Abfall- Entsorgungs- und VerwertungsGmbH in Graz, and at the premises of Linz Service GmbH für Infrastruktur und Kommunale Dienste in Linz.
- (12) On 15 July 2011, the Commission decided to initiate proceedings against ARA under Article 2(1) of Regulation (EC) No 773/2004.
- (13) During the investigation, the Commission sent several requests for information pursuant to Article 18 of Regulation (EC) No 1/2003 to ARA, its competitors Reclay Österreich GmbH, Vienna ("Reclay") - which belongs to the Reclay Group, Cologne, Germany - and Interseroh/EVA as well as to some of their clients and to some end-use sites.
- (14) On 19 October 2011, a state of play meeting took place with ARA. A further state of play conference call with ARA took place on 7 May 2013.
- (15) On 17 July 2013, the Commission adopted a Statement of Objections ("SO") addressed to ARA. Following the SO, and as requested by ARA, access to the

¹¹ ARA informed the Commission in a meeting on 9 July 2015 that ARA recently acquired 51% of AGR. See also <http://www.agr.at/presse/pressemitteilungen-zu-glasrecycling/pressemitteilungen-2014/pressemitteilungen-detail-2014/artikel/ara-und-austria-glas-recycling-ruecken-zusammen.html>, ID 2782. In the following, the reference to ARA also includes its predecessors, in particular the BRG and ARGEV.

¹² Preliminary data subject to audit and approval by the General Assembly.

¹³ Interseroh/EVA's direct mother holding is ALBA SE, Cologne, Germany, which in turn belongs to the ALBA Group plc & Co. KG, Berlin, Germany.

¹⁴ Submissions by Interseroh/EVA of 24 November 2009 (ID 6 and 7) and 23 February 2010 (ID 8-10). – Interseroh/EVA had already sent a few documents to the Commission in 2007 and 2008.

Commission's file was granted on 25 July 2013. ARA submitted its reply to the SO on 18 October 2013 within the time limit set by the Commission¹⁵.

- (16) On 26 November 2013, an Oral Hearing took place during which ARA made known its views. Interseroh/EVA and Reclay, as well as the Bundesarbeitskammer, were invited by the Commission to participate in the Oral Hearing pursuant to Article 13(3) of Regulation (EC) No 773/2004 and Article 12(1) of Decision 2011/695/EU¹⁶.
- (17) On 12 December 2013, the Commission submitted to ARA a document to which Interseroh/EVA had made reference at the Oral Hearing of 26 November 2013¹⁷. By letter of 20 January 2014, ARA submitted to the Commission its views on this document as well as the issues discussed in this respect at the Oral Hearing¹⁸.
- (18) On 10 September 2014, the Commission informed ARA about new elements in the Commission's preliminary assessment via a letter of facts ("LoF")¹⁹. ARA replied to it on 26 September 2014²⁰. A further LoF was sent on 15 February 2016²¹.
- (19) Instead of a substantial reply to the LoF of 15 February 2016, ARA submitted on 21 July 2016 a formal offer to cooperate with the Commission ("Cooperation Submission")²² by acknowledging an infringement by refusing access to the indispensable Austrian household collection infrastructure by imposing unjustified access conditions, in particular by limiting access to certain regions from 1 March 2008 until 2 April 2012, as described in the SO and the two LoF and as summarised in the Cooperation Submission. ARA also offered a structural remedy in the form of the divestiture of the part of the Austrian household collection infrastructure it owns and acknowledged such a remedy as necessary and proportionate. The Cooperation Submission contains:
 - (a) an acknowledgement in clear and unequivocal terms of ARA's liability for the infringement of having negligently refused access to the essential household collection infrastructure summarily described as regards the main facts, their legal qualification and the duration of the infringement;
 - (b) an indication of the maximum amount of the fine it anticipates to be imposed by the Commission and which it would accept in the framework of cooperation;
 - (c) its confirmation that it has received the SO and the two LoF, that it has had full access to the Commission's file at the time of the SO, that it has subsequently been granted sufficient opportunity to have access to the evidence supporting

¹⁵ ARA's reply of 18 October 2013 to the SO, ID 2385 and Annexes IDs 2386-2398.

¹⁶ OJ L 275, 20.10.2011, p. 29.

¹⁷ E-mail by the Commission of 12 December 2013, ID 2718-2719.

¹⁸ ARA's reply of 20 January 2014 to the e-mail from the Commission of 12 December 2013, ID 2489.

¹⁹ Letter of Facts dated 10 September 2014, ID 2601.

²⁰ ARA's reply to the Letter of Facts, ID 2650, Annexes IDs 2622 – 2647.

²¹ Letter of Facts dated 15 February 2016, ID 2898.

²² Cooperation Submission as submitted by ARA to the Commission on 21 July 2016, ID 2975-2978.

the Commission's objections and that it has been given sufficient opportunity to make its views known to the Commission;

- (d) its agreement to receive the final Decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in English; and
 - (e) its acknowledgement that the divestiture of the part of the Austrian household collection infrastructure which ARA owns is necessary and proportionate to effectively terminate the infringement.
- (20) ARA made its Cooperation Submission conditional upon the imposition of a maximum fine that it anticipated would be imposed by the Commission and which would not exceed the amount of EUR 6.1 million as specified in the Cooperation Submission.

4. DESCRIPTION OF ARA'S PRACTICES WHICH ARE SUBJECT TO THIS DECISION

4.1. ARA's household collection infrastructure

4.1.1. Collection of lightweight and metal packaging waste

(21) In return for a licence fee received from the producers, ARA organises – in addition to other services such as the recovery and recycling of the collected waste, support of waste minimisation programmes or information for consumers – the collection of packaging waste made of differing materials, the main ones being packaging made of plastic or composite materials²³ ("lightweight packaging waste"), metals, paper and glass.

(22) After its creation, ARA set up a new household collection infrastructure for lightweight and metal packaging waste. Within this household collection infrastructure, citizens had to bring their packaging waste to one of the containers located at public spots (so-called "bring system" or "drop off system"). and ARA's collectors also fetched the packaging waste directly from the households' premises, mostly via collection bags (so-called "fetch system" or "kerbside collection").

4.1.2. Legal requirements for the household collection infrastructure

(23) During the period of infringement, exemption systems had to fulfil certain legal criteria, in particular with respect to their collection infrastructure. In order to become active in the provision of exemption services, every exemption system needed to receive a system authorisation from the Ministry. The Ministry issues two different types of system authorisations for exemption systems wishing to license household packaging waste and for exemption systems wishing to license commercial packaging waste. Pursuant to Article 29 (4) 1 AWG, the Ministry had to grant a system authorisation if the collection of the applicant fulfilled all technical standards and if the public interest was not negatively affected²⁴.

(24) To obtain a system authorisation, a new entrant had to prove that it could collect the relevant packaging waste on a nationwide basis, meaning that it had to prove that it had access to a nationwide collection infrastructure ("nationwide coverage").

²³ ARA Performance Report 2010, p. 31, ID 1892, as published at: http://www.ara.at/uploads/tx_wxfilelist/ARA_Leistungsreport2010_A4.pdf

²⁴ See also letter by the Ministry of 15 January 2003 (registration date 16 January 2003), ID 2479.

Compared to the infrastructure for collecting waste at commercial end-use sites, the household collection infrastructure had to be much more dense and extensive in order to fulfil this requirement of nationwide coverage²⁵.

- (25) ARA has a household system authorisation as well as a commercial system authorisation for all relevant materials²⁶. During the period of infringement, a number of exemption systems held commercial system authorisations on the basis of their own commercial collection infrastructures which had been set up in parallel to the one established by ARA. Conversely, during the time of the infringement, the only comprehensive household collection infrastructure available in Austria was the existing nationwide household collection infrastructure set up by ARA (consisting of around 230 000 containers for lightweight packaging waste, 50 000 containers for metal packaging waste and collection bags for approximately 1.4 million households²⁷ covered by ARA's fetch system²⁸).

4.1.3. *The network of contracts establishing the household collection infrastructure*

- (26) ARA set up the household collection infrastructure for lightweight and metal packaging waste via a network of contracts with collectors ("collection partner agreements") and municipalities or associations of municipalities ("municipality agreements"). Collectors and municipalities owned most of the containers and bags. ARA itself still owns approximately 5% of the containers. Moreover, in the years 2006 to 2009, ARA procured between 54% and 59% of the collection bags for the municipalities²⁹.
- (27) The collectors and municipalities under contract with ARA set up the household collection infrastructure for ARA against payment by ARA. The contracts between ARA and collectors and municipalities defined the exact composition of the required household collection infrastructure³⁰. ARA had the sole authority to decide upon the type of packaging waste and material fractions for which the household collection infrastructure was designed³¹, as well as the methods of how the system was to be

²⁵ This follows from Articles 29 (2) 5 and 6 AWG and Article 11 (4) VerpackVO.

²⁶ See the overview of collection and recycling systems as published by the Ministry of 30 October 2012, ID 2204. Two further exemption systems had household system authorisations: AGR and Öko Box – they, however did not represent full-fledged competitors; see recitals (62) - (63).

²⁷ ARA's response of 10 September 2015 to the Commission's request for information of 4 September 2015, page 4, ID 2793.

²⁸ See the table: Collection infrastructure and ownership (Collection containers as at 2012) submitted as annex 10-3 to ARA's response of 30 May 2012 to the Commission's request for information of 28 March 2012, ID 670; ARA Performance Report 2010, p. 32, ID 1892, as published at:http://www.ara.at/uploads/tx_wxfilelist/ARA_Leistungsreport2010_A4.pdf.

²⁹ ARA's response of 24 September 2015 to complementary questions by the Commission of 18 September 2015 to the Commission's request for information of 4 September 2015, page 3, ID 2806.

³⁰ The contracts between ARA and collectors/municipalities define in an Annex called "Select Regional" the exact composition of the required household collection infrastructure (number and type of containers/bags, frequency of collection etc.). This Annex can be revised by ARA on an annual basis. See Select Regional, annex 11-25 of the response from ARA to the Commission's request for information dated 15 July 2011, ID 1928.

³¹ Point 1.4 and point 1.5 of the collection partner agreement 2007, submitted as Annex 11-19 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, p.3, ID 1928.

operated³². Regarding shared use, after the 2003 Decision, ARA had defined a number of conditions which were supposed to allow for a clear framework for collectors and municipalities for granting shared use³³. The contracts provided also that shared use of the household collection infrastructure may only be granted under the condition that it is provided on a fair and practicable basis and does "*under no circumstances lead to a discrimination of ARA*"³⁴.

4.2. Non-duplicability of the household collection infrastructure

4.2.1. Statements by the Austrian authorities and in the 2003 Decision against duplication

- (28) The Commission found in earlier investigations regarding ARA that the household collection infrastructure could not be duplicated. On 16 October 2003, the Commission adopted a decision ("the 2003 Decision")³⁵ relating to a proceeding pursuant to Article 81 of the EC Treaty (now Article 101 of the Treaty) and Article 53 of the EEA Agreement against ARA, ARGEV and Altpapier-Recycling-Organisationsgesellschaft m.b.H. ("ARO"), the BRG responsible at the time for the recycling of paper. The Commission found in the 2003 Decision that the household collection infrastructure was not duplicable and obliged ARA not to hinder shared-use³⁶.
- (29) In its finding of non-duplicability of the household collection infrastructure, the Commission referred in its 2003 Decision to the Austrian authorities which had stated that a duplication of the infrastructure had to be ruled out in practice because of spatial constraints and concerns regarding landscape protection, environmental concerns, such as the increased number of waste transport journeys, higher costs and the fact that consumers had no interest in dividing up the waste between separate infrastructures³⁷. The judgment of the General Court of 22 March 2011 in Case T-

³² Point 2.1 and 2.2.1 of the collection partner agreement 2007, submitted as Annex 11-19 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, p.3, ID 1928.

³³ Annex 8 on shared use, see Annex 6-5 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1922; Annex 1 on shared use, see Annex 6-6 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1922.

³⁴ Point 1 of Annex 1 on shared use to the municipality agreement and of Annex 8 on shared use to the collection partner agreement: Annex 8 on shared use, see Annex 6-5 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1922; Annex 1 on shared use, see Annex 6-6 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1922.

³⁵ Commission Decision 2004/208/EC of 16 October 2003 in Cases COMP D3/35470 — ARA, COMP D3/35473 — ARGEV, ARO, OJ L 75, 12.03.2004. The 2003 Decision was adopted following the notification of certain agreements to the Commission by ARA and the industry recycling companies ARGEV and ARO. ARA, ARGEV and ARO requested negative clearance or individual exemption of these agreements from Article 81(1) of the EC Treaty on the basis of Article 81(3) thereof. For the notified contracts concerning the licence fee for the Green Dot and for the collection service, the Commission issued a negative clearance. With respect to the collection and sorting contracts of ARGEV and ARO with their respective regional collection partners, which foresaw that only one collection and sorting company was assigned to each service contract, the Commission granted an exemption, subject to certain obligations, from 30 June 1994 to 31 December 2006.

³⁶ Commission Decision 2004/208/EC of 16 October 2003 in cases COMP D3/35470 — ARA, COMP D3/35473 — ARGEV, ARO, OJ L 75, 12.03.2004, recital 281-287.

³⁷ Letter by the Ministry of 15 January 2003 (registration date 16 January 2003), ID 2479.

419/03³⁸, *Altstoff Recycling Austria AG v Commission* ("the 2011 Judgment") confirmed the 2003 Decision in its entirety.

- (30) The Austrian authorities maintained and reiterated their view regarding any duplication of the household collection infrastructure in the present proceedings. The Ministry explained in a letter of 2 January 2013³⁹ that a duplication of the household collection infrastructure was not practical in economic and ecological terms since
- (i) costs for containers, which are ultimately borne by the citizens, would be multiplied,
 - (ii) parallel household collection infrastructures would lead to a higher number of waste transport journeys and higher costs,
 - (iii) it is neither acceptable nor possible for consumers to allocate packaging waste to different household exemption systems, and
 - (iv) a duplication of the household collection infrastructure would lead to an excessive emergence of containers and "*has to be rejected*" for reasons of lack of space as well as landscape preservation.
- (31) The Ministry, moreover, confirmed that no regional differences exist with regard to the non-duplicability of the household collection infrastructure⁴⁰. It repeated its view expressed in the letter of 2 January 2013 later again⁴¹ and indicated the need for assessing any individual application for a system authorisation based on an intended duplication under the criteria listed in Article 29 AWG.

4.2.2. *The amended Austrian waste law prohibits duplication*

- (32) The critical position of the Austrian authorities regarding the duplication of the household collection infrastructure (see recitals (30) to (31)) was subsequently reflected in Austrian legislation. When the AWG was amended in 2013 ("AWG 2013")⁴², an explicit prohibition of any duplication of the household collection infrastructure was introduced (§ 29 c) 6 AWG 2013).
- (33) The recitals in the AWG 2013 state that a parallel collection by several exemption systems with separate collection infrastructures would be neither ecologically nor economically meaningful and would lead to additional burdens for households and municipalities⁴³. Moreover, the impact assessment by the Ministry undertaken for the

³⁸ Judgement of the General Court of 22 March 2013, *Altstoff Recycling Austria AG v Commission*, Case T-419/03, ECLI:EU:T:2011:102, paragraph 60.

³⁹ Response from the Ministry sent via the Permanent Representation of Austria to the European Union of 2 January 2013 to the Commission's request for information of 5 December 2012, ID 2169.

⁴⁰ Response from the Ministry sent via the Permanent Representation of Austria to the European Union of 2 January 2013 to the Commission's request for information of 5 December 2012, page 2, ID 2169.

⁴¹ Letter from the Ministry sent to the Commission on 29 September 2014, ID 2655.

⁴² BGBl. I No. 193/2013 of 16 September 2013. With the amendment of 2013, major changes were introduced into the AWG. These changes were already publicly discussed as of the first public draft of 2 April 2012.

⁴³ Introductory Explanations ("Vorblatt und Erläuterungen") to the AWG 2013, page 3 (point 5), ID 2707.

AWG 2013 refers to several studies which came to the conclusion that the household collection infrastructure must be considered as an "essential facility"⁴⁴.

(34) A first draft of the AWG 2013 was consulted by the Ministry with interested third parties on 2 April 2012. During the subsequent formal public consultation of the draft AWG 2013, the association of towns and cities⁴⁵, the association of municipalities⁴⁶ and an Austrian waste association representing municipal waste companies ("ARGE")⁴⁷ argued against any duplication of the household collection infrastructure.

(35) Equally negative views on the duplication of the household collection infrastructure were also given in a legal opinion of 2007 which had been commissioned by the Ministry, the Austrian association of towns and cities and the platform of Austrian waste associations ("ARGE") regarding the question of access to the household collection infrastructure⁴⁸. That opinion stated that in discussions with the Ministry, the Austrian association of towns and cities and ARGE, the experts for waste from those organisations were strictly against any duplication of the household collection infrastructure for the same reasons as mentioned in the 2003 Decision⁴⁹.

4.2.3. *The negative position of stakeholders regarding the duplication of the household collection infrastructure was also expressed vis à vis ARA's competitors*

(36) Interseroh/EVA, the main competitor of ARA in the field of the exemption of commercial packaging waste, already explored the question of a possible system authorisation on the basis of a duplication of the household collection infrastructure with the Ministry in 2003. Interseroh/EVA also discussed this issue in the same year with the association of municipalities, the association of towns and cities as well as with ARGE. The Ministry as well as the associations rejected any duplication of the household collection infrastructure due to the lack of space and concerns related to the protection of the landscape in those discussions. The municipalities stated that it would be difficult to explain to citizens why new containers would be necessary, even though the waste could well be collected with the existing household collection infrastructure. It was feared that duplicated household collection infrastructures would not be accepted by the public. There were also doubts as to the practical viability of a packaging waste collection via several household collection infrastructures⁵⁰.

⁴⁴ Effects-oriented impact assessment ("Wirkungsorientierte Folgenabschätzung") to the AWG 2013, page 3, ID 2708.

⁴⁵ Statement by the association of towns and cities in the public consultation of the draft AWG 2013, page 8, ID 2669.

⁴⁶ Statement by the association of municipalities in the public consultation of the draft AWG 2013, page 7, ID 2670.

⁴⁷ Statement by the waste association ARGE in the public consultation of the draft AWG 2013, page 2, ID 2671.

⁴⁸ Opinion of 16 October 2007, sent by Interseroh/EVA on 5 May 2010, ID 12.

⁴⁹ Opinion of 16 October 2007, sent by Interseroh/EVA on 5 May 2010, page 15, footnote 29, ID 12.

⁵⁰ See minutes to the conference call with Interseroh/EVA on 26 February 2015, para. 1, ID 2668.

(37) Interseroh/EVA also addressed the question of a duplication of the household collection infrastructure with the authorities of the city of Vienna which rejected a duplication in light of the already existing infrastructure⁵¹.

(38) In 2008, Interseroh/EVA informed ARA of the Ministry's position when asking ARA for shared use of the household collection infrastructure⁵².

4.3. ARA's replies to requests for shared use

4.3.1. Interseroh/EVA's contacts with municipalities and collectors

(39) In 2007, following discussions with the BWB, ARA included provisions on shared use in its contracts with municipalities and collectors which specified a number of conditions under which municipalities and collectors would be able to grant shared use of the household collection infrastructure⁵³.

(40) In the following, Interseroh/EVA undertook attempts to enter the household exemption market via shared use agreements with municipalities, collectors and ARA⁵⁴. In January/February 2008, Interseroh/EVA contacted more than 400 municipalities, 100 public and private collectors (in particular via organised information events during a road show⁵⁵) as well as ARA itself for the part of the household collection infrastructure ARA owned (see also recital (45)). Interseroh/EVA requested the conclusion of collection contracts including a shared use of the existing household collection infrastructure in order to achieve the geographic coverage it needed in terms of collection agreements and thus obtain its system authorisation⁵⁶.

4.3.2. Municipalities and collectors consulting ARA

(41) Following the requests made by Interseroh/EVA, the association of municipalities asked ARA on 28 January 2008 whether the agreements as proposed by Interseroh/EVA would interfere with the rights and obligations set out in the existing

⁵¹ See minutes to the conference call with Interseroh/EVA on 26 February 2015, para. 3, ID 2668.

⁵² Letter by Interseroh/EVA to ARA of 29 January 2008, submitted as Annex 37-4 to ARA's reply of 30 August 2011 to the Commission request for information of 15 July 2011, ID 1942.

⁵³ Annex 1 on shared use to the municipality agreement, see Annex 6-6 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1922; Annex 8 on shared use to the collection partner agreement, see Annex 6-5 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1922.

⁵⁴ Letter by Interseroh/EVA to the Commission of 13 November 2008, ID 34, and attached interim reports from EVA to the BWB of 15 February 2008 and 10 March 2008, ID 35 and 36.

⁵⁵ Presentation submitted by Interseroh/EVA on 23 February 2010, slide 5, ID 9; minutes to the roadshow information events between 25 and 28 February 2008 in Annex 3 to the submission by Interseroh/EVA of 13 November 2008, ID 37; see also the interim reports by Interseroh/EVA of 15 February 2008 and 10 March 2008 informing the BWB about the process of contacting municipalities and collectors in Annexes 1 and 2 to the submission by Interseroh/EVA of 13 November 2008, ID 35 and 36.

⁵⁶ Presentation submitted by Interseroh/EVA on 23 February 2010, slide 5, ID 9; letters by Interseroh/EVA to one municipality dated 16 January 2008 as well as to ARGEV (as owner of collection infrastructure) dated 11 February 2008 submitting its contract proposal for a shared use, ID 125 (SIE 16) and 1942; see also the interim reports by Interseroh/EVA informing the BWB about the process of contacting municipalities and collectors in Annexes 1 and 2 to the submission by Interseroh/EVA of 13 November 2008, ID 35 and 36.

municipality agreements⁵⁷. Furthermore, the association of Austrian disposal companies (VÖEB⁵⁸) contacted ARA on 12 February 2008. It requested that ARA verify whether the proposed shared use contracts would – as claimed by Interseroh/EVA – not interfere with existing collection partner agreements⁵⁹.

- (42) In March 2008, ARA wrote largely identical letters to the associations of municipalities⁶⁰, the association of Austrian waste collection companies⁶¹ and the association of towns and cities⁶². With regard to the question of the requested shared use, ARA indicated that several clauses in the shared use contract proposed by Interseroh/EVA raised concerns (such as clauses concerning the disclosure of prices and system descriptions). ARA, moreover, set out that it was apparent that Interseroh/EVA and ARA had two fundamentally different concepts of shared use of the household collection infrastructure in mind and denied that there could be a legal obligation for collectors and municipalities to enter into shared use contracts.
- (43) According to ARA, Interseroh/EVA could be expected to plan its collection in detail "*region per region*" and had to set up its own household collection infrastructure wherever possible ("regional approach" or "partial shared use")⁶³. ARA moreover rejected Interseroh/EVA's statement to the municipalities that the conditions for shared use had been clarified⁶⁴.
- (44) After having received ARA's objections by email on 10 March 2008, the association of towns and cities sent a letter to its members including a model letter to Interseroh/EVA indicating that the agreement proposed by Interseroh/EVA was too

⁵⁷ Inspection documents GLA 7, ID 121, page 19-20.

⁵⁸ Verband Österreichischer Entsorgungsbetriebe

⁵⁹ The letter of 12 February 2008 by the association of Austrian disposal companies to ARA is referred to in ARGEV's letter of 14 March 2008. Inspection document SK 41 – 2/5: Letter of 14 March 2008, which ARGEV sent to the association of collectors as response to a referenced letter to ARA of 12 February 2008, ID 131; Inspection document SK 37/1: Letter of 4 March 2008, which ARA sent to the association of collectors as response to a referenced letter to ARA of 12 February 2008, ID 131.

⁶⁰ Letter by ARA of 6 March 2008 to the association of towns and cities on shared use, submitted as Annex 37-16 to ARA's response of 30 May 2012 to the Commission's request for information of 28 March 2012, forwarding to the association of towns and cities a letter of 3 March 2008 from ARA to the association of municipalities, ID 702. See also inspection document SK 39, ID 131.

⁶¹ Inspection document SK 37, ID 131: Letter of 4 March 2008 from ARA to the association of Austrian disposal companies on shared use.

⁶² Letter by ARA of 6 March 2008 to the association of towns and cities on shared use, submitted as Annex 37-16 to ARA's response of 30 May 2012 to the Commission's request for information of 28 March 2012, forwarding to the association of towns and cities a letter of 3 March 2008 from ARA to the association of municipalities, ID 702.

⁶³ "Partial shared use" is used as opposed to "total shared use". The latter refers to a shared use in the whole of Austria based on contracts between competing exemption systems on the one hand and the collectors and municipalities under contract with ARA on the other hand. On the notion of "total shared use" see, for example, document "Verpackungssammlung in Österreich" (Collection of Packaging in Austria) submitted by Interseroh/EVA to the Commission on 23 February 2010 for a meeting on 24 February 2010, slide 7, ID 9.

⁶⁴ Inspection document SK 41, ID 131, page 4/5: letter by ARGEV of 14 March 2008 to the association of municipalities on shared use; inspection document SK 41, ID 131, page 2/5: letter by ARGEV of 14 March 2008 to the association of Austrian disposal companies on shared use.

vague in many respects and that a clarification of the open issues between the exemption systems was necessary⁶⁵.

- (45) In a later letter of 5 June 2008⁶⁶, ARA replied to some of the questions raised by the association of municipalities and again made reference to the regional approach indicating that an overall "*total shared use*" of the household collection infrastructure in the whole of Austria would create "*disadvantages for today's high efficiency and quality of the system*" as organised by ARA. ARA moreover mentioned in this letter that with respect to shared use of the part of the household collection infrastructure it owns, ARA itself would be the correct contract partner for any shared use request.

4.3.3. *ARA's discussions with Interseroh/EVA and involvement of the BWB*

- (46) Interseroh/EVA also contacted ARA directly (with similar letters of 29 January 2008⁶⁷ to ARA and of 11 February 2008⁶⁸ to ARGEV) with the request to enter into a shared use agreement in relation to those parts of the household collection infrastructure owned at the time by ARGEV.
- (47) On 7 April 2008⁶⁹ ARA replied to Interseroh/EVA and reiterated the regional approach, stating that shared use of the household collection infrastructure which ARA owned could under no circumstances mean "*total shared use*" in the whole of Austria since that would amount to free-riding on ARA achievements, not creating competition and decreasing the efficiency of the ARA system⁷⁰. ARA offered a pilot for shared use in a selected number of regions under the condition that Interseroh/EVA agreed to partial shared use⁷¹. Since Interseroh/EVA did not agree to that partial shared use, no pilot was conducted⁷².
- (48) Subsequently, two meetings were held between ARA, Interseroh/EVA and the BWB in the premises of the BWB on 2 May 2008⁷³ and on 20 May 2008⁷⁴. In the two

⁶⁵ Inspection document IP 7, page 5/8, ID 1901: Email of 10.3.2008 from the association of towns and cities and the members of the special committee for waste management and town cleaning on the agreement on shared use forwarding a letter dated 7.3.2008.

⁶⁶ Letter by ARGEV of 5 June 2008 to the association of municipalities submitted as Annex 40-2 to ARA's reply of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1945.

⁶⁷ Letter by Interseroh/EVA of 29 January 2008 to ARA submitted as Annex 37-4 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1942.

⁶⁸ Letter by Interseroh/EVA of 11 February 2008 to ARGEV, submitted as Annex 37-6 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1942.

⁶⁹ Letter by ARGEV of 7 April 2008 to Interseroh/EVA submitted as Annex 37-11 of ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1942.

⁷⁰ Letter by ARGEV of 7 April 2008 to Interseroh/EVA, submitted as annex37-11 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1942.

⁷¹ Letter by ARGEV of 7 April 2008 to Interseroh/EVA submitted as Annex 37-11 of ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1942: "We therefore request that you inform us, by 21 April 2008, whether or not you would be interested in partial shared use. If this is the case, we propose that we work through the associated technical and commercial questions on the basis of a specific collection region."

⁷² Inspection document AK 7, ID 115: Letter by Interseroh/EVA to ARGEV of 16 April 2008 – "Shared use – your letter of 7 April 2008".

⁷³ Meeting of 2 May 2008: Minutes by ARA - see ARA's letter of 8 July 2015, Annex 9, ID 2740 (handwritten) and the Annex to ARA's e-mail of 14 July 2015 (transcript), ID 2755; minutes by

meetings, several open issues were discussed regarding the conditions under which shared use of the household collection infrastructure could be granted at the level of collectors and municipalities.

- (49) The discussions ended without a solution. ARA continued to require the regional approach and did neither agree to the shared use of the part of the household collection infrastructure it owned nor give the explicit and unequivocal consent which had been requested by collectors and municipalities to nationwide access to the part of the household collection infrastructure ARA controlled, as requested by Interseroh/EVA⁷⁵.

5. RELEVANT MARKETS

5.1. Relevant product market

- (50) A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use⁷⁶.
- (51) The exemption of packaging waste is subject to a specific regulatory regime and therefore different from other types of waste (see recitals (2) to (3) and (23) to (25)). Separate markets for the exemption of household packaging waste ("household exemption market") and for commercial packaging waste have to be distinguished as was already done in the 2003 Decision⁷⁷. Exemption services concerning household packaging waste are not substitutable with exemption services concerning packaging occurring as waste in companies and *vice versa*. A producer of goods wishing to buy exemption services for its packaging occurring as waste in households cannot change to a commercial exemption system which can only exempt commercial packaging waste and which will accordingly only collect and recycle commercial packaging waste. In addition, the Ministry issues different types of system authorisations for household exemption systems and for commercial exemption systems.
- (52) Self-exemption by producers, including self-collection, is not a feasible alternative for household packaging waste since no producer could collect from all households only the packaging relating to the own specific product. Self-collection therefore does not form part of the market⁷⁸.

Interseroh/EVA - see Interseroh/EVA's supplementary reply of 17 July 2015 to the Commission's request for information of 6 July 2015, Annex 10, ID 2769.

⁷⁴ Meeting of 20 May 2008: Minutes by ARA - see ARA's reply to the SO, Annexes 10 (handwritten), ID 2395, and Annex 11 (transcript), ID 2396; minutes by Interseroh/EVA - see Interseroh/EVA's supplementary reply of 17 July 2015 to the Commission's request for information, Annex 11, ID 2770.

⁷⁵ Document "Verpackungssammlung in Österreich" (Collection of Packaging in Austria) submitted by Interseroh/EVA to the Commission on 23 February 2010 for a meeting on 24 February 2010, slide 7, ID 9.

⁷⁶ See the Commission notice on the definition of the relevant market for the purposes of Community competition law, Official Journal C 372, 9.12.1997, p. 5–13, para. 7.

⁷⁷ Commission Decision 2004/208/EC of 16 October 2003 in Cases COMP D3/35470 — ARA, COMP D3/35473 — ARGEV, ARO, OJ L 75, 12.03.2004, recitals 141-154.

⁷⁸ See also judgment 27 Kt 59, 60/12-102 by the Austrian cartel court of 22 December 2014, as provided by the BWB on 7 July 2015, page 52, ID 2785.

- (53) No separate market for the exemption of small businesses packaging waste should be defined. During the period of the infringement (1 March 2008 until at least 2 April 2012), there was some uncertainty as to whether small businesses had to be regarded as households or as commercial end-use sites due to different delineations⁷⁹ in the system authorisations of ARA and other commercial exemption systems. For the exemption of packaging occurring as waste in small businesses, the producers of goods have, however, been facing options very similar to those available for packaging occurring as waste in large companies. They were able to choose between ARA and its competitors on the commercial exemption market. Therefore, the exemption of packaging occurring as waste in small businesses can be regarded as part of the market for the exemption of commercial packaging waste. This view was also taken by the Austrian cartel court in a recent judgment⁸⁰.
- (54) Exemption systems have to cover all relevant packaging materials. While the market does not necessarily have to be separated per material, this Decision only focusses on lightweight and metal packaging⁸¹. However, the results of the analysis would in any case not change if exemption services for individual materials were assessed. This is because ARA's market position would not differ significantly, even under the assumption of separate markets for the exemption of packaging per material as its market shares do not differ to a large extent for the relevant materials (see section 6.2) and also the overall competition assessment of ARA's conduct would not change. Consequently, it can be left open whether the household exemption market should be subsegmented into packaging materials.

5.2. Relevant geographic market

- (55) According to settled case law and Commission practice, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different⁸².

⁷⁹ See Decision of the Supreme Administrative Court of 28 March 2013, No 2008/07/0206, ID 2641, by which Interseroh/EVA's request to be authorised as an exemption system for small businesses was finally rejected, because the commercial collection infrastructure installed by Interseroh/EVA was held to be insufficient in this market segment.

⁸⁰ See also judgment 27 Kt 59, 60/12-102 by the Austrian cartel court of 22 December 2014, as provided by the BWB on 7 July 2015, page 40-41, ID 2785.

⁸¹ Also the Austrian cartel court did not consider separate exemption markets per material, but based its judgment on a household exemption market and a commercial exemption market, see judgment 27 Kt 59, 60/12-102 by the Austrian cartel court of 22 December 2014, as provided by the BWB on 7 July 2015, page 52, ID 2785.

⁸² Commission Decisions in case COMP/37451, *Deutsche Telekom AG*, recitals 92-93; and case COMP/38.233, *Wanadoo Interactive*, recital 205. See also judgment of the Court of Justice of 14 February 1978, *United Brands v Commission*, Case C-27/76, ECLI:EU:C:1978:22, paragraph 44; judgment of the Court of Justice of 9 November 1983, *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, paragraph 26; judgment of the Court of Justice of 5 October 1988, *Alsatel v Novasam*, C-247/86, ECLI:EU:C:1988:469, paragraph 15. See also the Commission notice on the definition of the relevant market for the purposes of Community competition law, Official Journal C 372, 9.12.1997, p. 5-13, para. 8.

- (56) According to the statutory requirement of nationwide coverage, exemption systems have to provide collection facilities an adequate distance from the end-use sites where the packaging occurs as waste. Since the packaging waste of an individual product normally does not occur only in specific regions, a nationwide network of facilities needs to be established and both exemption as well as collection services are provided on a nationwide basis. Exemption systems are therefore effectively obliged by law to collect the packaging waste for which they have taken over the responsibility of collection and recycling in the whole territory of Austria.
- (57) Already the 2003 Decision regarded the relevant exemption markets as being limited to the territory of Austria⁸³. The relevant geographic market is therefore Austria.

6. DOMINANT POSITION

6.1. Introduction

- (58) According to settled case law, a dominant position within the meaning of Article 102 of the Treaty is *"a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers"*⁸⁴.
- (59) The notion of independence, which is a special feature of dominance⁸⁵, is related to the level of competitive constraints faced by the undertaking in question. It is not required for a finding of dominance that the undertaking in question has eliminated all opportunity for competition in the market⁸⁶. However, for dominance to exist, the undertaking concerned must have substantial market power so as to have an appreciable influence on the conditions under which competition will develop⁸⁷.
- (60) Very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position⁸⁸. Other factors indicating dominance include for example the disparity between the market share of the leading

⁸³ Commission Decision 2004/208/EC of 16 October 2003 in Cases COMP D3/35470 — ARA, COMP D3/35473 — ARGEV, ARO, OJ L 75, 12.03.2004, recital 173.

⁸⁴ Judgment of the Court of Justice of 14 February 1978, *United Brands v Commission*, C-27/76, ECLI:EU:C:1978:22, paragraph 65.

⁸⁵ Judgment of the Court of Justice of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraphs 42-48.

⁸⁶ Judgment of the Court of Justice of 14 February 1978, *United Brands v Commission*, C-27/76, ECLI:EU:C:1978:22, paragraph 113.

⁸⁷ Judgment of the Court of Justice of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraph 39.

⁸⁸ Judgment of the Court of Justice of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraph 41; judgment of the Court of Justice of 3 July 1991, *Akzo Chemie v Commission*, C-62/86, ECLI:EU:C:1991:286, paragraph 60.

undertaking and the next largest competitor, structural advantages over competitors⁸⁹ or market entry barriers⁹⁰.

6.2. ARA's dominant position in the household exemption market

- (61) Since its creation in 1993, ARA (and its predecessor ARA-system (see recital (9)) has been the only household exemption system which offered comprehensive household exemption services during the period of the infringement. After the merger between ARA and most of the BRGs, only two other companies had system authorisations as household exemption systems but were not fully-fledged competitors to ARA.
- (62) The company **AGR** had a system authorisation for glass packaging and organised the collection and recycling of glass exclusively for ARA. As the only remaining BRG, AGR did not offer exemption services to producers; all licensing of glass packaging was done by ARA. AGR therefore had no own market share as an exemption system but provided collection and recycling services for glass packaging to ARA.
- (63) Throughout the period of infringement, **Öko Box** operated as a household exemption system specialising, however, in one specific type of lightweight packaging, namely composite drink cartons. Since Öko Box relied to a large extent on ARA's household collection infrastructure and cooperated closely with ARA, it cannot be considered to be a fully-fledged competitor to ARA.
- (64) From 2008 until 2012, ARA's market share amounted to approximately 95% of the Austrian household exemption market, with Öko Box having 5% (if separated by material, ARA would have 84% and Öko Box 16% for lightweight packaging; ARA would have been the sole provider of household exemption services for metal packaging waste)⁹¹.
- (65) Consequently, ARA held a dominant position on the market for the exemption of household packaging waste throughout the period of infringement.
- (66) The area in which ARA held a dominant position on the household exemption market covers the whole of Austria and therefore represents a substantial part of the internal market.

7. ABUSE OF ARA'S DOMINANT POSITION

7.1. Introduction

- (67) Article 102 of the Treaty prohibits any abuse by one or more undertaking of a dominant position within the internal market or in a substantial part of it, insofar as it may affect trade between Member States.

⁸⁹ See for example judgment of the Court of Justice of 9 November 1983, *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, paragraphs 55 ff.

⁹⁰ Judgment of the Court of Justice of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraph 48.

⁹¹ Calculation based on Annex C-2 to ARA's response of 30 May 2012 to the Commission's request for information of 28 March 2012, ID 840. See also ARA's confirmation that its market shares on the household exemption market did not fluctuate significantly during the period of infringement, see ARA's reply of 30 November 2015 on the Commission's request for information of 3 November 2015, question 3, page 3, ID 2857.

- (68) The fact that an undertaking holds a dominant position is not in itself contrary to the competition rules. However, an undertaking enjoying a dominant position is under a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the internal market⁹². The scope of this special responsibility should be considered in light of the specific circumstances of each case.
- (69) The Court of Justice of the European Union ("the Court of Justice") defined the concept of abuse under Article 102 of the Treaty in the following terms: "*The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*"⁹³.
- (70) It follows from the nature of the obligations imposed by Article 102 of the Treaty that in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which would be unobjectionable if adopted or taken by non-dominant undertakings⁹⁴. Thus, Article 102 of the Treaty prohibits a dominant undertaking from, among other things, strengthening its dominant position by engaging in activities other than competing on the merits⁹⁵. The Union Courts have held that the strengthening of a dominant position may be an abuse and therefore prohibited under Article 102 of the Treaty, regardless of the means and procedure by which that is achieved and irrespective of any fault⁹⁶.

⁹² Judgment of the Court of Justice of 9 November 1983, *Michelin v Commission*, C-322/81 ECLI:EU:C:1983:313, paragraph 57; and judgment of the Court of Justice of 27 March 2012, *Post Danmark*, C-209/10, ECLI:EU:C:2012:172, paragraph 23; and judgment of the Court of Justice of 6 October 2015, *Post Danmark II*, C-23/14, ECLI:EU:C:2015:651, paragraph 71.

⁹³ Judgment of the Court of Justice of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraph 91; judgment of the Court of Justice of 17 February 2011, *TeliaSonera*, C-52/09, ECLI:EU:C:2011:83, paragraph 27; judgment of the Court of Justice of 19 April 2012, *Tomra v Commission*, C-549/10 P, ECLI:EU:C:2012:221, paragraph 17.

⁹⁴ See, to that effect, judgment of the Court of Justice of 9 November 1983, *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, paragraph 57; judgment of the General Court of 17 July 1998, *ITT Promedia v Commission*, T-111/96, ECLI:EU:T:1998:183, paragraph 139; judgment of the General Court of 9 September 2009, *Clearstream v Commission*, T-301/04, ECLI:EU:T:2009:317, paragraph 133.

⁹⁵ Judgment of the Court of Justice of 27 March 2012, *Post Danmark*, C-209/10, ECLI:EU:C:2012:172, paragraph 25.

⁹⁶ Judgment of the Court of Justice of 21 February 1973, *Europemballage and Continental Can v Commission*, Case 6/72, ECLI:EU:C:1973:22, paragraphs 27 and 29; judgment of the General Court of 1 April 1993, *British Gypsum*, T-65/89, ECLI:EU:T:1993:31, paragraph 70; judgment of the General Court of 12 December 2000, *Aéroports de Paris v Commission*, T-128/98, ECLI:EU:T:2000:290, paragraph 170; judgment of the General Court of 9 September 2009, *Clearstream*, T-301/04, ECLI:EU:T:2009:317, paragraph 141.

- (71) Furthermore, Article 102 of the Treaty is aimed not only at practices which may cause prejudice to consumers directly but also at those which are detrimental to them through the impact of those practices on an effective competition structure⁹⁷. The Court of Justice has held that "*competition rules laid down in the Treaty (...) aim to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such*"⁹⁸. According to settled case law, the list of abusive practices contained in Article 102 of the Treaty does not provide an exhaustive list of the methods of abusing a dominant position prohibited by the Treaty⁹⁹.
- (72) In its examination of the conduct of a dominant undertaking and for the purposes of identifying any abuse of a dominant position, the Commission is obliged to consider all of the relevant facts surrounding such conduct¹⁰⁰. Whilst in that analysis the Commission is entitled to refer to subjective factors such as the motives or intent of the dominant undertaking, it is under no obligation to establish the existence of an anti-competitive intent on the part of the dominant undertaking. Moreover, existence of an intention to compete on the merits, if established, would not in itself militate against the finding of an abuse¹⁰¹.
- (73) Exclusionary conduct may escape the prohibition of Article 102 of the Treaty if the dominant undertaking can provide an objective justification for its behaviour or demonstrate that its conduct produces efficiencies which outweigh the negative effects on competition. The burden of proof for such an objective justification or efficiency defence is on the dominant undertaking¹⁰².

⁹⁷ Judgment of the Court of Justice of 15 March 2007, *British Airways v Commission*, C-95/04, ECLI:EU:C:2007:166, paragraphs 106-107 and judgment of the Court of Justice of 21 February 1973, *Europemballage and Continental Can v Commission*, Case 6/72, ECLI:EU:C:1973:22, paragraph 26.

⁹⁸ See judgments of the Court of Justice of 6 October 2009, *GlaxoSmithKline Services and Others v Commission* and Others, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECLI:EU:C:2009:610, paragraph 63 and judgment of the Court of Justice of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, ECLI:EU:C:2009:343, paragraphs 38 and 39.

⁹⁹ See, for example, judgment of the Court of Justice of 16 March 2000, *Compagnie Maritime Belge Transports and Others v Commission*, C-395/96 P and C-396/96 P, ECLI:EU:C:2000:132, paragraph 112; judgment of the Court of Justice of 17 February 2011, *TeliaSonera*, Case C-52/09, ECLI:EU:C:2011:83, paragraph 26.

¹⁰⁰ Judgment of the Court of Justice of 15 March 2007, *British Airways v Commission*, C-95/04 P, ECLI:EU:C:2007:166, paragraph 67; judgment of the Court of Justice of 19 April 2012, *Tomra v Commission*, C-549/10 P, ECLI:EU:C:2012:221, paragraph 18.

¹⁰¹ Judgment of the Court of Justice of 19 April 2012, *Tomra v Commission*, Case C-549/10 P, ECLI:EU:C:2012:221, paragraphs 19 et seq; judgment of the General Court of 9 September 2009, *Clearstream*, Case T-301/04, ECLI:EU:T:2009:317, paragraph 142.

¹⁰² See judgment of the General Court of 30 September 2003, *Michelin v Commission* (Michelin II), T-203/01, ECLI:EU:T:2003:250, paragraphs 107-109; judgment of the Court of Justice of 19 April 2012, *Tomra v Commission*, C-549/10 P, ECLI:EU:C:2012:221, paragraph 75; judgment of the Court of Justice of 27 March 2012, *Post Danmark*, C-209/10, ECLI:EU:C:2012:172, paragraphs 40-41; judgment of the Court of Justice of 6 October 2015, *Post Danmark II*, C-23/14, ECLI:EU:C:2015:651, paragraphs 47-49.

7.2. Abuse of a dominant position in the Austrian exemption market for household packaging waste by refusing to give access to potential competitors to the Austrian household collection infrastructure

7.2.1. Principles

- (74) According to settled case law, an undertaking abuses its dominant position where it strengthens that position by refusing access to an infrastructure which is indispensable for market entry with a view to foreclosing that market from competition¹⁰³.
- (75) In particular, the owner of an infrastructure which is necessary for market entry abuses its dominant position if it blocks access to such infrastructure or only grants access on the basis of inferior conditions in order to protect or strengthen its own market position. According to settled case law, such conduct is in breach of Article 102 of the Treaty if it restricts competition in the market for which access to that infrastructure is an indispensable condition¹⁰⁴.
- (76) According to settled case law¹⁰⁵, in order for refusal to grant access to an infrastructure which is indispensable for market entry to be considered to be abusive, it is sufficient if the following conditions are met:
- (1) the refusal relates to a product or service which is indispensable in order to enter into effective competition in a market;
 - (2) the refusal is likely to lead to the elimination of competition in the affected market; and
 - (3) the refusal cannot be objectively justified and is not counterbalanced by efficiency gains.

7.2.2. Application to ARA's behaviour in the Austrian household exemption market

- (77) The Commission has reached the conclusion that ARA abused its dominant position by refusing to give access to potential competitors to the Austrian household collection infrastructure, which ARA controls or owns, during the period from 1 March 2008 until at least 2 April 2012. In particular, ARA has done so by imposing unjustified access conditions for shared use of the household collection infrastructure by its competitors and, in particular, by limiting potential access to the household collection infrastructure to individual regions, despite the fact that this infrastructure cannot be duplicated on a nationwide basis in the whole of Austria.

¹⁰³ See judgment of the Court of Justice of 6 April 1995, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission (Magill)*, joined cases C-241/91 P and C-242/91 P, ECLI:EU:C:1995:98, paragraph 53; judgment of the Court of Justice of 26 November 1998, *Oscar Bronner v Mediaprint*, case C-7/97, ECLI:EU:C:1998:569, paragraph 41; judgment of the General Court of 10 July 1991, *Radio Teelfis Eireann (RTE) v Commission*, case T-69/89, ECLI:EU:T:1991:39, paragraph 37.

¹⁰⁴ Judgment of the Court of Justice of 26 November 1998, *Oscar Bronner v Mediaprint*, Case C-7/97, ECLI:EU:C:1998:569, paragraph 41. Commission Decision No 94/19/EC of 21.12.1993 in Case IV/34.689 *Sea Containers v Stena Sealink* — Interim Measures, paragraph 66.

¹⁰⁵ Judgment of the Court of Justice of 26 November 1998, *Oscar Bronner v Mediaprint*, Case C-7/97, paragraph 41 and judgment of the General Court of 10 July 1991, *Radio Teelfis Eireann (RTE) v Commission*, case T-69/89, ECLI:EU:T:1991:39, paragraph 73.

7.2.2.1. Indispensability of the household collection infrastructure

- (78) ARA's household collection infrastructure is an indispensable input; it cannot be duplicated and it is thus indispensable for market entry by companies wishing to compete in the Austrian household exemption market. Not giving access to that infrastructure leads to a likely elimination of competition in the market.
- (79) This is based, first, on the finding of the 2003 Decision and the 2011 Judgment since relevant facts have not changed since then. Second, the current investigation has confirmed that the household collection infrastructure as a whole or in individual regions was non-duplicable during the period of infringement. The obstacles which made the duplication of the household collection infrastructure impossible or at least unreasonably difficult consist of legal, practical and economic obstacles in the sense of the *Bronner* case law¹⁰⁶. Each of those three types of obstacles effectively prevented a duplication. This applies also if several competitors tried to duplicate the household collection infrastructure together.

7.2.2.1.1. The 2003 Decision and the 2011 Judgment

- (80) The Commission had concluded already in its 2003 Decision that ARA's household collection infrastructure was not duplicable. In the 2011 Judgment, the 2003 Decision was confirmed by the General Court. The General Court also accepted the Commission's reasoning on the non-duplicability of the household collection infrastructure (see recitals (28) to (29)) and, in particular, made reference to the "*spatial and logistical reasons*" that "*militate against the establishment of other collection infrastructure facilities for final consumers*" in its judgment¹⁰⁷. The relevant facts and arguments considered in the context of the 2003 Decision have not changed and remained pertinent during the period of infringement. Therefore there is no reason which would suggest that the household collection infrastructure would have become duplicable after the 2003 Decision.

7.2.2.1.2. Legal and practical obstacles

- (81) The Commission considers that there were legal obstacles militating against the duplication of the household collection infrastructure by another company wishing to become active as a household exemption system. During the period of infringement, legal obstacles resulted from the fact that it was highly unlikely that a new entrant intending to duplicate the household collection infrastructure would have received a system authorisation given that under Austrian law (Art. 29(4)1 AWG), such an authorisation could not be granted if it impaired the public interest.
- (82) On different occasions, the Ministry expressed its negative views on a duplication of the existing household collection infrastructure due to several concerns that would lead to an impairment of the public interest (see section 4.2.1).

¹⁰⁶ Judgment of the Court of Justice of 26 November 1998, *Oscar Bronner v Mediaprint*, Case C-7/97, ECLI:EU:C:1998:569, paragraph 44.

¹⁰⁷ See judgment of the General Court of 22 March 2013, *Altstoff Recycling Austria AG v Commission*, Case T-419/03, ECLI:EU:T:2011:102, paragraph 60.

- (83) The Ministry explained in a letter of 2 January 2013 to the Commission¹⁰⁸ that a duplication of the household collection infrastructure was not practical in economic and ecological terms due to the multiplication of costs, the increased number of waste transport journeys and the higher burden on consumers to allocate packaging waste to different household exemption systems. The Ministry explained that a duplication of the household collection infrastructure would lead to an excessive emergence of containers and "*has to be rejected*" for reasons of lack of space as well as landscape preservation (see recital (30)). The Ministry, moreover, confirmed that no regional differences existed with regard to the non-duplicability of the household collection infrastructure (see also recital (31))¹⁰⁹.
- (84) The same negative view had been expressed by the Ministry before the 2003 Decision. In 2003, the Ministry stated that the duplication of the household collection infrastructure had to be excluded in practice due to spatial constraints, reasons of landscape and town protection, an increased number of waste transport journeys, a higher ecological burden as well as a more complicated collection and increased efforts for consumers to divide the waste. The Ministry also considered in this respect that the public interest had to be protected in all aspects regarding the system authorisation¹¹⁰.
- (85) While the statements by the Ministry do not constitute an outright rejection of a specific application for a household system authorisation on the basis of a duplicated household collection infrastructure¹¹¹, the letters by the Ministry of 2003 and 2013 demonstrate that an application for a system authorisation on the basis of a duplicated household collection infrastructure under the AWG would in all likelihood have been rejected. Interseroh/EVA reported that the Ministry also expressed its objections against the duplication of the household collection infrastructure in discussions with Interseroh/EVA¹¹² about which Interseroh/EVA informed ARA¹¹³ (see recitals (36) and (38)). The negative view of the Ministry was ultimately reflected in the prohibition of any duplication of the household collection infrastructure which was included in the revised Austrian waste law, as adopted in September 2013 (Art. 29 c) 6) AWG 2013)¹¹⁴ and already consulted with market participants and interested parties in April 2012 (see section 4.2.2).
- (86) The Commission considers that the view of the Ministry that a duplication of the household collection infrastructure would raise significant concerns is plausible and

¹⁰⁸ Response from the Ministry sent via the Permanent Representation of Austria to the European Union of 2 January 2013 to the Commission's request for information of 5 December 2012 (p.1-2), ID 2169.

¹⁰⁹ Response from the Ministry sent via the Permanent Representation of Austria to the European Union of 2 January 2013 to the Commission's request for information of 5 December 2012, page 2, ID 2169.

¹¹⁰ See letter by the Ministry of 16 January 2003 (registration), ID 2479.

¹¹¹ See letter by the Ministry of 29 September 2014, ID 2655.

¹¹² See agreed minutes to a conference call with Interseroh/EVA on 26 February 2015, point 1, ID 2668.

¹¹³ See letter by Interseroh/EVA to ARA of 29 January 2008, ID 1942.

¹¹⁴ See also introductory Explanations ("Vorblatt und Erläuterungen") to the AWG 2013 as published at http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02408/fname_307766.pdf, page 3 (point 5), ID 2707; and the impact assessment ("Wirkungsorientierte Folgenabschätzung") to the AWG 2013 as published at http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02408/fname_307767.pdf, page 3, ID 2708.

could be reflected in the assessment of public interest. The concerns relating to (i) spatial constraints and landscape preservation, (ii) an increased number of waste transport journeys, (iii) increased overall costs and (iv) an increased burden on households seem to be covered by the objective of the law (see also recital (35)).

- (87) **Spatial constraints and landscape preservation:** The lack of space becomes particularly evident in densely populated areas where the local population and authorities would be unlikely to accept additional containers for other household exemption systems at central collection points and on the premises of apartment buildings or several different bags or containers for the various household exemption systems on the premises of the households (see also recital (36)).
- (88) **Increased number of waste transport journeys:** If the household collection infrastructure were duplicated, the number of waste transport journeys would necessarily increase. An increased number of waste transport journeys would create nuisances to the public as well as create ecological concerns and is highly unlikely to find public support.
- (89) **Increased overall costs:** Furthermore, duplicated household collection infrastructures, each with a nationwide coverage, would lead to higher overall costs. These costs would ultimately have to be borne by the consumers.
- (90) **Increased burden on households:** Duplicated household collection infrastructures would impose a heavy burden on households as households would be forced to separate their packaging waste not only according to materials but also according to different household exemption systems (see also recital (36)). Exemption systems could also no longer ensure that they collect the mandatory quota of the packaging waste they licensed, since households would most likely not allocate all packaging waste correctly to the different exemption systems.
- (91) The letters by the Ministry of 2003 and 2013, setting out the serious concerns of the Ministry against the duplication of the household collection infrastructure, are in themselves sufficient to show that it is highly unlikely that a household exemption system based on duplicating the household collection infrastructure would have received a household system authorisation under the AWG.

7.2.2.1.4. Economic obstacles

- (92) Economic obstacles during the period of infringement consisted in particular of large up-front investments necessary for setting up a nationwide collection infrastructure as well as of the legal obligation on exemption systems to charge cost-covering licensing fees (§ 11 (3) VerpackVO).
- (93) During a start-up phase, a new entrant would have to build up a nationwide household collection infrastructure, which would involve significant start-up costs. A new entrant would also have to set high tariffs in this phase when the market share is low since the law also requires a new entrant to set cost-covering tariffs. This would force a new entrant with an initially very limited customer base to cover the significant costs for the nationwide household collection infrastructure from the start via high licensing fees charged to a low number of customers. Due to the low licensed quantities and comparably high fixed costs resulting from the requirement of nationwide coverage, the licensing fees per unit would necessarily be higher for the new entrant than for ARA and any increase in market share would be prevented.
- (94) A competitor entering the household exemption market via a duplicated household collection infrastructure would therefore not be economically viable during the start-

up phase. That constitutes an economic obstacle capable of making it impossible, or at least unreasonably difficult, to set up an alternative household collection infrastructure on a nationwide or regional basis.

7.2.2.2. ARA's control of the household collection infrastructure

- (95) During the period of infringement, ARA controlled part of the household collection infrastructure and owned part of it directly.
- (96) During this period, ARA owned approximately 5% of the containers. In the years 2008 and 2009, ARA directly procured between 54% and 59% of the collection bags (see recital (26))¹¹⁵.
- (97) ARA controlled the household collection infrastructure which it did not own itself but which was owned by the collectors and municipalities under contract with ARA. ARA's control emanated from ARA's agreements with the municipalities and collectors. The household collection infrastructure was set up by the municipalities and collectors specifically for ARA. On the one hand, ARA paid the collectors and municipalities for the provision of containers, the distribution of bags and the services connected to the collection. On the other hand, ARA retained control over the overall set-up of the household collection infrastructure by having the sole authority to set the type of packaging waste and material for which the household collection infrastructure was designed¹¹⁶ as well as the methods of how the system was to be operated¹¹⁷ (see recital (27)). More specifically, the collection partner agreements and the municipality agreements stipulated that the household collection infrastructure was to be operated as instructed by ARA¹¹⁸.
- (98) ARA also controlled the household collection infrastructure insofar as the possibility to allow for shared use was concerned. While point 1.7 of the collection partner agreements stipulated that ARA would not prevent collection partners from entering into agreements on shared use of containers and other facilities of the household collection infrastructure¹¹⁹, the legal uncertainty of the precise conditions for shared use obliged collectors and municipalities *de facto* to coordinate any request for shared use of the household collection infrastructure with ARA and get ARA's prior consent in order to avoid the risk of an infringement of the contracts with ARA.
- (99) In particular, the provision that shared use of the household collection infrastructure may only be granted under the condition that it is provided on a fair and practicable

¹¹⁵ ARA's response of 24 September 2015 to complementary questions by the Commission of 18 September 2015 to the Commission's request for information of 4 September 2015, page 3, ID 2806.

¹¹⁶ Point 1.4 and point 1.5 of the collection partner agreement 2007, submitted as Annex 11-19 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, p.3, ID 1928.

¹¹⁷ Point 2.1 and 2.2.1 of the collection partner agreement 2007, submitted as Annex 11-19 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, p. 4-5, ID 1928

¹¹⁸ The contracts between ARA and collectors/municipalities define in an Annex called "Select Regional" the exact composition of the required household collection infrastructure (number and type of containers/bags, frequency of collection etc.). This Annex can be revised by ARA on an annual basis. See Select Regional, annex 11-25 of the response from ARA to the Commission's request for information dated 15 July 2011, ID 1928

¹¹⁹ Ibid., p.3.

basis and does "*under no circumstances lead to a discrimination of ARA*" (see recital (27)) required collectors and municipalities to coordinate with ARA to ensure that the conditions under which shared use of the household collection infrastructure could be granted would not violate that non-discrimination obligation.

- (100) ARA was therefore effectively in a position to block the conclusion of such shared use contracts.

7.2.2.3. Refusal

- (101) ARA refused to give access to its household collection infrastructure by only offering shared use for individual regions (regional approach), but not for the whole of Austria.

7.2.2.3.1. The "regional approach" as an expression of refusal

- (102) ARA refused access to the household collection infrastructure – both to the part it owned as well as to the part it controlled – by:

(i) denying access to its own household collection infrastructure by requiring companies wishing to enter the household exemption market to prove the non-duplicability of the household collection infrastructure region by region; and

(ii) denying access to the household collection infrastructure controlled by ARA but owned by collectors or municipalities by informing the collectors and municipalities that the household collection infrastructure did not represent an essential facility and that Interseroh/EVA had no general right of access to that infrastructure. To gain access, Interseroh/EVA would therefore first have to prove non-duplicability of the household collection infrastructure region by region.

- (103) As explained above, the non-duplicability of the Austrian household collection infrastructure does not result from special characteristics in individual collection regions (see section 7.2.2.1), but the legal, practical and economic obstacles to the duplicability of the household collection infrastructure apply to the whole of Austria. As duplication of the household collection infrastructure is impossible, or at least unreasonably difficult, in the whole of Austria, the concept of offering partial shared use of the household collection infrastructure in a limited number of regions effectively amounts to preventing potential competitors from entering the Austrian household exemption market. Due to the refusal to grant shared use nationwide, no potential competitor would have been able to demonstrate nationwide coverage with collection infrastructure (which in turn is a precondition for obtaining a household system authorisation) and, thus, enter the household exemption market.

7.2.2.3.2. ARA refused access to the household collection infrastructure it owns

- (104) With respect to the part of the household collection infrastructure it owns, ARA refused access by requiring that Interseroh/EVA prove, region by region, that a duplication was in fact not possible.

- (105) In particular, ARA confirmed in a letter of 5 June 2008 to the association of municipalities¹²⁰ that ARA itself would be the correct contract partner for any shared

¹²⁰ Letter by ARGEV of 5 June 2008 to the association of municipalities, submitted as Annex 40-2 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1945.

use request. ARA had also been contacted directly by Interseroh/EVA. Moreover, ARA informed Interseroh/EVA by letter of 7 April 2008¹²¹ that there was a need to assess the indispensability of access to the household collection infrastructure region by region. That position was maintained in a meeting between Interseroh, ARA and the BWB on 2 May 2008¹²².

- (106) ARA thereby refused nationwide access to the household collection infrastructure it owns. Due to the need for nationwide coverage, this refusal was already sufficient to prevent access to the household exemption market altogether.

7.2.2.3.3. ARA refused access to the household collection infrastructure it controls

- (107) With respect to the part of the household collection infrastructure it controlled, ARA asserted the legal position vis-à-vis municipalities and collectors that access to that part of the household collection infrastructure should not be granted for the whole of Austria but should be proven for each region individually by a competitor wishing to enter the household exemption market.

- (108) ARA communicated its request for a "regional approach", in particular, in its letters sent to the associations of municipalities and of towns and cities of 3 March and 6 March 2008 (see section 4.3.2, in particular recital (42)), setting out the objections that it would have to a shared use of the household collection infrastructure on the basis of the agreements proposed by Interseroh/EVA¹²³. A letter with similar content was sent by ARA on 4 March 2008¹²⁴ and by ARGEV on 14 March 2008¹²⁵ to the association of Austrian disposal companies. ARA stated that it was conceivable that there were a very high number of regions where Interseroh/EVA could carry out its own collection and so shared use by ARA would only be necessary in the other regions.

- (109) ARA also took the view in the past that shared use of the household collection infrastructure in the whole of Austria would create disadvantages for ARA and would be discriminatory against ARA. In its letter to Interseroh/EVA of 7 April 2008, ARA indicated that shared use of the household collection infrastructure could under no circumstances mean "*total shared use*" in the whole of Austria since that would amount to free-riding on ARA achievements, would not create competition and would decrease the efficiency of ARA's household collection infrastructure (see recital (47))¹²⁶. By letter of 17 April 2008 to the BWB, ARA stated that ARA and

¹²¹ Letter of 7 April 2008 from ARA to EVA, submitted as Annex 37-11 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1942.

¹²² Interseroh/EVA's minutes to the meeting of 2 May 2008 submitted as Annex 10 to its supplementary reply of 17 July 2015 to the Commission's request for information of 6 July 2015, ID 2769.

¹²³ Letter of 6 March 2008 from ARA to the association of towns and cities on shared use of the ARGEV household system by Interseroh/EVA, submitted as Annex 37-16 to ARA's response of 30 May 2012 to the Commission's request for information of 28 March 2012, forwarding to the association of towns and cities a letter of 3 March 2008 from ARA to the association of municipalities, ID 702.

¹²⁴ Inspection document SK 37, ID 131: Letter of 4 March 2008 from ARA to the association of Austrian disposal companies on shared use on the ARGEV household system by EVA.

¹²⁵ Inspection document SK 41, ID 131: Fax of 14 March 2008 from ARGEV Vienna and ARA on shared use by EVA and inspection document SK 37, ID 131.

¹²⁶ Letter by ARA to Interseroh/EVA of 7 April 2008, submitted as annex 37-11 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1942.

ARGEV will not support the concept of "*total shared use*" because, as they claimed, under such a concept, no competition would be created. Total shared use of the household collection infrastructure would, according to ARA, only lead to asymmetry to the detriment of ARA.¹²⁷ That view was repeated by ARA in its letter to the association of municipalities on 5 June 2008¹²⁸, indicating that an overall "*total shared use*" of the household collection infrastructure in the whole of Austria would create "*disadvantages for today's high efficiency and quality of the system*" as organised by ARA (see recital (45)). ARA thereby made it clear to all stakeholders involved, including municipalities and collectors, that it considered the conclusion of shared use contracts as proposed by Interseroh/EVA as being incompatible with the general foundation of the legal framework under which household exemption systems are required to operate in Austria.

- (110) By requiring that shared use could not be granted for the whole of Austria but only for regions for which the non-duplicability would be proven on an individual basis, ARA effectively refused access to the part of the household collection infrastructure it controls.

7.2.2.3.4. Conclusion on refusal

- (111) To conclude, during the period of infringement, ARA refused a nationwide shared use of the part of the household collection infrastructure it owns as well as shared use of the part it controls.

7.2.2.4. Elimination of competition

- (112) Without access to the non-duplicable household collection infrastructure, it would not have been possible for potential competitors of ARA to receive a system authorisation which requires proof of nationwide coverage with collection services. ARA's refusal therefore was likely to eliminate competition in the Austrian exemption market for household packaging waste since competitors could not have entered that market without shared use.

- (113) ARA believes that circumstances other than ARA's infringement (such as the uncertainty mentioned in recital (53) as to whether small businesses had to be regarded as households or as commercial end-use sites due to different delineations in the system authorisations of the exemption systems) may have caused the fact that no market entry occurred before 1 January 2015. However, the Commission is not obliged to establish the causality between ARA's refusal and Interseroh/EVA's failure to enter the market. ARA's consent to a nationwide shared use would have been necessary to allow for market entry. Consequently, ARA's refusal was likely to eliminate competition. The question of causality can be left open.

7.2.2.5. Objective justification and efficiency gains

- (114) Conduct capable of being abusive may escape the prohibition of Article 102 of the Treaty if the dominant undertaking can provide an objective justification for its

¹²⁷ Letter by ARA's legal counsel to the BWB of 17 April 2008, submitted as Annex 37-13 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1942.

¹²⁸ Letter by ARGEV of 5 June 2008 to the association of municipalities, submitted as annex40-2 to ARA's response of 30 August 2011 to the Commission's request for information of 15 July 2011, ID 1945.

behaviour or if it can demonstrate that its conduct produces efficiencies which outweigh the negative effects on competition. The burden of proof for such an objective justification or efficiency defence is on the dominant undertaking¹²⁹.

- (115) ARA acknowledges in its cooperation submission that ARA's refusal to provide access to the Austrian household collection infrastructure is not objectively justified.

7.2.3. *Effect on trade between Member States and Appreciability*

- (116) Article 102 of the Treaty prohibits the abuse of a dominant position in the internal market or a substantial part thereof insofar as it may affect trade between Member States. The criterion of the effect on trade has three basic elements.

- (117) First, "trade between Member States" must be affected. In order to determine this, account must be taken of the consequences of the abusive conduct for the effective competition structure in the internal market¹³⁰. The Court of Justice has found that it is immaterial whether behaviour relates to trade between Member States if the dominant undertaking aims to eliminate a competitor from the internal market once it has been shown that such elimination will have repercussions on the patterns of competition in the internal market¹³¹.

- (118) Second, it is sufficient that the abuse "may affect trade" between Member States. The Court of Justice does not require proof that the abusive conduct has in fact appreciably affected trade between Member States. It is sufficient if the abusive conduct is capable of having that effect¹³². This is the case if it is possible to anticipate with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, and as such may prejudice achieving the aim of a single market between the Member States¹³³.

- (119) Third, the effect of the abuse on trade must be appreciable. This requires that the effect on trade between Member States must not be insignificant and it is assessed

¹²⁹ See judgment of the General Court of 30 September 2003, *Michelin v Commission* (Michelin II), T-203/01, ECLI:EU:T:2003:250, paragraphs 107-109; judgment of the Court of Justice of 27 March 2012, *Post Danmark*, C-209/10, ECLI:EU:C:2012:172, paragraphs 40-41; judgment of the Court of Justice of 6 October 2015, *Post Danmark II*, C-23/14, ECLI:EU:C:2015:651, paragraphs 47-49.

¹³⁰ Judgment of the General Court of 8 October 1996, *Compagnie maritime belge*, Joined Cases T-24/93 and others, ECLI:EU:T:1996:139, paragraph 203.

¹³¹ Judgment of the Court of Justice of 14 February 1978, *United Brands v Commission*, Case C-27/76, ECLI:EU:C:1978:22 paragraph 201.

¹³² Judgment of the Court of Justice of 9 November 1983, *Michelin v Commission*, Case C-322/81, ECLI:EU:C:1983:313, paragraph 104. See also judgment of the Court of Justice of 6 April 1995, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission (Magill)*, Joined Cases C-241/91 P and C-242/91 P, ECLI:EU:C:1995:98, paragraphs 69-70.

¹³³ Judgment of the Court of Justice of 21 January 1999, *Bagnasco v BNP and Others*, Joined Cases C-215/96 and C-216/96, ECLI:EU:C:1999:12, paragraph 47.

primarily with reference to the position of the undertaking(s) on the market for the product concerned.¹³⁴

- (120) ARA's practices were capable of foreclosing the household exemption market in Austria. Given the fact that ARA's main competitor that tried to enter the Austrian household exemption market was Interseroh/EVA, which is part of the German ALBA group, that behaviour was able to affect trade between Member States by preventing competitors from other Member States from offering exemption services in Austria.
- (121) During the period of infringement, ARA has held a dominant position on the relevant market for the whole territory of Austria. ARA's market share has been 95% of the exemption market for household packaging waste (see recital (64)). Consequently, abusing its dominant position by foreclosing access of potential competitors to the Austrian household exemption market was sufficiently significant. Hence, the effect on trade between Member States of ARA's abusive conduct was appreciable.

7.3. Duration of the infringement

- (122) Interseroh/EVA made a number of serious efforts to be granted shared use of the household collection infrastructure and enter the household exemption system market at the beginning of 2008, when it sent draft shared use agreements to municipalities and collectors. In March and April 2008, ARA informed Interseroh/EVA (letter of 7 April 2008, see recital (47)) as well as collectors and municipalities (letters of 3, 4 and 6 March 2008, see recital (42)) that it demanded the regional approach, requiring proof of non-duplicability of the household collection infrastructure region per region. The Commission therefore considers that the infringement began on 1 March 2008.
- (123) Regarding the termination date, the assessment differentiates between the refusal of access to the part of the household collection infrastructure ARA owns and the part it controls (see section 7.2.2.2)).
- (124) With respect to the **household collection infrastructure which ARA controls**, the infringement ended at the point in time when ARA could no longer effectively refuse access to this part of the household collection infrastructure. The Commission considers that the refusal ended when collectors and municipalities obtained clarity about their obligation to grant shared use.
- (125) The AWG 2013 provides for an obligation to grant shared use both for the exemption system having set up the household collection infrastructure as well as for collectors and municipalities. The AWG 2013 thereby ensures that a new entrant may choose between a shared use on "system level" (via one contract with the exemption system owning or controlling the household collection infrastructure for a nationwide shared use) and a shared use on "collectors' level" (via contracts with all individual collectors and municipalities which in turn have an agreement with the exemption system on setting up the nationwide household collection infrastructure for this

¹³⁴ Judgment of the Court of Justice of 28 April 1998, *Javico*, Case C-306/96, ECLI:EU:C:1998:173, paragraph 17 and Judgment of the General Court of 1 April 1993, *BPB Industries and British Gypsum*, Case T-65/89, ECLI:EU:T:1993:31, paragraph 138.

exemption system). The law moreover introduces a prohibition on duplicating the household collection infrastructure.

- (126) While the relevant provisions of the AWG 2013 entered into force on 17 September 2013, the necessary degree of certainty for collectors and municipalities to effectuate shared use was not only obtained when the AWG 2013 was adopted, but already when the first draft of the AWG 2013 which contained all relevant elements for the assessment of the household collection infrastructure was consulted by the Ministry with market participants and interested parties.
- (127) As set out above (see section 7.2.2), ARA had used a certain degree of legal uncertainty on the side of collectors and municipalities in order to exert its full control of the household collection infrastructure and to refuse access to it by inducing collectors and municipalities to take into account ARA's opposition to a nationwide shared use. Moreover, ARA had denied the character of the household collection infrastructure as an indispensable input for potential competitors wishing to enter the Austrian exemption market for household packaging waste. It had informed collectors and municipalities about its requirement of a regional approach and of the negative impact of a nationwide shared use on ARA. In such a situation, where a certain degree of legal uncertainty prevailed on the side of municipalities and collectors about their obligation to grant shared use, municipalities and collectors felt compelled to fully respect ARA's objections and act according to ARA's wishes, considering that ARA controlled the household collection infrastructure.
- (128) The main features of the new law became apparent already with the first draft of 2 April 2012 which was discussed between the Ministry and different market players. In this context, the Ministry provided – for the first time in this official form – clarity regarding the municipalities' and collectors' obligation to grant shared use. This removed the uncertainty for collectors and municipalities and would have allowed the collectors and municipalities to act against the objections which ARA had previously raised. If a competitor had requested nationwide access to the household collection infrastructure from the collectors and municipalities as of April 2012, ARA could no longer have defended its view vis-à-vis competitors or municipalities and collectors that there was no obligation to grant shared use on a nationwide basis and instead require the regional approach for the household collection infrastructure.
- (129) With respect to the **household collection infrastructure which ARA owned** during the period of infringement, the AWG 2013 (as well as the draft of April 2012) does not provide full clarity. It does not explicitly address the question as to whether an exemption system is obliged to allow for shared use regarding its own household collection infrastructure when a new entrant wishes to conclude shared use contracts on a collectors' level (see recital (125)).
- (130) The Commission does not have sufficient evidence to show that ARA continued its refusal to give access to the household collection infrastructure it owned after 2 April 2012, when the circumstances of the market changed significantly due to the consultation of the draft AWG 2013. Market entry occurred in January 2015.
- (131) The Commission therefore considers that the infringement started on 1 March 2008 and lasted until at least 2 April 2012.

8. REMEDIES AND FINES

8.1. Article 7 of Regulation (EC) No 1/2003

8.1.1. Principles

- (132) Where the Commission finds an infringement of Article 102 of the Treaty and Article 54 of the EEA Agreement, it may by decision require the undertakings concerned to bring such infringement to an end pursuant to Article 7 of Regulation (EC) No 1/2003¹³⁵.
- (133) Pursuant to Article 5 of Council Regulation (EC) No 2894/94¹³⁶, “*the Community rules giving effect to the principles set out in Articles 85 and 86 of the EC Treaty ... shall apply mutatis mutandis*” in relation to the EEA Agreement.
- (134) According to Article 7(1) of Regulation (EC) No 1/2003, the Commission may impose any behavioural or structural remedies that are proportionate to the infringement and that are necessary to bring the infringement effectively to an end.
- (135) The Commission is empowered to “*...order the undertaking to do certain acts or provide certain advantages which have been wrongfully withheld as well as to [to prohibit] the continuation of certain action, practices or situations which are contrary to the Treaty. For this purpose the Commission may, if necessary, require the undertaking concerned to submit to it proposals with a view to bringing the situation into conformity with the requirements of the Treaty*”¹³⁷.
- (136) The requirement for a remedy to be effective authorises the Commission to require a dominant undertaking to desist from all measures that have an equivalent effect to the identified abusive behaviour.
- (137) Article 7(1) refers to the possibility of imposing remedies in ongoing infringements in order to “bring the infringement effectively to an end”. When the infringement has ended, remedies may only be imposed to prevent the infringement being committed again in the future where there is a risk of such repetition¹³⁸. With respect to structural remedies, recital (12) of Regulation (EC) No 1/2003 indicates: “*Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.*”

¹³⁵ Council Regulation (EC) No 1/2003 of 16.12.2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 of the TFEU), OJ L 1, 4.1.2003. In Article 5 of Council Regulation (EC) No 2894/94 of 28.11.1994 concerning arrangements for implementing the Agreement on the European Economic Area, “the Community rules giving effect to the principles set out in Articles 85 and 86 of the EC Treaty [now Articles 101 and 102 TFEU] ... shall apply mutatis mutandis. This shall also hold good for any relevant provisions which the Community might adopt in the future in the field of competition.” (OJ L 305/6, 30.11.1994).

¹³⁶ Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area (OJ L 305, 30.11.1994, p. 6).

¹³⁷ Judgment of the Court of Justice of 6 March 1974, *Commercial Solvents v Commission*, Joined Cases C-6/73 and C-7/73, ECLI:EU:C:1974:18, paragraph 45.

¹³⁸ The following cases contain references to “preventing the repetition of the infringement”: Judgment of the Court of Justice of 6 March 1974, *Commercial Solvents*, Joined Cases C-6/73 and C-7/73, ECLI:EU:C:1974:18, paragraph 46; judgment of the Court of Justice of 3 July 1991, *Akzo*, case C-62/86, ECLI:EU:C:1991:286, paragraph 155; judgment of the General Court of 7 October 1999, *Irish sugar*, case T-228/97, ECLI:EU:T:1999:246, paragraph 299.

8.1.2. *Application to the present case*

- (138) While the infringement has ended, it is necessary to ensure that it is not repeated in the future. It is therefore imperative for the Commission to ensure that ARA refrains from any behaviour in the future which may have the same or similar effect.
- (139) In accordance with Article 7(1) of Regulation (EC) No 1/2003, the Commission can impose on ARA remedies in order to ensure that the infringement will not be repeated. As proposed by ARA to solve this issue, ARA shall conclude a sales and purchase agreement until [CONFIDENTIAL]* and transfer the legal title to the part of the household collection infrastructure which it owns until [CONFIDENTIAL] to one or several buyers independent of ARA. ARA currently owns approximately 10.000 containers for the collection of lightweight and/or metal packaging waste in seven regions in Kärnten and three regions in Niederösterreich. ARA shall divest those containers to one or several buyers independent from ARA. In this specific case, the remedies do not anticipate any buyer approval since the circle of possible buyers is limited to the municipalities and the collectors active in the specific regions where the containers are placed. It is thereby ensured that the buyers are suitable.

8.1.2.1. Necessity of the remedy

- (140) The divestiture of the part of the household collection infrastructure which ARA owns is necessary to ensure that the infringement will not be repeated. As indicated above (see recital (129)), the AWG 2013 does not explicitly address the question as to whether there is an obligation on ARA to grant shared use regarding the household collection infrastructure it owns if shared use is sought on the basis of agreements at collectors' level. This could be used again by ARA in the future in order to refuse shared use.
- (141) While, in practice, this has not been an issue at the beginning of 2015, when a number of new competitors entered the market, the divestiture of the part of the household collection infrastructure ARA owns would remove ARA's possibility to refuse in the future access to the part of the household collection infrastructure it owns. Without its own infrastructure, the question as to whether ARA is covered in this respect by the legal obligation to enter into shared use contracts when a competitor seeks shared use at collectors' level could not be used by ARA in the future to refuse shared use.
- (142) At the time of the refusal, ARA owned approximately 5% of the containers. This is still the case today. Apart from this, it had procured during the years 2008 and 2009 more than 50% of the collection bags directly for the respective years. ARA confirmed that today the procurement of the collection bags is normally done by the municipalities and collectors.
- (143) Due to the requirement of nationwide coverage, the refusal by ARA to give access to its own household collection infrastructure was sufficient to prevent access to the household exemption market even in the years when ARA only owned 5% of the containers. Already the failure to have access to a limited number of regions is sufficient to prevent market entry since competitors need to prove nationwide coverage with collection services in order to receive a system authorisation. As

*Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are replaced by a non-confidential summary in square brackets or are shown as [...].

shown above (see section 7.2.2.1), the household collection infrastructure cannot be duplicated on a nationwide or regional basis. ARA was able to refuse access to its own household collection infrastructure directly which was enough to foreclose competitors from the entire household exemption market.

- (144) There is a substantial risk of a repeated infringement. ARA has in the past made use of legal uncertainties in order to prevent shared use. While the 2003 Decision already found that the household collection infrastructure was non-duplicable, ARA used the fact that this finding was made under Article 101 instead of Article 102 of the Treaty under an "essential facility"-assessment to justify the regional approach and thereby effectively prevent access to the market. Similarly, in 2007, after negotiations with the BWB about the implementation of the 2003 Decision, ARA included a number of specific conditions into its contracts with collectors and municipalities which were supposed to give a clear framework to all relevant parties for a shared use (see recital (28)). Shortly thereafter in 2008, ARA rejected Interseroh/EVA's claim that the conditions for shared use were on this basis clarified and raised a number of points which had not been explicitly defined in the conditions for shared use (see recital (43)).
- (145) The divestiture of the part of the household collection infrastructure which ARA owns addresses the lack of explicit obligation in the AWG 2013. Such a divestiture is therefore necessary to ensure that the most direct and effective means of refusal is no any longer available to ARA in the future.

8.1.2.2. Proportionality of the remedy

- (146) According to established case law, the principle of proportionality requires that the acts of the institutions of the Union do not go beyond what is necessary to attain the objective pursued and that if a choice of several suitable measures is available, the least burdensome must be selected¹³⁹.
- (147) The divestiture of the part of the household collection infrastructure which ARA owns is – as a structural remedy – also proportionate and fulfils the conditions as explained in recital (12) of Regulation (EC) No 1/2003. Despite the fact that ARA has allowed for access to the part of the household collection infrastructure it owns when competitors prepared for market entry in January 2015, there is – as set out in recital (144) – a substantial risk of a repeated infringement considering the history of ARA's behaviour in the past. No other less burdensome measures can be conceived that would equally effectively remove ARA's remaining possibility to refuse shared use to the part of the household collection infrastructure it owns and ensure access to it. A mere declaration by ARA not to refuse access in the future to that part of the household collection infrastructure on the basis of the above mentioned legal uncertainty in the AWG would not be as effective as a divestiture. Such a declaration would require a long-term monitoring of ARA's behaviour whereas a divestiture provides for a clear-cut solution.

¹³⁹ Judgment of the General Court of 19 June 1997, *Air Inter v Commission*, Case T-260/94, ECLI:EU:T:1994:265, paragraph 144; judgment of the General Court of 23 October 2003, *Van den Bergh Foods v Commission*, case T-65/98, ECLI:EU:T:2003:281, paragraph 201; judgment of the Court of Justice of 29 June 2010, *Commission v Alrosa*, case C-441/07, ECLI:EU:C:2010:377, paragraphs 36 and 39; judgment of the Court of Justice of 5 May 1998, *UK v Commission*, case C-180/96, ECLI:EU:C:1998:192, paragraph 96

(148) ARA itself suggested this divestiture as a remedy in its Cooperation Submission of 21 July 2016 as part of its offer to cooperate as an appropriate means to ensure that the infringement is effectively terminated and cannot be repeated. ARA acknowledged in its Cooperation Submission not only the necessity of the remedy but also its proportionality, indicating that the divestiture of the part of the household collection infrastructure which ARA owns is not more burdensome than a behavioural remedy.

8.2. Article 23(2) of Regulation (EC) No 1/2003 – Fines

8.2.1. Principles

(149) Under Article 23(2) of Regulation (EC) 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 102 of the Treaty. For the undertaking participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

(150) In fixing the amount of any fine, pursuant to Article 23(3) of Regulation (EC) 1/2003, regard shall be had both to the gravity and to the duration of the infringement. In setting the fines to be imposed, the Commission shall refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) 1/2003¹⁴⁰ (“Guidelines on fines”).

8.2.2. Intent or negligence

(151) In this Decision, the Commission considers that based on the facts described in this Decision and the assessment contained in it, the infringement has been committed at least negligently since ARA disregarded that the household collection infrastructure was not duplicable and that its behaviour represented a refusal to grant access with the consequence of a likely elimination of competition.

8.2.3. Basic amount of the fine

(152) The basic amount of the fine to be imposed on the undertaking concerned is to be set by reference to the value of sales, that is, the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic market. Depending on the gravity of the infringement, a proportion of the value of sales (up to 30% according to the Guidelines on fines) is to be established which is multiplied by the number of years over which the infringement was committed.

8.2.3.1. Calculation of the value of sales

(153) The Commission normally takes into account the sales related to the infringement made by an undertaking during the last full business year of its participation in the infringement¹⁴¹. The last full business year of ARA's participation in the infringement was 2011.

(154) The services to which the infringement relates are exemption services for household lightweight and metal packaging waste provided by ARA. ARA's relevant licensing revenues for lightweight and metal packaging amounted to [BUSINESS SECRET:

¹⁴⁰ OJ C 210, 1.9.2006, p. 2.

¹⁴¹ Guidelines on fines, point 13

turnover] in 2011¹⁴². Those revenues constitute the value of sales to which ARA's infringement directly or indirectly relates.

8.2.3.2. Gravity

- (155) In order to determine the proportion of the value of sales to be considered as the basic amount (up to 30%), the Commission shall have regard to a number of factors to assess the gravity of the infringement, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented¹⁴³.
- (156) Taking account of such factors and in light of the specific circumstances of the case as described in section 4 of this Decision, the proportion of the values of sales to be taken into account is set at 2%.

8.2.3.3. Duration

- (157) The infringement started on 1 March 2008. For the purposes of the calculation of the fine, the Commission considers that it ended on 2 April 2012 (on the duration see section 7.3).
- (158) Therefore, for the purpose of the calculation of the fine, ARA's value of sales as defined above is to be multiplied by 4.083.

8.2.4. *Adjustments to the basic amount*

- (159) There are no aggravating or mitigating circumstances in this case. No specific increase for deterrence is applied.
- (160) The final amount of the fine as calculated above does not exceed the 10% legal maximum¹⁴⁴.

8.2.5. *Reduction for cooperation*

- (161) On 21 July 2016 ARA submitted to the Commission a Cooperation Submission, that is a formal offer to cooperate with the Commission by acknowledging the infringement as well as by proposing a structural remedy in the form of the divestiture of the part of the household collection infrastructure ARA owns and acknowledging the necessity and proportionality of such a remedy.
- (162) Under point 37 of the Guidelines on fines, the particularities of a given case may justify departing from the methodology specified in the Guidelines on fines. With its Cooperation Submission, ARA acknowledged the infringement as set out in this Decision as well as the need for a structural remedy, which it accordingly proposed. The proposed structural remedy further ensures that the legal gap as to the legal obligation to grant shared use is removed. The acknowledgment and the accompanying waiver also allowed for administrative efficiencies. In the light of the above, the amount of the fine to be imposed on ARA should be reduced by 30%.

¹⁴² Table: ARA income and expenditure 2011 submitted as Annex X-2 to ARA's response of 30 September 2012 to the Commission's request for information of 31 August 2012, ID 1871.

¹⁴³ Guidelines on fines, point 20.

¹⁴⁴ Article 23(2) of Regulation (EC) No 1/2003.

8.2.6. *Conclusion: final amount of the fine*

(163) In light of the above (recitals (149) to (162)), the final amount of the fine to be imposed on ARA pursuant to Article 23(2) of Regulation (EC) No 1/2003 should be EUR 6 015 000.

8.3. Article 24(1)(a)-of Regulation (EC) No 1/2003 - periodic penalty payments

(164) Under Article 24(1)(a) of Regulation (EC) No 1/2003, the Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them to put an end to an infringement of Article 101 or Article 102 of the Treaty, in accordance with a decision taken pursuant to Article 7 of Regulation (EC) No 1/2003.

(165) With this Decision, the Commission imposes a structural remedy on ARA. ARA will have to divest the part of the household collection infrastructure which it owns to one or several buyers independent of ARA within the deadlines as set out in the Annex to this Decision. In order to ensure compliance with this remedy, the Commission shall impose periodic penalty payments in the event that ARA has not divested the part of the household collection infrastructure which it owns by the defined deadline.

(166) On this basis, the Commission fixes the periodic penalty payment at 2.5% of ARA's daily consolidated group turnover in the business year preceding an infringement of this Decision. The periodic penalty payment shall be imposed as from the first day after [CONFIDENTIAL] for the failure to conclude a sales and purchase agreement and as from the first day after [CONFIDENTIAL] for the failure to transfer the legal title to the part of the household collection infrastructure ARA owns.

9. CONCLUSION

(167) In light of the considerations set out in this Decision, the Commission:

- (a) finds that ARA has infringed Article 102 of the Treaty by foreclosing the Austrian market for the exemption of household packaging waste and for that reason fines should be imposed on ARA pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003;
- (b) requires ARA to bring the infringement to an end if it has not already done so and to refrain from taking measures having an equivalent effect as the conduct identified as abusive;
- (c) requires ARA to divest the part of the Austrian household collection infrastructure which it owns within the deadlines specified in the Annex to this Decision to one or several buyers independent from ARA; and
- (d) imposes periodic penalty payments in the event that ARA does not comply with this Decision within the deadlines as indicated in Article 4 of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

Altstoff Recycling Austria Aktiengesellschaft has infringed Article 102 of the Treaty and Article 54 of the Agreement on the European Economic Area by foreclosing the Austrian market for the exemption of household packaging waste.

That infringement lasted from 1 March 2008 until at least 2 April 2012.

Article 2

For the infringement referred to in Article 1, a fine of EUR 6 015 000 is imposed on Altstoff Recycling Austria Aktiengesellschaft.

The fine shall be credited, in euros, within a period of three months from the date of notification of this Decision to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg
IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: European Commission – BUFI / AT.39759

After the expiry of this period, interest will automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking must cover the fine by the due date, either by providing an acceptable financial guarantee, or by making a provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012.¹⁴⁵

Article 3

Altstoff Recycling Austria Aktiengesellschaft shall immediately bring to an end the infringement referred to in Article 1 insofar as it has not already done so.

Altstoff Recycling Austria Aktiengesellschaft shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or equivalent object or effect.

Article 4

Altstoff Recycling Austria Aktiengesellschaft shall divest the part of the household collection infrastructure which it owns to one or several purchasers independent of Altstoff Recycling Austria Aktiengesellschaft and provide proof of it. The precise conditions for the remedies are set out in the Annex.

¹⁴⁵ Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L362, 31.12.2012, p. 1).

Article 5

If Altstoff Recycling Austria Aktiengesellschaft fails to comply with any of the obligations set out in Article 4 of this Decision within the deadlines referred to in Article 4, second sentence and the Annex, the Commission shall impose a daily penalty payment on that undertaking of 2.5% of Altstoff Recycling Austria Aktiengesellschaft's daily consolidated turnover in the preceding business year in accordance with Article 24(1)(a) of Regulation (EC) No 1/2003.

That penalty shall be calculated as from the first day following the expiry of the deadlines referred to in Article 4, second sentence and the Annex of this Decision.

Article 6

This Decision is addressed to Altstoff Recycling Austria Aktiengesellschaft, Mariahilfer Strasse 123, 1062 Vienna, Austria.

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the Agreement on the European Economic Area.

Done at Brussels, 20.9.2016

For the Commission
Margrethe VESTAGER
Member of the Commission

